

2009-0678

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO)	
)	On Appeal from the Lake County
Plaintiff-Appellant)	Court of Appeals Eleventh Appellate
)	District
vs.)	
)	
JOSEPH PEPKA)	Court of Appeals Case No.: 2008 L 016
)	
Defendant-Appellee)	

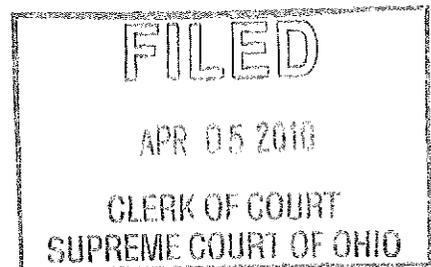
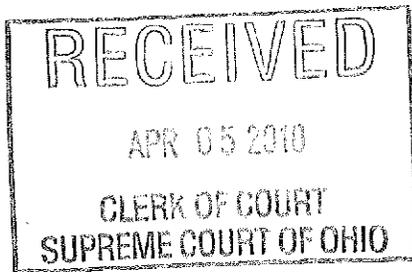
MOTION FOR RECONSIDERATION

Charles E. Coulson (0008667)
 Prosecuting Attorney
 P. O. Box 490
 Painesville, OH 44077
 (440) 350-2683
 (440) 350-2585 fax

Albert L. Purola (0010275)
 38298 Ridge Road
 Willoughby, OH 44094
 (440) 951-2323
 (440) 951-5005 fax
purola@hotmail.com

Counsel for Appellant, State of Ohio

Counsel for Appellee, Joseph Pepka



Joseph Pepka moves this Court to reconsider, and immediately withdraw, the opinion filed in this case for the following reasons: The decision is in irreconcilable conflict with at least three (3) prior decisions of this Court that were never mentioned or considered by counsel, or the Court. For this reason alone, the case should be set for re-argument.

Additionally, the dismissive treatment of *State v. Wozniak*, 172 Ohio St. 517, violates the Separation of Powers, and the Modern Courts Amendment.

Also, this Court's "judicial enlargement" of indictment requirements by its "unforeseeable and unsupported" state law decision violates the Due Process Clause of the Fourteenth Amendment. *Bowie v. Columbia*, 378 U.S. 347.

I

A.

The gist of this Court's analysis is found in Paragraph 21 of the opinion where the conclusion is reached that, since the indictment said it was a third degree felony, it was sufficient to charge such even though the statutory element that makes the act a felony was omitted. The court rejected our assertion the third degree felony language as only a legal conclusion, and held, since the third degree language was included, the grand jury must have found serious physical harm. Paragraph 23.

This holding is foursquare precluded by a case decided by this Court ONE HUNDRED AND FIFTY THREE YEARS AGO!

Fouts v. State, 8 Ohio St. 98 (1857), in addressing the limits and requirements of the indictment in language that seems to have been written for our case, just six (6) years after the Ohio Constitution first containing the grand jury provision we are construing, this Court held, at page 122:

“When it shall be determined that the grand jury need not find all the material elements of the crime charged, but upon finding a part of them may infer the balance, or **conclude, as a legal result**, that because a part of the ingredients of the crime are found the existence of the balance must follow—when this shall have been determined, then all principle in criminal pleadings, or the mode of procedure in criminal cases, be utterly discarded. This, however, cannot be done until some of the leading landmarks of the constitution are done away with. If by mere intendment, or **the simple statement of a legal result in the formal conclusion of an indictment, material omissions in the description of the offense may be supplied**, [ISN'T THAT EXACTLY WHAT HAPPENED HERE?] that humane safeguard for the protection of the citizen against arbitrary exercise of judicial discretion, supposed to have been secured by the constitutional requirement of the ordeal of a grand jury and of formal presentment and finding, setting out the nature and cause of the accusation, may at once be frittered away by judicial construction.” (Emphasis supplied.)

Starting at page 117 in *Fouts*, this Court wrote rules that are directly contrary to what was relied upon in this case. These rules relate directly to conclusions at the end of indictments. This Court held statements at the end are “not any part of the statement of the overt act charged as a crime, nor even a recital, by way of preamble, after a whereas, but the statement of a legal result or conclusion of law.” *Id.* 118.

While it seems archaic today to cite the seminal Chitty on Criminal Law, Vol. 1, this Court relied upon it in *Fouts*, and its verity is unchanged. “It is not necessary to state *a conclusion of law* resulting from the facts of a case; it suffices to state the facts, and leave the court to draw the inference.” (Emphasis in original.)

In *Whiting v. State*, 48 Ohio St. 220, (1891), the insistence of facts, rather than conclusions, has become “a settled rule”, at 223. This Court wrote, in discussing what is required for a criminal charge, “facts, and not mere conclusions from them, should be stated”, *Id.*

Du Brul v. State, 80 Ohio St. 52 (1909) is to the same effect, drawing on both *Fouts* and *Whiting*. It is very hard to square the following quotation from *De Brul* with *Pepka*: “It has been held again and again in this state to require a statement of the material facts which it is necessary to prove to warrant conviction; that conclusions of law are not sufficient.”

In our case it was necessary to prove serious physical harm to get a conviction, and it most assuredly was not in the indictment.

While not legally binding on this Court the undeniable correctness of the logic and holding *State v. Burgun*, 49 Ohio App. 2d 112, on this same subject is instructive. In *Burgun*, the charging document omitted an element of the crime and the state urged, much like here, the “failure to charge an element of the crime is

cured by the fact that the complaint designates the statute under which the appellant was charged and that a reading of the statute will inform the appellant of all the elements of the crime with which she is charged.” *Supra*, 118.

The Court went on: “In *Fouts v. State*, (1857), 8 Ohio St.98, the Ohio Supreme Court held that an indictment charging the defendant with murder in the first degree was invalid because it failed to allege all the elements of the crime charged. In that case, the state argued that the omission was cured by the statement at the end of the indictment that the defendant ‘did***kill and murder, contrary to the form of the statute.’ In rejecting this argument, the court stated: ‘***this statement of a legal conclusion cannot by the settled rules of pleading in criminal cases, supply the omission of any material and essential ingredient of the offense in the direct averments descriptive of the overt act of the party stated as the crime.’ *Fouts v. State*, *supra*, at 121.

It cannot be gainsaid that if *Fouts* had been briefed and argued, the outcome would have been otherwise, leave to appeal may well have not been granted. This Court is bound by *Fouts* until, and unless, you decide to overrule it.

B.

To say *Wozniak*, 172 Ohio St. 517 (1961), has no relevance because it is a pre-rule case does at least two (2) things. First, it implies, strongly, that if it did apply, it would command the opposite result, and second, raises disingenuousness

to a new level because *Wozniak's* statute, Ohio Revised Code Section 2941.30 and Criminal Rule 7 are Xerox copies of each other, and *Wozniak* has been cited with approval by this Court numerous times since the adoption of the Criminal Rules, e.g. *State v. Childs*, 88 Ohio St.3d 194,198, *State v. Colon*, 118 Ohio St. 3d 26, 32, *State v. Headley*, 6 Ohio St.3d 475, 479.

Be that as it may, the real problem with this Court's treatment of, and disregard of, *Wozniak* is its attempt to interpret a Criminal Rule differently than an identical statute which is, perforce, substantive law, having been agreed to by the legislature and governor.

It hardly bears repeating the Modern Courts Amendment, Art 4 Section 5 gives rule making power to this Court "governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify and substantive right." The substantive right that circumscribes Criminal Rule 7 was pre-1973 Ohio Revised Code Section 2941.30 which prohibited an amendment that changed the identity of the offense, meaning penalty and degree.

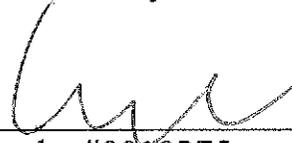
To not consider *Wozniak's* effect is to abridge the rights in the statute by a completely unsupportable interpretation of Criminal Rule 7; it is an attempt to somehow say Rule 7 is different from the statute which it is, of course, not. This Court's decision in *Pepka* by way of a Rule interpretation takes away a right from *Pepka* granted by statute, which this court cannot constitutionally do.

As *Bowie* points out, new interpretation may well lawfully apply to future cases, but to apply it to Pepka makes it operate just like an *ex post facto law*, and it therefore, violates Due Process. Id. 362.

III

This case is wrong on so many fronts, but the highest hurdle it has in front of it is the 153 year old precedent that does not allow the result reached here. Ohio courts will now be besieged with variations of the amendment dilemma, some relying on pre-Pepka doctrine and others on irreconcilable post-Pepka charging ingenuity.

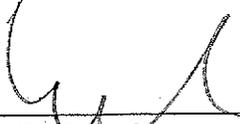
The judgment should be vacated, and the petition dismissed as improvidently allowed, or the judgment vacated and the case set for re argument to that the applicability of the precedents mentioned can be fully considered.



Albert L. Purola, #0010275
Attorney for Defendant-Appellee
38298 Ridge Road
Willoughby, OH 44094
(440) 951-2323

CERTIFICATE OF SERVICE

A copy of the foregoing Appellee's Motion for Reconsideration was sent by regular U. S. mail, postage prepaid, this 22 day of April, 2010, to Charles Coulson, Prosecuting Attorney, at P. O. Box 490, Painesville, Ohio 44077.



Albert L. Purofa
Attorney for Defendant-Appellee