

ORIGINAL

IN THE SUPREME COURT OF OHIO
Case No. 2010-2148

10-1671

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| STATE OF OHIO | : | |
| Appellee | : | |
| -vs- | : | On Appeal from the |
| CHARLES FREEMAN | : | Cuyahoga County Court |
| Appellant | : | of Appeals, Eighth |
| | | Appellate District Court |
| | | of Appeals |
| | | CA: 92809 |

REPLY BRIEF OF APPELLANT CHARLES FREEMAN

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ARGUMENT

Reply to Proposition of Law:

WHEN THE STATE'S CHARGING INSTRUMENT ALLEGES NUMEROUS IDENTICAL OFFENSES OCCURRING OVER AN EXTENDED PERIOD OF TIME IT VIOLATES THE ACCUSED'S RIGHTS TO NOTICE AND A FAIR TRIAL WHILE FAILING TO PROTECT AGAINST DOUBLE JEOPARDY.

Mr. Freeman did not Waive this Proposition of Law

In claiming that Mr. Freeman has waived or forfeited the Proposition of Law before this Court, the State, implicitly at least, agrees that the charging instrument's sufficiency is an issue that needs to be addressed pretrial. Pretrial resolution of concerns surrounding the charging instrument is the most practical solution to what can be a difficult problem. By addressing the issue before trial, 1) the accused will receive the notice he needs to meet and defend against the charges; 2) the prosecution can refine, focus, and clarify its case and the charges on which it will proceed to trial; and 3) the potential for later double jeopardy violations can be avoided.

According to the State, the duty to correct deficiencies in the prosecution's indictment falls on the accused. Placing this burden entirely on the defense, however, is problematic. The State instituted the case by presenting it to the Grand Jury and securing the indictment. The defense is not even permitted to be present at, let alone participate in, that process. The State, not the defense, controls every aspect of the charging decision and the evidence underlying it. The accusations derive from State witnesses based on the State's evidence. Simply put, it is the State's case. The responsibility for assuring that the instrument charging that case does what it is supposed to really ought to rest squarely with the State.

The indictment charging Mr. Freeman alleged 19 separate, but unspecified, counts of rape (sexual conduct) involving two different children under the age of ten, sometime between

September 2007 and March of 2008. Before trial, Mr. Freeman's attorney filed two motions for a bill of particulars. Both times he requested details about the charges, i.e., the date, time and specific place(s) where the offenses were allegedly committed and the method and means by which the crime was alleged to have been committed. (Appendix to Appellant's Merit Brief, A-35) The defendant maintained that the Bill of Particulars was necessary because the "indictment is vague, indefinite, uncertain and insufficient, in general terms and conclusions; and that from the indictment, [he] cannot determine the nature and cause of the charges against him." (Appendix, A-36)

In response to such a request, the law requires the prosecution to turn over the allegations' particulars "setting up specifically the nature of the offense(s) charged and the conduct of the defendant which is alleged to constitute the offense." R.C. 2941.07. The purported "Bill of Particulars" that the prosecution eventually filed in response did not comply with R.C. 2941.07's dictates. Instead, that pleading repeated the indictment almost verbatim. The only new bit of information the bill of particulars provided was the location – i.e., the address where the two children then resided – of the alleged abuse. (Appendix, A-37-48)

The purpose of a bill of particulars is to "elucidate or particularize the conduct of the accused that constitutes the alleged offense." *State v. Lawrinson* (1990), 49 Ohio St.3d 238, 239. To that end, this Court has held that the State must respond to a request for a bill of particulars (or discovery request) by supplying specific dates and times with regard to an alleged offense where it possesses such information. *State v. Sellards* (1985), 17 Ohio St.3d 169, 171. In so finding, this Court observed, that "[n]o door, however remote and uncertain, ought to be closed to an accused engaged in the task of preparing a defense to a criminal charge. Clearly it is wisest

to err on the side of openness and disclosure.” *Id. quoting, State v. Gingell* (1982), 7 Ohio App.3d 364, 368.

Accordingly, even though these allegations derived from evidence totally within the prosecution’s control, and the defense actually took steps pretrial to force the prosecution to clarify its own allegations, the State in this proceeding (and in the court of appeals) maintains that Mr. Freeman has waived, forfeited, or otherwise lost the right to challenge the prosecution’s inadequate charging instrument on direct appeal. In taking this position, the State ignores the efforts Freeman made to obtain the indictment’s clarification. The State equates Mr. Freeman’s claim that the indictment is vague and multiplicative with a challenge to an indictment based on a defect. As this Court held in *State v. Horner* (2010), 126 Ohio St.3d, 466, the failure to object to an indictment’s defects results in a waiver of the underlying challenge. The two issues, however, are different.

A defective indictment is one that fails to track the language of the statute under which the violation was alleged to have occurred. Crim.R. 7(B). The indictment with which Mr. Freeman was charged did track the applicable statute. Nevertheless, it failed to differentiate between the many counts alleged – specifically the 19 separate, but identical allegations of rape involving a child under the age of 10. It is important to note that the extent of the indictment’s deficiency might not have made itself apparent until the prosecution actually presented its case. At that point it became apparent that, rather than 19 discrete incidents of sexual misconduct, the state was really alleging a pattern of abuse. Consequently, a pretrial objection to the indictment might have been premature. Instead, Mr. Freeman used the proper mechanism for seeking clarification of the indictment – by filing a request for a bill of particulars. By charging so many counts without alleging any facts to distinguish between them, the prosecution violated Mr.

Freeman's rights to notice, and the prohibition against double jeopardy. This Court should not deem these concerns to be waived.

Due Process, Notice and the Ability to Defend Against Criminal Charges

The principal purpose of a grand jury indictment is give the accused notice: “[A] criminal offense must be charged with reasonable certainty in the indictment so as to apprise the defendant of that which he may expect to meet and be required to answer; so that the court and jury may know what they are to try, and the court may determine without unreasonable difficulty what evidence is admissible.” *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707

This Court has held that an indictment meets constitutional requirements if it “first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.” *Id.* at ¶ 8-9, quoting *Hamling v. United States* (1974), 418 U.S. 87, 117-118.

The State maintains that the indictment with which it charged Mr. Freeman provided him the notice that the constitution guarantees, and asks this Court to affirm the Eighth District's decision. Although the State initially acknowledges that the prevailing law addressing an indictment's sufficiency was established in *United States v. Russell* (1962), 369 U.S. 749, it then undertakes to cut away most of *Russell's* thrust. Specifically, the State proposes that *Russell's* pleading requirements have been largely marginalized by the Supreme Court decision in *United States v. Resendiz-Ponce* (2007), 549 U.S. 102. A review of that decision demonstrates that the State is wrong.

Russell's Notice Mandate Applies to Prosecutions in the State of Ohio

The concerns addressed in *Resendiz-Ponce* are different from the ones this case presents, and the decision does not alter *Russell*'s notice requirements. In *Russell*, the High Court resolved that an indictment must 1) contain the elements of the offenses; 2) charge the offenses in such a way that the accused knows what he must be prepared to confront; and 3) in case other charges are sought for similar offenses, the record must accurately show to what extent the accused can plead former conviction or acquittal. *Id.* at 763. *Resendiz-Ponce* did not undermine or change those reasonable requirements – nor did it obviate the need for clarity and differentiation between charges in multiple count indictments.

The defendant in *Resendiz-Ponce* was charged in a *single count* indictment with violating Title 9 U.S.C. § 1326(a) by attempting to reenter the United States illegally. The indictment also provided the date on or about the accused was believed to have committed this offense. The defendant, nevertheless, complained that the indictment was defective because it failed to include the specific overt act he was accused of taking when he attempted to commit the offense. The Supreme Court reasoned that the indictment's use of the term "attempt" was sufficient because the word encompassed both the specific intent to commit the offense and an overt act in furtherance. *Id.* at 107.

Following this logic, the High Court concluded that the indictment was sufficient, because it charged the offense, and included the allegation that this was an "attempt" at the offense. That factor, "*coupled with the specification of the time and place of the respondent's attempted illegal reentry*" rendered the indictment sufficient. *Id.* at 108 (emphasis added). Accordingly, *Resendiz-Ponce* appears to require the very specificity that Mr. Freeman seeks, because it suggests that if the government opts to be elusive about the specific acts alleged, it must at least include the time and place where the conduct purportedly occurred.

The Indictment used in Mr. Freeman’s Case Failed to Address the Constitutional Parameters Set Forth in *Russell*

Had Mr. Freeman been charged in the way that Mr. Resendiz-Ponce was, he would not be pressing this issue before this Court now. Unlike the accused in *Resendiz-Ponce*, Mr. Freeman faced a 31-count indictment charging misconduct over a seven month period. Nineteen of those counts alleged undifferentiated “sexual conduct” with two minor females. Accordingly, when Mr. Freeman went to trial on these charges: 1) he did not know when each alleged incident occurred—beyond the seven month time frame alleged; 2) he did not know where specifically (other than the address where the children resided) each incident occurred; 3) he did not know specifically what kind of “sexual conduct” was claimed to have occurred; and 4) he did not know which child was involved.¹

The State stresses that it “went to great lengths to differentiate Freeman’s convictions during trial.” (Appellee’s Merit Brief, p. 13) The State offers this Court a chart, which it claims reflects how it differentiated between the 19 incidents. (Appellee’s Merit Brief, p. 20) That chart derives, not from the evidence, but from the prosecutor’s closing remarks to the jury. In fact, that prosecutor provided the jury with an enlarged depiction of a similar chart for its use during deliberations. (Tr. 693, 712, State Ex. 22 admitted over objection). The chart is simply a wish-list: a reflection of what the prosecutor hoped the evidence showed. The chart, however, fails to confront or explain in any fashion the various conflicts between the children’s testimony about the alleged incidents. As noted in Appellant’s Merit Brief, it is unclear from that testimony which incidents occurred where, what actually happened, and who was present. When the incidents allegedly occurred was never established beyond the seven month time frame.

¹ Neither did the prosecution, for that matter, because at the end of its case-in-chief it had to amend the indictment so that Counts 4-9 applied to P.S., rather than I.S., as previously alleged.

The fact that the prosecution tried to differentiate between the 19 counts after it presented its case does not mean that it corrected a notice problem of its own making. An indictment is supposed to apprise the accused of whatever wrongs he was supposed to have committed – before the trial starts, so he can prepare to confront or defend against them. That cannot happen if this critical charging information does not get conveyed to the accused until the prosecutor’s closing argument.

The prosecution’s purported clarification efforts notwithstanding, the witnesses testified to a pattern of sexual misconduct over a six-seven month period of time. It is far from clear that they testified about 19 specific instances of sexual conduct. In fact much of the misconduct to which the child witnesses testified seemed to involve uncharged sexual contact – essentially *de facto* other acts evidence – that was never differentiated for the jury. Under Ohio Rules of Evidence, the proponent of such other acts evidence generally has to first identify it, and then provide a legally cognizable justification for the evidence’s use. Evid. R. 404; R.C. 2945.59. Because the counts were never differentiated, the jury simply heard about numerous sexual incidents occurring at unspecified times untethered to any particular count. Under the circumstances the prosecution’s use of multiple carbon copy charges also enabled the prosecution to avoid such pretrial constraints.

We recognize that in sexual abuse cases involving children, courts have typically found that fairly large time windows were consistent with due process notice requirements. See, *Valentine v. Konteh* (C.A. 6, 2005), 395 F.3d 626, 632. It is also true that as a general matter exact dates and times are not required in an indictment. But dates, times, locations and/or specific conduct should be required in cases, like this one, where there is no other way of making certain that the accused is actually informed of the misconduct alleged. Consequently, when

they are able, prosecutors should be as specific as possible in delineating between offenses, by offering dates, times, locations, and/or specifying the conduct alleged. That specificity was utterly lacking in Mr. Freeman's case. As the dissenting opinion from his direct appeal remarked:

This is not a case where a child is unable to testify to exact dates or times; courts have great tolerance and understanding of that difficulty. This is a case where the available differentiating information, e.g., cunnilingus, vaginal penetration, digital penetration, in the bedroom, in the bathroom, etc., was in fact available, but specifically and purposefully denied the defendant prior to trial.

State v. Freeman, Cuyahoga App. No. 92809, 2010 Ohio 3714, p 25 (McMonagle, J., dissenting)

When the prosecution presented this case to the grand jury, at the very least, it possessed the statements I.S. and P.S. made to a hospital nurse who examined them for abuse, as well as Mr. Freeman's statement to the police following his arrest.² There is simply no proper justification for withholding that information when it could have been used to differentiate between otherwise identical counts.

The State's argument, in favor of the kinds of undifferentiated charges reflected in the instant matter, defies logic, distorts clearly established federal constitutional law, and asks this Court to embrace a rule that permits a charging instrument to become more, not less, vague as the number of counts alleged increases. This is not the law that the constitution contemplates, nor is it a tenet this Court should embrace.

² The State claims that Mr. Freeman confessed to 5 counts of rape in his post arrest statement to police. We dispute that assessment. Arguably all of the conduct to which Mr. Freeman "confessed" constituted GSI, rather than rape.

CONCLUSION

Wherefore, pursuant to the sole proposition of law posited herein, this Court should reverse his convictions and remand this case to the trial court to ascertain whether and the extent to which any of the charges alleged in Counts 1-19 can be retried.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Brief was served upon William Mason, Cuyahoga County Prosecutor and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 23rd day of May, 2011.



ERIKA B. CUNLIFFE