ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	SCT 2011-0599
Appellant	:	
-vs-	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals CA: 94718
DONALD EAFFORD Appellee	:	

APPELLEE'S MERIT BRIEF

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(as posited by the State of Ohio)

Where a verdict form states a charge of possession of drugs but omits the drug at issue, the court is to look to the entirety of the record, to include the indictment, the evidence at trial, the argument of counsel, and the jury instructions to determine the level of offense. (*State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, limited and explained.)

(as posited by Amicus)

Where a defendant is convicted of the lowest form of the offense, *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, has no application.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case of error correction. When the Cuyahoga County Prosecutor tried Donald Eafford, it did not pay attention to the jury verdict form. That form did not reflect a verdict for the crime of "possession of cocaine," which is the name of the offense contained in the indictment and which is an offense proscribed by R.C. 2929.11. As its name implies, that particular crime involves the possession of a particular controlled substance, namely "cocaine."

Instead, the verdict form reflected a verdict for the separate offense of "possession of drugs," which is a different offense that also happens to be proscribed by R.C. 2925.11. The crime of "possession of drugs" involves the possession of Schedule III, IV or V controlled substances. The possession of cocaine is not prohibited within the offense language for the crime of "possession of drugs" – indeed, cocaine is not even covered within Schedules III, IV or V.

On direct appeal, the Eighth District simply held that the sentence to be imposed had to reflect the verdict that was returned. This holding reflects a rule of law that is well-established and not subject to any real debate:

> **One can only be sentenced and punished for the crime that the jury found was committed.**

On appeal to this Court, the Cuyahoga County Prosecutor seeks to punish Mr. Eafford for the crime of possession of cocaine even though there has never been a guilty verdict returned for that crime. In order to accomplish its goal, the State would have this Court violate the Sixth Amendment by holding that a judge can impose punishment for the verdict that the judge thinks the jury must have intended. The Cuyahoga County Prosecutor believes that judicial findings that the defendant is guilty of a particular offense can override a jury's verdict form that reflects a guilty verdict for a different offense.

This case has been miscast as involving the misapplication of this Court's holding in *State v. Pelfrey,* 112 Ohio St.3d 422, 2007-Ohio-256. But *Pelfrey* involves a case where an aggravated form of a particular offense was charged and the verdict only reflected a lesser form of that *same offense.* Everyone in this case – the Cuyahoga County Prosecutor, the Franklin County Prosecutor (as amicus) and Mr. Eafford – agrees that R.C. 2929.11 encompasses a number of *different offenses.* Thus, *Pelfrey* has not been misapplied in the instant case.

In the end, the Cuyahoga County Prosecutor wants error correction from this Court. But the error that needs to be corrected was the prosecution's own error in not checking or objecting to the verdict form. By the time the Eighth District decided this case, it was too late to save the prosecutor from that error. This case should be dismissed as improvidently allowed.

STATEMENT OF THE CASE AND FACTS

Appellee, Donald Eafford, was convicted after a trial by jury of permitting drug abuse, a fifth degree felony, in Count One. That verdict is not at issue in this appeal, nor is the sentence of eight months imprisonment imposed on that count. In addition, the jury returned the following verdict with respect to Count Two of the indictment.

STATE OF OHIO)
) SS:
CUYAHOGA COUNTY)

JANUARY TERM A.D. 2010

To-Wit: January ____, 2010

STATE OF OHIO
Plaintiff

vs

DONALD EAFFORD
Defendant

CRIMINAL ACTION

CASE NO. 527280

COUNT TWO
(POSSESSION OF DRUGS)

VERDICT

We, the Jury in this case being duly impaneled and sworn, do find the Defendant, Donald Eafford, (*) guilty of Possession of Drugs in violation of §2925.11(A) of the Ohio Revised Code, as charged in Count Two of the Indictment.

(*) INSERT IN INK: **"GUILTY"** or **"NOT GUILTY"**

1. Elizabeth Williams Foreperson
2.
3.
4.
5.
6.
7.
8.
9.
10.
11. Bruce Washington
12.

No objection was voiced by the parties to the verdict form in Count Two, either before or after the verdict was returned.

At sentencing, the trial court, apparently believing that it was sentencing the defendant for a felony, imposed a sentence on Count Two of eight months imprisonment, concurrent to the sentence imposed in Count One.

On appeal, the Eighth District Court of Appeals affirmed the conviction for permitting drug abuse but held that the verdict for "possession of drugs" rendered against Mr. Eafford merely convicted him of a misdemeanor and did not support the sentence imposed. *State v. Eafford*, Cuyahoga App. No. 94718, 2011-Ohio-927.

ARGUMENT

In Response to Propositions of Law

(as posited by Appellant State of Ohio, represented by the Cuyahoga County Prosecutor):

> **Where a verdict form states a charge of possession of drugs but omits the drug at issue, the court is to look to the entirety of the record, to include the indictment, the evidence at trial, the argument of counsel, and the jury instructions to determine the level of offense. (*State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, limited and explained.)**

(as posited by Amicus Franklin County Prosecutor):

> **Where a defendant is convicted of the lowest form of the offense, *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, has no application.**

The arguments of the Cuyahoga County Prosecutor and the Franklin County Prosecutor are similarly flawed. Each fails to recognize that the phrase "possession of drugs" is a legal term that describes a particular offense. As a result, the real issue in this case involves the responsibility of the trial court to sentence a defendant in accordance with the verdict form.

The Defendant Has Been Found Guilty of a Particular Offense

Just as, for example, "theft" and "aggravated robbery" are legal terms that describe particular offenses, so too the phrase "possession of drugs" is a legal term describing a particular offense codified at R.C. 2925.11(C)(2). R.C. 2925.11 prohibits the possession of a controlled substance. R.C. 2925.11 (C)(1)-(7) then sets forth a variety of offenses that are committed when one violates subsection (A). The offenses include

- "aggravated possession of drugs," which is the possession of a Schedule I or II controlled substance other than marijuana, cocaine, L.S.D., heroin and hashish; R.C. 2925.11(C)(1).

- **"possession of drugs,"** which is the possession of a Schedule III, IV or V controlled substance. R.C. 2925.11(C)(2).

- "possession of marijuana." R.C. 2925.11(C)(3).

- "possession of cocaine." R.C. 2925.11(C)(4).

- "possession of L.S.D." R.C. 2925.11(C)(5).

- "possession of heroin." R.C. 2925.11(C)(6).

- "possession of hashish." R.C. 2925.11(C)(7).

The verdict returned by the jury was that of "guilty of Possession of Drugs in violation of 2925.11(A) of the Ohio Revised Code..." As noted above the crime "possession of drug" is one of the specific offenses delineated in the statute, and is covered by R.C. 2925.11(C)(2). Because the jury's verdict did not specify a particular quantity of the drugs that would aggravate the form of the offense, the verdict was for the lowest form of the offense. *Pelfrey.* The lowest form of the offense of possession of drugs at the time of the offense conduct was a first degree misdemeanor. (The Amicus correctly notes that the court of appeals applied the former version of subsection(C)(2) which classified "possession of drugs" as a third-degree misdemeanor.").

The Real Issue in This Case: The Trial Court Sentenced the Defendant For An Offense Other Than That Reflected in the Jury's Verdict Form

Thus, the question in this case is "what should a court of appeals do when the verdict form reflects a different level of offense than that which the trial court applied at the time of sentencing?" This question is not addressed by the propositions of law propounded by Appellant or its amicus. For this reason, alone, this case should be dismissed as improvidently allowed.

Answering the Real Issue

If this Court nonetheless wishes to address this question, it should arrive at the same conclusion reached by the First District Court of Appeals in *State v. Whiting* (1987), 41 Ohio App.3d 107. Whiting had been indicted for the offense of aggravated trafficking. However, the verdict form found him guilty of trafficking in drugs.

> The discrepancy between the indictment and the verdict form is sufficient to cast doubt upon the jury's verdict and create the need for a new trial because, under the facts of the case on review, trafficking in drugs cannot be a lesser included offense of aggravated trafficking.

Whitting, at 108.

Whiting is consistent with the First District's pre-*Whiting* case of *State v. English* (1985), 21 Ohio App.3d 130. In *English,* the defendant was charged with "aggravated burglary" in Count Two of the indictment. The verdict form reflected a verdict of "guilty of *Burglary 2911.12 R.C.,* as charged in the Second Count of the Indictment." *English* at 131, (emphasis in original).

> Where the defendant is charged with aggravated burglary (R.C. 2911.11), and where the jury is properly instructed on aggravated burglary, but the jury, nevertheless, returns a verdict of guilty of burglary (R.C. 2911.12) because they were given the wrong verdict form, the trial court may not, after the jury has been discharged, *sua sponte* or on motion, amend the verdict to a finding of guilty of aggravated burglary.

English, at Syllabus ¶ 1. The First District Court of Appeals made this determination even though, the verdict form used the term "as charged in the Second Count of the Indictment" and even though,"[o]n the evidence, the only offense of which English could be found guilty is aggravated burglary." Id., at 131. *English* held that the trial court erred when it amended the verdict to reflect "aggravated burglary:" "Once the jury was discharged and the verdict entered of record, the verdict could not be amended by the court on motion or *sua sponte*; it was the jury's verdict not the judge's." Id., at 132 (italics in original).

Pelfrey Has Not Been Misapplied

Pelfrey is concerned with the level of a particular offense where there are multiple levels of the offense in the Revised Code. *Pelfrey* applies R.C. 2945.75 and holds that, if and aggravating element increases the level of the offense, than the verdict form must reflect the finding by the jury that the aggravating element has been proven. This arises, for example, where a defendant is found guilty of "possession of drugs" but the jury also finds that the amount of the Schedule III, IV or V substance exceeds the bulk amount, in which case R.C. 2925.11(C)(2)(b) would have provided for felony penalties.

In the instant case, Count Two of the indictment did not contain any aggravating element of the crime of "possession of cocaine," under R.C. 2925.11(C)(4). The jury's verdict was for the lowest form of a different offense, "possession of drugs" in violation of R.C. 2925.11(C)(2). The problem in this case is not with a difference between the level of the offense charged in the indictment and a lesser version of the same offense reflected in the verdict form. To the contrary, the problem in this case is that there is a different offense charged in the indictment than that reflected in the verdict form.

Accordingly, the problem in this case is not with the application of *Pelfrey* and this case does not provide a vehicle for this Court to revisit *Pelfrey*.

The Appellant's Proposition of Law Violates the Sixth Amendment

Contrary to the Cuyahoga County Prosecutor's proposition of law, a trial court cannot look beyond a verdict form, examine the entire record, and then "determine the level of offense." Such a "determination," by its very nature, requires judicial fact-finding. But judicial factfinding that results in increased punishment has been consistently condemned as violative of the Sixth Amendment by the United States Supreme Court. E.g., *Apprendi v. New Jersey* (2000), 530 U.S. 466; *Blakely v. Washington* (2004), 542 U.S. 296.

Amicus Franklin County Prosecutor argues that a special verdict form is not required by *Apprendi* and its progeny. The Franklin County Prosecutor is correct that *Apprendi* would not be violated by a general verdict form in this case that had simply

found the defendant "guilty of the offense alleged in Count Two." But the verdict form in the instant case did not simply reference Count Two. Rather, the verdict form went further and specifically identified by name an offense codified under R.C. 2925.11(C)(2) – "possession of drugs."

In the end, a comparison of the indictment with the verdict form presents confusion – the jury has found the defendant guilty of an offense different than that which was indicted. But as *English* recognized in 1985, and as the United States Supreme Court has re-affirmed in *Apprendi* and its progeny, the jury's verdict is not merely a starting point for the determination of punishment – it is the ending point as well. When the trial judge ignored the verdict form reflecting misdemeanor "possession of drugs" and sentenced Mr. Eafford for felony "possession of cocaine," the trial judge substituted the judgment of a "lone employee of the State"[1] for that of a jury. And the Eighth District had no choice but to reverse.

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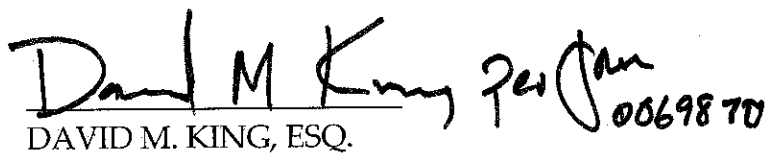
[1] *Blakely,* 542 U.S. at 313-14.

CONCLUSION

This case turns on a unique set of circumstances – which could have been avoided by checking the verdict forms before they were submitted to the jury. This case should be dismissed as improvidently allowed.

Respectfully submitted,



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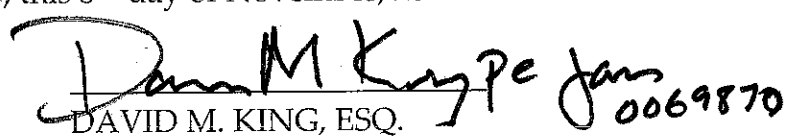
SERVICE

A copy of the foregoing Brief of Appellee was sent via U.S. Mail to T. Allan Regas in the office of William D. Mason, County Prosecutor, Justice Center, 9th Floor, 1200 Ontario Street. Cleveland, Ohio 44113, this 8th day of November, 2011.



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AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.