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IN THE SUPREME COURT OF OHIO

STATE OF OHIO Appellant, vs. ALFRED JACKSON Appellee.	)))))))))))))))	SUPREME COURT CASE NO. 11-1925 ON APPEAL FROM THE COURT OF APPEALS, NINTH APPELLATE DISTRICT 10CA009791 LORAIN COUNTY COMMON PLEAS COURT CASE NO. 08CR077144

MEMORANDUM OF APPELLANT, THE STATE OF OHIO, IN SUPPORT OF JURISDICTION

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FILED
NOV 14 2011
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Explanation of Why This Case is a Case of Public or General Interest and Involves a Substantial Constitutional Question 1

Statement of the Case and Facts 3

LAW & ARGUMENT 6

ARGUMENT IN SUPPORT OF APPELLANT'S SOLE PROPOSITION OF LAW

I. Pursuant to *State v. Headley*, for an indictment that alleges a violation of Chapter 2925 of the Ohio Revised Code to be constitutionally valid, the indictment must track the language of the statute, including one of the eight categories of controlled substances, and does not require the specific name of the substance involved 6

Conclusion 14

Proof of Service 15

TABLE OF AUTHORITIES

CASES:

Hamling v. United States (1974), 418 U.S. 87, 117-118, 94 S.Ct. 2887 7

Harris v. State (1932), 125 Ohio St. 257, 264 7

State v. Buehner, 110 Ohio St.3d 403, 2006 Ohio 4707 ..... 1, 7, 11, 12

State v. Childs (2000), 88 Ohio St.3d 558, 465-565, 2000 Ohio 425, 728 N.E.2d 379 ..... 7, 12

State v. Colon, 118 Ohio St.3d 26, 2008 Ohio 1624 1

State v. Colon, 119 Ohio St.3d 204, 2008 Ohio 3749 1

State v. Dunlap, 129 Ohio St.3d 461, 2011 Ohio 4111 1

State v. Headley (1983), 6 Ohio St.3d 475, 453 N.E.2d 716 ..... 1, 2, 3, 4, 6, 7, 8, 9, 11, 14

State v. Horner, 126 Ohio St.3d 466, 2010 Ohio 3830 ..... 1, 13

State v. Jackson, 9th Dist. No. 10CA009791, 2011 Ohio 4998 5

State v. Lester, 123 Ohio St.3d 396, 2009 Ohio 4225 1

State v. Lynn, 129 Ohio St.3d 146, 2011 Ohio 2722 1

State v. Pepka, 125 Ohio St.3d 124, 2010 Ohio 1045 ..... 1, 12

State v. Smoot (July 18, 1997), 2nd Dist. No. 96-CA-107 ..... 2, 10, 11

RULES & STATUTES:

Crim.R. 7(B) 1, 2, 7, 14

Crim.R. 7(D) 6, 12

Chapter 2925, Ohio Revised Code 1, 2, 14

R.C. 2903.21 11

R.C. 2911.01(A)(3) 13

R.C. 2919.22(A) 12

R.C. 2923.24 3

R.C. 2925.1(D) 11

R.C. 2925.03 ..... 2, 3, 5, 6, 13

R.C. 2925.11 2

R.C. 2925.14 3

R.C. 2925.51 3

R.C. 2927.12 11

OTHER:

Article I, Section 10, Ohio Constitution 1, 2, 6

EXPLANATION OF WHY THIS FELONY CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST OR INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

The State of Ohio urges this Honorable Court to grant jurisdiction in the within matter. This case involves a question arising under Article I, Section 10, of the Ohio Constitution and Criminal Rule 7(B), and more specifically, what constitutes a constitutionally valid indictment under Chapter 2925 of the Ohio Revised Code. This case is also a felony case and of public and great general interest because a decision regarding this issue will clarify what constitutes a sufficient and constitutionally valid indictment in all Drug Trafficking and Drug Possession cases throughout the State of Ohio and will clarify this Court's opinion in *State v. Headley* (1983), 6 Ohio St.3d 475.

A number of this Court's recent decisions have centered on the constitutional validity of an indictment that does not specifically aver a culpable mental state. See, *State v. Colon* 118 OhioSt.3d 26, 2008-Ohio-1624, (Colon I); *State v. Colon* 119 Ohio St.3d 204, 2008-Ohio-3749, (Colon II); *State v. Lester* 123 Ohio St.3d 396, 2009-Ohio-4225; *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830; *State v. Dunlap*, 129 Ohio St.3d 461, 2011-Ohio-4111.

In addition to those decisions regarding *mens rea*, this Court has also recently addressed the constitutional validity of indictments in other areas, specifically, Ethnic Intimidation, *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707; Child Endangering, *State v. Pepka*, 125 Ohio St.3d 124, 2010-Ohio-1045; and Aggravated Burglary, *State v. Lynn*, 129 Ohio St.3d 146, 2011-Ohio-2722. These cases concerned the issue of what elements need, or need not, be included, for a constitutionally sufficient indictment.

While at first blush, the constitutional validity of the Drug Trafficking indictment at issue in the present case may seem to be resolved by *State v. Headley* (1983), 6 Ohio St.3d 475, a closer inspection of *Headley* reveals two possible interpretations. While *Headley* states that the ***type*** of controlled substance is an essential element which must be included in the indictment, this could be read as requiring that the indictment include one of the eight categories[1] of controlled substances listed under either R.C. 2925.03(C)(1) through (8), or R.C. 2925.11(C)(1) through (8), or, it could be read as requiring the actual name of the controlled substance as well.[2] These two possible interpretations are evidenced by the majority and dissenting opinions in the Ninth District Court of Appeals opinion in this case, and is the question that the State of Ohio is asking this court to answer. Additionally, the Second District Court of Appeals came to a conclusion that was the opposite of the Ninth District's on this very same issue. See, *State v. Smoot* (July 18, 1997), 2nd Dist. No. 96-CA-107.[3]

Accordingly, this case clearly involves a constitutional question regarding the sufficiency of an indictment for a violation of Chapter 2925 of the Ohio Revised Code, under Article I, Section 10 of the Ohio Constitution, and Criminal Rule 7(B), and is also of public and/or great general interest since the answer will apply to all drug cases in the State of Ohio. Therefore, the State of Ohio strongly urges this Honorable Court to accept jurisdiction in this matter.

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[1] Schedule I or II, with the exception of Marijuana, [Synthetic Marihuana Substances], Cocaine, L.S.D., Heroin, and Hashish; Schedule III, IV, or V; Marijuana; Cocaine; L.S.D.; Heroin; Hashish; and Synthetic Marijuana Substances.

[2] There are currently one hundred and thirty two (132) controlled substances listed under R.C. 3719.41 (Schedule I).

[3] Though the state did not request the Ninth District to certify a conflict, even a cursory reading of the two cases clearly demonstrates conflicting opinions on the same question.

STATEMENT OF THE CASE AND FACTS

On December 10, 2008, Alfred E. Jackson, III, was indicted by the Lorain County Grand Jury on two (2) counts of Trafficking in Drugs, violations of R.C. 2925.03(A)(1) and (A)(2), respectively, both felonies of the third degree (Counts One and Two); one (1) count of Trafficking in Drugs, a violation of R.C. 2925.03(A)(2), a felony of the fourth degree (Count Three); one (1) count of Possession of Criminal Tools, a violation of R.C. 2923.24, a felony of the fifth degree (Count Four); and one (1) count of Possession of Drug Paraphernalia, a violation of R.C. 2925.14, a misdemeanor of the fourth degree (Count Five). The only counts at issue in this case are Counts One and Two. Both of these counts also contained language indicating the type of drug involved, Schedule I or II, and that the amount of the drug was equal to or exceeded the bulk amount but was less than five times the bulk amount. While stating the Schedule of the drug involved, these two counts did not name the specific substance, which here was Benzylpiperazine, often referred to as BZP, a Schedule I controlled substance.

On February 11, 2009, the State, under its continuing duty to provide discovery, filed a Notice of Intent to Submit Lab Report under R.C. 2925.51, along with a copy of the Lab Report, revealing that the substance at issue in counts One and Two was Benzylpiperazine, a Schedule I controlled substance.

The defendant filed his first Motion to Dismiss on July 15, 2009, alleging that Benzylpiperazine was not included in Schedule I and therefore, counts One and Two failed to charge an offense under Ohio law. The State filed a written response, and on September 10, 2009, the trial court denied the defendant's Motion to Dismiss.

On October 27, 2009, the State submitted a written request asking the trial court to take judicial notice that Benzylpiperazine, (BZP), was a Schedule I drug. While this request was pending, the defendant filed a second Motion to Dismiss, on February 26, 2010, arguing that counts One and Two failed to charge an offense because, even though the type or category of the drug was included, i.e. 'Schedule I or II,' the specific substance was also required to be named in the indictment.

Prior to the scheduled trial on March 1, 2010, the court held a hearing regarding both issues. The court granted the State's request and found that Benzylpiperazine, (BZP), was, as a matter of law, a Schedule I drug. (Tr. 17-18). As to the Motion to Dismiss, the defense argued that all one hundred and seventy two (172) drugs under Schedules I and II have different penalties and that there were one hundred and seventy two (172) different ways to traffick. (Tr. 5). Further, the defendant stated that determining bulk amount was not easily ascertainable without the specific name of the controlled substance, and also suggested to the court that in addition to naming the actual substance, its classification as an opiate, stimulant, or hallucinogenic should also be included in the indictment. (Tr. 6).

The State argued that the indictment repeated verbatim the language of the statute, included that the substance was under Schedule I, and that *Headley* actually supported the state's position. (Tr. 8). As to the specific substance, the state pointed out that the defendant clearly knew what it was due to the numerous motions already filed regarding BZP, and that this information was included in the Bill of Particulars and/or the Lab Results. (Tr. 9).

The trial court overruled the defendant's second Motion to Dismiss, stating that *Headley* actually supported the state's argument. (Tr. 10). The defendant then entered a plea of no contest to the indictment. On March 17, 2010, the defendant was sentenced to one (1) year in prison for each of the three (3) Drug Trafficking counts, ten (10) months on the Possession of Criminal Tools, and one (1) month on the Drug Paraphenalia. All counts were run concurrently. The sentences for counts one and two were mandatory.

The defendant filed a Notice of Intention to File Appeal on March 25, 2010, and was given an appellate bond pending resolution of his appeal to the Ninth District Court of Appeals. The defendant's principal argument was that the trial court erred in not granting the second Motion to Dismiss in that the first two counts were defective due to a failure to name the specific substance, over and apart from the classification of the substance as a Schedule I or II substance.

On September 30, 2011, the Ninth District Court of Appeals, in a two (2) to (1) one decision, reversed the trial court on this issue, finding that the indictment was insufficient because, despite mirroring the language of the statute, it did not specifically name the controlled substance involved. *State v. Jackson*, 9th Dist. No. 10CA009791, 2011 Ohio 4998. In support of this proposition, the majority relied on *State v. Headley* (1983), 6 Ohio St.3d 475. The dissenting opinion also cited *Headley* in support of its position. In fact, both the majority and dissent cited the exact same language in support of their respective opinions, displaying a split in the Ninth District on *Headley's* meaning.

In November 2011, the State of Ohio filed a discretionary appeal with this Honorable Court.

LAW & ARGUMENT

SOLE PROPOSITION OF LAW

I. PURSUANT TO *STATE V. HEADLEY*, FOR AN INDICTMENT THAT ALLEGES A VIOLATION OF CHAPTER 2925 OF THE OHIO REVISED CODE TO BE CONSTITUTIONALLY VALID, THE INDICTMENT MUST TRACK THE LANGUAGE OF THE STATUTE, INCLUDING ONE OF THE EIGHT CATEGORIES OF CONTROLLED SUBSTANCES, AND DOES NOT REQUIRE THE SPECIFIC NAME OF THE SUBSTANCE INVOLVED.

In *State v. Headley* (1983), 6 Ohio St.3d 475, 453 N.E.2d 716, the Ohio Supreme court held that, "[t]he type of controlled substance involved in the crime of aggravated trafficking under R.C. 2925.03 is an essential element which must be included in the indictment, the omission of which cannot be cured by amendment under Crim. R. 7(D)." *Syllabus of the Court*. At first blush, this proposition seems fairly straightforward. But upon closer examination, a question arises as to what exactly this Court meant by the term '***type***.' Did it mean one of the eight (8) categories of controlled substances now listed in R.C 2925.03(C)(1) through (8),[4] or did it mean the specific name of the substance. This is the question presented by this case. It is also the issue that divided the Appellate Court panel in this case and was decided differently by the Second District Court of Appeals.

Revised Code Section 2925.03, entitled Trafficking in Drugs, contains eight (8) separate categories of offenses. These categories are: (1) Schedule I or II, with the exception of Marihuana, Synthetic Marihuana Substances,[5] Cocaine, L.S.D., Heroin, and

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[4] At the time of the hearing in this case, there were only seven categories. Synthetic Marijuana Substances became the eighth, with the enactment of H.B. 64, effective October 17, 2011. In addition, both the Drug Trafficking, R.C. 2925.03, and Drug Possession, R.C. 2925.11, sections of the Revised Code, list the exact same categories.

[5] 1-Pentyl-3-(1-naphthoyl)indole, 1-Butyl-3-(1-naphthoyl)indole, 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole, 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol, and 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol.

Hashish; (2) Schedule III, IV, or V; (3) Marihuana; (4) Cocaine; (5) L.S.D.; (6) Heroin; (7) Hashish; and (8) Synthetic Marijuana Substances. It should be noted that Marihuana, Synthetic Marihuana Substances, L.S.D., Heroin, and Hashish are also Schedule I substances, and Cocaine is a Schedule II substance. These particular substances were placed into their own separate categories, including felony level and penalties.

Section 10 of Article I of the Ohio Constitution provides that, "* * * no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury * * *." This provision guarantees the accused that the essential facts constituting the offense for which he is tried will be found in the indictment of the grand jury." *Headley*, at 720, citing, *Harris* v. *State* (1932), 125 Ohio St. 257, 264. Criminal Rule 7(B) provides that an indictment "may be made in ordinary and concise language without technical averments or allegations not essential to be proved. The statement may be in the words of the applicable section of the statute, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged." Thus, this Court has stated that "[a]n 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.'" *State v. Buehner,* 110 Ohio St.3d 403, 405, 853 N.E. 2d 1162, 1164, quoting *State v. Childs* (2000), 88 Ohio St.3d 558, 564-565, 2000 Ohio 425, 728 N.E.2d 379, quoting *Hamling v. United States* (1974), 418 U.S. 87, 117-118, 94 S.Ct. 2887.

Both counts One and Two of the present indictment contain language which tracks the language found in the statute. Both counts state that, "the drug involved in the violation is a compound, mixture, preparation, or substance included in Schedule I or II, with the exception of marijuana, cocaine, L.S.D., heroin, and hashish and that the amount of the drug involved equals or exceeds the bulk amount but is less that five times the bulk amount." Thus, both counts included the category of the controlled substance involved. Neither count listed the specific name of the controlled substance.

In reaching opposite conclusions, both the majority and dissenting opinions of the Ninth District relied heavily upon *State v. Headley*. In fact, both opinions cited the same language in *Headley* in support of their divergent positions.

Unlike the indictment at issue here, the indictment in *Headley,* contained neither the category nor the specific name of the controlled substance. It merely charged the defendant with aggravated trafficking of a controlled substance. In finding that the indictment in *Headley* was fatally defective, the Court noted that:

> Generally, [R.C. 2925.03] prohibits the selling, distribution, production or possession of certain controlled substances, or drugs, for certain purposes. The severity of the offense is dependent upon the type of drug involved. Under R.C. 2925.03(C), the offense is aggravated trafficking if the substance involved is a Schedule I drug, with the exception of marijuana, or a Schedule II drug. Under R.C. 2925.03(D), if the substance involved is a Schedule III, IV or V drug, the offense is the lesser one of trafficking in drugs.
>
> Under this analysis, it is evident that R.C. 2925.03 sets forth more than one criminal offense with the identity of each being determined by the type of controlled substance involved. As such, the type of controlled substance involved constitutes an essential element of the crime which must be included in the indictment. The omission of that information cannot be cured by amendment, as to do so would change the very identity of the offense charged.

Headley, at 479.

In reaching its decision, the Court in *Headley* made explicit reference to the Drug Schedules. The Court noted that there would be a difference in the identity of the offense (in reality, its felony level) depending upon the schedule of the substance. For example, in 2011, if an individual trafficks in a Schedule I or II substance, less that the bulk amount, the indictment would constitute a felony of the fourth degree. If an individual trafficks in a Schedule III, IV, or V substance, the indictment would only constitute a felony of the fifth degree. Similarly, if the Schedule I or II substance was equal to or over the bulk amount but less that five times the bulk amount, the indictment would constitute a felony of the third degree. However, if the substance was a Schedule III, IV, or V, substance, and was equal to or over the bulk amount but less that five times the bulk amount, the indictment would only constitute a felony of the fourth degree.

Significantly, other than for the tangible amount of the controlled substance involved, either by weight or unit dose, no matter which of the one hundred and thirty four (134) substances listed under Schedule I, or the seventy (70) substances listed under Schedule II, is trafficked, the degree of the offense never changes. If the amount is under bulk amount, the offense is always a felony of the fourth degree, regardless of what the actual substance may be. If it is one to five times the bulk amount, the offense is always a felony of the third degree, again regardless of what the actual substance may be. Thus, as long as the category of the substance is included in the indictment, the identity of the offense does not change due to the name of the actual substance.

Based on the portion of *Headley* cited above, this was clearly the issue that concerned this Court. Without identification of the category or Schedule of the substance, the degree of the offense would not be ascertainable. However, as long as the

amount and category of a controlled substance is included in an indictment, a defendant would have adequate notice of all the elements of the offense with which he or she is charged. The name of the actual controlled substance is additional information that would be part of the discovery process, either in a Bill of Particulars or in the filing of the laboratory results.

In a case that is factually identical to the present case, the Second District Court of Appeals came to a conclusion different than that of the Ninth District majority.[6] In *State v. Smoot* (July 18, 1997), 2nd Dist. No. 96-CA-107, the court noted that, "[c]ount five of the indictment alleged that Smoot knowingly sold or offered to sell a Schedule II controlled substance. Unlike the other counts in his indictment, count five did not identify the substance by name." Smoot argued that the indictment was fatally defective because it did not identify the specific substance he sold. The court went on to address how *Headley* would apply to this scenario.

> Although *Headley* seemingly supports Smoot's argument, upon closer examination we find the case distinguishable. In *Headley*, the court expressed concern because the defendant, charged generally under R.C. 2925.03, had no way of knowing which criminal offense he allegedly committed. Absent an indictment identifying the controlled substance, the court explained that Headley could not determine whether indictment alleged drug trafficking or aggravated drug trafficking, two different criminal offenses.
>
> In the present case, however, the indictment informed Smoot of exactly what criminal offense he allegedly committed. The indictment alleged that Smoot "did knowingly sell or offer to sell the Schedule II controlled substance in an amount equal to or exceeding the bulk amount, but in an amount less than three times that amount * * * ." As in *Headley*, the indictment failed to identify the particular controlled substance at issue. Unlike *Headley*, however, the indictment did identify the substance as a "Schedule II" controlled substance, thereby informing Smoot that the state's indictment alleged aggravated trafficking. As the Ohio Supreme Court recognized in *Headley*,

[6] The dissent in the present case came to the same conclusion as the Second District.

> whenever the substance involved is a Schedule II controlled substance, the offense is aggravated drug trafficking. Consequently, we believe the Schedule I, II, III, or IV classification of a controlled substance determines the severity of the offense as much as the specific name of the substance.

Smoot, Id.

As demonstrated in *Smoot* and the discussion in *Headley*, the indictment in the present case is constitutionally valid since it tracks the words of the applicable section of the statute, and gives the defendant notice of all the elements of the offense with which he is charged, which includes the type, or category, of the controlled substance, and the bulk amount range. The only determination left to be made then, is what constitutes bulk amount. This is easily ascertained, either by weight or unit dose, under R.C. 2925.01(D). It bears repeating that no matter what the specific Schedule I or II substance may be, the name, identity, and degree of offense does not change. The decision of the Ninth District has imposed a new requirement over and above what is constitutionally required by *Headley* and which is unnecessary for a valid indictment.

Other cases decided by this Court in analogous areas have also come to the similar conclusion that an indictment that tracks the words of the applicable statute, gives the defendant notice of all the elements of the offense with which he is charged. In *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, the defendant was indicted for one count of Ethnic Intimation in violation of R.C. 2927.12. The predicate offense for this charge was Aggravated Menacing, R.C.2903.21, which one of the five listed sections (or categories) of predicate offenses. The indictment listed only the Revised Code section for the predicate offense and not the actual elements of the underlying offense. Thus, the defendant argued that the indictment failed to charge all material elements of the crime.

However, this Court disagreed and concluded that, "an indictment that tracks the language of the charged offense and identifies a predicate offense by reference to the statute number need not also include each element of the predicate offense in the indictment. The state's failure to list the elements of a predicate offense in the indictment in no way prevents the accused from receiving adequate notice of the charges against him." *Id.*, at 406.

Like *Buehner*, the indictment in this case tracked the language of the charged offense. It also listed the category of the controlled substance, which is the equivalent of identifying the predicate offense. In this case, the defendant clearly had adequate notice of all the elements of the offense for which he was charged.

In *State v. Pepka*, 125 Ohio St.3d 124, 2010-Ohio-1045, the defendant was charged with Endangering Children, R.C. 2919.22(A), a felony of the third degree. The indictment did not originally include language that the victim suffered 'serious physical harm.' The trial court allowed the state to amend the indictment prior to trial, under Criminal Rule 7(D), to include that language. The defendant argued that the amendment changed the identity of the crime from a misdemeanor of the first degree to a felony of the third degree. The state contended that the defendant had adequate notice because the only circumstance in which Endangering Children could be a felony of the third degree is when there is 'serious physical harm.' Therefore, the defendant had adequate notice of the elements of the offense charged.

This Court, citing *Buehner* and *State v. Childs*, held that the original, unamended indictment was sufficient and provided the defendant with adequate notice of the offense for which he was charged. Likewise, the defendant in the present case clearly had

adequate notice of all the elements of the offense for which he was charged. As long as the defendant is informed as to which one of the eight categories of controlled substances he is charged with under R.C. 2925.03, he has adequate notice of the offense for which he is charged.

In *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, the defendant was charged with Aggravated Robbery, R.C. 2911.01(A)(3). The defendant argued that the indictment was insufficient because a culpable mental state was not included in the indictment. This Court disagreed with that proposition and found that, "when an indictment fails to charge a *mens rea* element of the crime, but tracks the language of the criminal statute describing the offense, the indictment provides the defendant with adequate notice of the charges against him and is, therefore, not defective." *Id.*, at 473. The Court reasoned that,

> The purpose of a grand jury indictment has always been to give notice to the accused: "[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." *Horton v. State* (1911), 85 Ohio St. 13, 19, 96 N.E. 797, 9 Ohio L. Rep. 366
>
> Expanding on the idea of notice to the accused, we have held that "[t]he purposes of an indictment are to give an accused adequate notice of the charge, and enable an accused to protect himself or herself from any future prosecutions for the same incident." *State v. Buehner*, 110 Ohio St.3d 403, 2006 Ohio 4707, P 7, 853 N.E.2d 1162, citing *Weaver v. Sacks* (1962), 173 Ohio St. 415, 417, 20 O.O.2d 43, 183 N.E.2d 373 and *State v. Sellards* (1985), 17 Ohio St.3d 169, 170, 17 OBR 410, 478 N.E.2d 781.
>
> . . .
>
> As required by *Buehner*, the language of the indictment tracked the language of the statute.

Id., at 468-469.

The same analysis should also apply to indictments alleging a violation of Chapter 2925 of the Ohio Revised Code. The indictment in this case, clearly provided the defendant adequate notice of all the elements of the offense for which he was charged. No matter what the Schedule I substance actually was, the weight or unit dose provided the identity of the crime and penalty. Thus, the actual name of the substance is mere surplusage, and its inclusion in the indictment is not required under Article I, Section 10 of the Ohio Constitution or Criminal Rule 7(B).

By accepting the instant matter on a discretionary appeal this Court can resolve the issue of what it meant by the term '***type***' in *State v. Headley*, and continue its recent efforts in defining what constitutes a constitutionally valid indictment, here specifically for a case charged under section 2925 of the Revised Code. Therefore, the State of Ohio strongly urges this Honorable Court to accept jurisdiction in this matter.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Honorable Court accept jurisdiction over the instant matter.

Respectfully Submitted,

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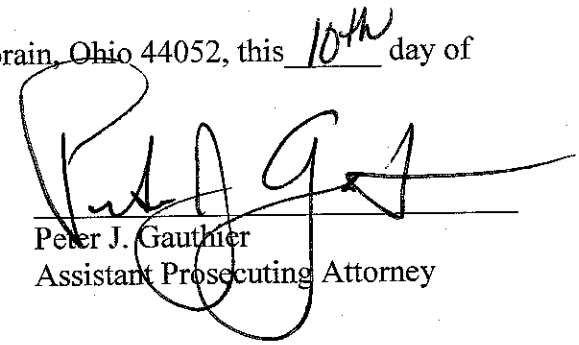
PROOF OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was sent by regular U.S. Mail to Jack Bradley, Esq., and Michael Stepanik, Esq., Counsel for Appellee, 520 Broadway Avenue, Third Floor, Lorain, Ohio 44052, this 10th day of November, 2011.



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COURT OF APPEALS

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

FILED IN THE COURT OF APPEALS
LORAIN COUNTY
NINTH JUDICIAL DISTRICT

2011 SEP 30 A 10: 22

CLERK OF COMMON PLEAS
RON NABAKOWSKI

STATE OF OHIO

Appellee

v.

ALFRED JACKSON III

Appellant

C.A. No. 10CA009791

9th APPELLATE DISTRICT

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 08CR077144

I HEREBY CERTIFY THIS TO BE A TRUE COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.
RON NABAKOWSKI, LORAIN COUNTY
CLERK OF THE COURT OF COMMON PLEAS
BY DEPUTY

DECISION AND JOURNAL ENTRY

Dated: September 30, 2011

BELFANCE, Presiding Judge.

{¶1} Defendant-Appellant Alfred Jackson, III, appeals from the judgment of the Lorain County Court of Common Pleas. For the reasons set forth below, we reverse.

I.

{¶2} Mr. Jackson was indicted for trafficking in drugs in violation of R.C. 2925.03(A)(1), a third-degree felony, and trafficking in drugs in violation of R.C. 2925.03(A)(2), a third-degree felony. He was also charged with three other offenses not at issue in this appeal.

{¶3} At Mr. Jackson's request, the State filed a bill of particulars indicating Mr. Jackson had trafficked in ecstasy pills. Mr. Jackson filed a motion to dismiss counts one and two of the indictment asserting that the State was now alleging that the pills at issue contained benzylpiperazine ("BZP"), but BZP was not a controlled substance under Ohio law. The court denied the motion.

{¶4} The State then requested that the court take judicial notice that BZP is a Schedule I controlled substance. Thereafter, Mr. Jackson moved to dismiss the first two counts of the indictment, arguing that the indictment failed to charge an offense as it did not specify the controlled substance involved and again asserting that BZP is not a controlled substance under Ohio law. The court denied Mr. Jackson's motion and granted the State's request. Subsequently, Mr. Jackson pleaded no contest and was convicted on all counts.

{¶5} Mr. Jackson now appeals arguing that his indictment was defective. He presents two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED IN FAILING TO DISMISS THE INDICTMENT WHERE IT LACKED AN ESSENTIAL ELEMENT OF THE OFFENSE"

{¶6} Mr. Jackson asserts in his first assignment of error that the trial court erred in failing to dismiss the first two counts of the indictment as the indictment failed to specify the type of controlled substance at issue and thus failed to include an essential element of the crime. We agree.

{¶7} We begin by noting that in the instant matter, Mr. Jackson pleaded no contest. "[U]nlike a guilty plea, a plea of no contest is not an admission of guilt and therefore reserves certain issues for appeal that are not available to a defendant who has pled guilty." *State v. Brown*, 9th Dist. No. 25103, 2010-Ohio-3387, at ¶6. "[A] no contest plea * * * is an admission of the truth of the facts alleged in the indictment * * *.'" *State v. Bird* (1998), 81 Ohio St.3d 582, 584, quoting Crim.R. 11(B)(2). "[W]here the indictment * * * contains sufficient allegations to state a felony offense and the defendant pleads no contest, the court must find the

defendant guilty of the charged offense." Id. The adequacy of an indictment is a question of law that we review de novo. *State v. Hernon* (Dec. 29, 1999), 9th Dist. No. 2933-M, at *2.

{¶8} "'The purposes of an indictment are to give an accused adequate notice of the charge, and enable an accused to protect himself or herself from any future prosecutions for the same incident.'" *State v. Pepka*, 125 Ohio St.3d 124, 2010-Ohio-1045, at ¶20, quoting *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, ¶7. "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." (Internal quotations and citations omitted.) *Pepka* at ¶20.

{¶9} Mr. Jackson contends that the first two counts of the indictment fail to identify the type of controlled substance at issue, and thus those two counts of the indictment are fatally deficient as provided by *State v. Headley* (1983), 6 Ohio St.3d 475, 479. *Headley* provides that, with respect to R.C. 2925.03, trafficking in drugs, the offense at issue, "the type of controlled substance involved constitutes an essential element of the crime which must be included in the indictment." Id. Thus, "[t]he omission of that information cannot be cured by amendment, as to do so would change the very identity of the offense charged." Id.

{¶10} The defendant in *Headley* was indicted on one count of aggravated trafficking in violation of R.C. 2925.03(A)(8). The indictment provided that the defendant "'did knowingly provide money or other items of value to another person with the purpose that the recipient of the money or items of value would use them to obtain controlled substances for the purpose of selling or offering to sell such controlled substances in amounts exceeding a bulk amount * * *.'" Id. at 475. The Supreme Court of Ohio noted that:

> "[t]he severity of the offense is dependent upon the type of drug involved. Under R.C. 2925.03(C), [as it existed at the time,] the offense is aggravated trafficking if the substance involved is a Schedule I drug, with the exception of marijuana, or a Schedule II drug. Under R.C. 2925.03(D), if the substance involved is a Schedule III, IV or V drug, the offense is the lesser one of trafficking in drugs." Id. at 479.

Thus, "it is evident that R.C. 2925.03 sets forth more than one criminal offense with the identity of each being determined by the type of controlled substance involved. As such, the type of controlled substance involved constitutes an essential element of the crime which must be included in the indictment." Id. The Supreme Court concluded that "the indictment purported to charge [the defendant] with the offense of aggravated trafficking but neglected to state the controlled substance involved. This was a fatal defect which was not curable by amendment." Id. In 2000, in *State v. Childs* (2000), 88 Ohio St.3d 558, the Supreme Court revisited *Headley* in the context of a charge of conspiracy to commit aggravated trafficking and reaffirmed that "*Headley* [required] the specific substance to be identified in an indictment for aggravated trafficking[.]" Id. at 565.

{¶11} Mr. Jackson's indictment provides as follows:

"**COUNT ONE**

"Trafficking In Drugs -2925.03(A)(1) – F3

> "That ALFRED E JACKSON III, on or about October 23, 2008[,] at Lorain County, Ohio, did knowingly sell or offer to sell a controlled substance in violation of Section 2925.03(A)(1) of the Ohio Revised Code contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio. The drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, cocaine, L.S.D., heroin, and hashish and the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount.

"**COUNT TWO**

"Trafficking In Drugs – 2925.03(A)(2) – F3

> "That ALFRED E JACKSON III, on or about October 23, 2008[,] at Lorain County, Ohio, did knowingly prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knew or had reasonable cause to believe that the controlled substance was intended for sale or resale by the offender or another person in violation of Section 2925.03(A)(2) of the Ohio Revised Code contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio. The drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, cocaine, L.S.D., heroin, and hashish and the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount."

{¶12} It appears that the State intended to charge Mr. Jackson with aggravated trafficking in drugs, as the language in the indictment mirrors R.C. 2925.03(C)(1). R.C. 2925.03(C)(1) provides that "[i]f the drug involved in the violation is any compound, mixture, preparation, or substance included in schedule I or schedule II, with the exception of marihuana, cocaine, L.S.D., heroin, and hashish, whoever violates division (A) of this section is guilty of aggravated trafficking in drugs." While the State tracked the language of the relevant statutes, it "neglected to state the controlled substance involved[,]" as specifically required by *Headley*. See *Headley,* 6 Ohio St.3d at 479; *Childs,* 88 Ohio St.3d at 565. The Supreme Court of Ohio noted in *Childs* that "[u]ndoubtedly the language of the statute may be used in the general description of an offen[s]e, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offen[s]e, coming under the general description, with which he is charged." (Internal quotations and citation omitted.) *Childs,* 88 Ohio St.3d at 565. Thus, it is clear that one of the Supreme Court's concerns in not only *Childs,* but also, in *Headley* was insuring that the defendant was aware of the specific offense for which the defendant was being charged. See *Headley*, 6 Ohio St.3d at 479. While the Supreme Court of Ohio has spoken

numerous times since *Headley* on the sufficiency of indictments, it has never overruled it. *Headley* remains binding authority on the sufficiency of indictments charging a defendant with a violation of R.C. 2925.03.

{¶13} While several of the recent Supreme Court of Ohio opinions *could* be read as implicitly overruling *Headley*, we conclude those cases are factually distinguishable. See *State v. Lynn,* 129 Ohio St.3d 146, 2011-Ohio-2722, at ¶22 (holding that "when a defendant is aware prior to trial that an aggravated-burglary indictment incorrectly states the *underlying criminal offense*, the trial court does not violate defendant's due process rights by conforming the jury instructions to the evidence presented at trial and instructing the jury on the correct underlying criminal offense[]") (emphasis added); *Pepka* at ¶21 (concluding the indictment was sufficient when the original indictment set forth the elements of the offense, specified that the defendant was being charged with a third-degree felony, and when *there was only one circumstance in which the offense at issue was a third-degree felony*); *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, at paragraph one of the syllabus (concluding that "[a]n indictment that charges an offense by tracking the language of the criminal statute is not defective for failure to identify a *culpable mental state* when the statute itself fails to specify a mental state[]") (emphasis added); *Buehner* at syllabus (holding that "[a]n indictment that tracks the language of the charged offense and identifies a *predicate offense* by reference to the statute number need not also include each element of the predicate offense in the indictment[]") (emphasis added).

{¶14} The indictment in the instant matter, just like the indictment in *Headley,* "purported to charge [the defendant] with the offense of aggravated trafficking but neglected to state the controlled substance involved." *Headley,* 6 Ohio St.3d at 479. Such a defect renders the indictment insufficient. Id. Accordingly, we sustain Mr. Jackson's first assignment of error.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED IN FAILING TO DISMISS THE INDICTMENT WHEN THE INDICTMENT DID NOT PERMIT JACKSON TO PLEAD FORMER ACQUITTAL OR CONVICTION IN BAR OF FUTURE PROSECUTION"

{¶15} Mr. Jackson contends in his second assignment of error, that the trial court erred in failing to dismiss the indictment because the drug listed in the bill of particulars, ecstasy/MDMA, was different than the drug that Mr. Jackson pled to trafficking in, namely BZP. As our resolution of Mr. Jackson's first assignment of error renders this assignment of error moot, we decline to address it. See 12(A)(1)(c).

III.

{¶16} In light of the foregoing, we sustain Mr. Jackson's first assignment of error and remand the matter to the Lorain County Court of Common Pleas for proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

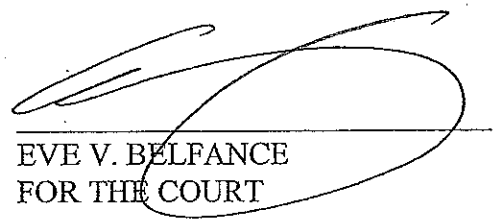
There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

~~Immediately upon the filing hereof, this document shall constitute the journal entry of~~ judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.



EVE V. BELFANCE
FOR THE COURT

MOORE, J.
CONCURS

WHITMORE, J.
DISSENTS, SAYING:

{¶17} I respectfully dissent as I would conclude that the trial court properly refused to dismiss the indictment against Jackson.

{¶18} As the majority notes, Jackson's indictment named both his R.C. 2925.03 trafficking offenses as third-degree felonies and specifically provided as follows:

> "The drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, cocaine, L.S.D., heroin, and hashish and the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount."

Thus, the indictment identified the felony level of Jackson's offense, the Schedule number of the controlled substance at issue, and the amount of the controlled substance at issue. From the foregoing information, it was possible to determine the exact offenses for which Jackson was indicted. See R.C. 2925.03(C)(1)(c) (applying to third degree-felony trafficking offenses of a Schedule I or II controlled substance where the amount at issue "equals or exceeds the bulk amount but is less than five times the bulk amount").

{¶19} A motion to dismiss an indictment tests the sufficiency of the indictment on its face. *State v. Silos* (1995), 104 Ohio App.3d 23, 26. It does not depend upon "the quantity or quality of evidence that may be produced" or any information contained in the bill of particulars. Id., quoting *State v. Patterson* (1989), 63 Ohio App.3d 91, 95. To be legally sufficient, an indictment simply must "provide[] the defendant with adequate notice of the charge against him." *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, at ¶12. "The type of controlled substance involved in the crime of aggravated trafficking under R.C. 2925.03 is an essential element which must be included in the indictment[.]" *State v. Headley* (1983), 6 Ohio St.3d 475, paragraph two of the syllabus.

{¶20} Unlike Jackson's indictment, the indictment in *Headley* charged the defendant with aggravated trafficking of a controlled substance. See id. at 475. It did not contain any further information about the controlled substance. Id. See, also, *State v. Reyna* (1985), 24 Ohio App.3d 79, 81 (distinguishing *Headley* and noting that "the indictment in *Headley* provided no means whatsoever by which one could ascertain what controlled substance was allegedly involved"). In concluding that Headley's indictment failed to sufficiently identify the identity of the offense charged, the Ohio Supreme Court explained as follows:

> "In this case, [Headley] was charged under R.C. 2925.03, relating to trafficking in drugs. Generally, that statute prohibits the selling, distribution, production or possession of certain controlled substances, or drugs, for certain purposes. The severity of the offense is dependent upon the type of drug involved. Under R.C. 2925.03(C), the offense is aggravated trafficking *if the substance involved is a Schedule I drug, with the exception of marijuana, or a Schedule II drug*. Under R.C. 2925.03(D), *if the substance involved is a Schedule III, IV or V drug*, the offense is the lesser one of trafficking in drugs.
>
> "Under this analysis, it is evident that R.C. 2925.03 sets forth more than one criminal offense with the identity of each being determined by the type of controlled substance involved. As such, the type of controlled substance involved constitutes an essential element of the crime which must be included in the indictment. The omission of that information cannot be cured by amendment, as

to do so would change the very identity of the offense charged." (Emphasis added.) Id. at 479.

{¶21} Headley's indictment was defective because, on its face, one could not determine the offense level of trafficking involved. Id. As the Supreme Court noted, that offense level depended upon whether Headley trafficked a 1) Schedule I or II drug; or 2) Schedule III, IV, or V drug. Id.

{¶22} I would read *Headley* as requiring an indictment to include the Schedule of the drug involved in a trafficking offense, not the specific drug at issue within that Schedule. So long as the State presented evidence of any drug within Schedule I or II, the identity of Jackson's offense would not change. Accord *State v. Justice* (Jan. 11, 1984), 9th Dist. No. 11224, at *7 (considering *Headley* and concluding that amendment to indictment at issue did not change the nature of the offense charged because the both the original indictment and the amended indictment charged the defendant with fourth-degree felony receipt of stolen property). Compare *Headley*, supra (discussing the "type of drug" involved in the context of the Schedule to which the controlled substance belonged). Jackson's indictment sufficiently notified him of the specific offenses with which he was charged. Accordingly, I would conclude that the trial court properly refused to dismiss the indictment and overrule Jackson's assignments of error.

APPEARANCES:

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DENNIS P. WILL, Prosecuting Attorney, and AMY IOANNIDIS BARNES, Assistant Prosecuting Attorney, for Appellee.