ORIGINAL

NO. 2011-0599

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 94718

STATE OF OHIO,

Plaintiff-Appellant

-vs-

DONALD EAFFORD,

Defendant-Appellee

REPLY BRIEF OF APPELLANT, THE STATE OF OHIO

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REPLY BRIEF

Proposition of Law I: 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, including 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.)***

I. R.C. 2975.45 Does Not Apply to the Facts of State of Ohio v. Eafford

The facts of *State of Ohio v. Eafford*, Cuyahoga App. No. 94718, 2011-Ohio-927, are undisputed. As the Eighth District Court of Appeals found, the State's evidence consisted of several witnesses, one of whom was a veteran police officer who used information from a confidential informant to obtain a search warrant for property Eafford was then leasing. *Id.* at ¶ 4. The detective described in detail how he, other officers, and a SWAT team executed the search warrant. *Id.* at ¶ 6. One of the officers described Eafford's property as a "smoke house," which is a place where individuals meet to engage in drug activity. *Id.* at ¶ 7. When the SWAT team entered the house, they found a person smoking what appeared to be crack cocaine. *Id.* Several others were found with various drug paraphernalia and crack cocaine, which was in plain view. *Id.* During the execution of the search warrant, officers found a crack pipe with cocaine residue in the medicine cabinet in the bathroom. *Id.* at ¶ 8. These facts do not warrant application of R.C. 2945.75.

Ohio Revised Code Section 2945.75 was created with the intent to prevent defendants from having their penalties unconstitutionally increased. But when all aspects of a trial, including the charging instrument, the evidence at trial, the arguments by both parties, the jury instructions, and the subsequent jury deliberations clearly focus on a specific charge, disregarding the jury's findings does not follow the intent of the statute; rather, it creates new precedent allowing a

defendant to escape punishment even though the ultimate charge was never considered in any phase of the trial.

Appellee suggests the responsibility of the trial court is to sentence a defendant only in accordance with the verdict form filled out by the jury rather than the offense that was charged, that was argued on, and that was deliberated over during all phases of the trial. (*Appellee's Merit Brief* at 5.) While this argument might be proper in contexts where the record is short and lacks the completeness of a full trial, a trial calls for a different analysis – one that complies with the evidence heard and the arguments made. When a trial focuses all of its effort on a specific charge, such as possession of cocaine, convicting on a lesser charge thwarts the purpose of the trial. A trial provides the defendant the constitutional protection of arguing for a lesser charge, or no charge at all; but when these efforts prove unsuccessful, he should not subsequently escape conviction for a lesser charge that was never contemplated at any phase of the trial. All of the resources used to prosecute and defend that charge would be for naught.

At least one other Ohio case, *State v. Sullivan*, Cuyahoga App. No. 82816, 2003-Ohio-5930, opined that noncompliance with R.C. 2945.75(A)(2) does not constitute reversible error if the evidence is overwhelming and there has been no objection at trial. *Id.* at ¶ 35. Here, the evidence was overwhelming that possession of cocaine was the offense charged because all phases of the trial focused on the charge of possession of cocaine. As suggested in *Sullivan*, R.C. 2945.75 was not meant to apply in situations where there is indisputable evidence regarding the crime charged, it was meant to apply in situations where the evidence was controverted and the parties themselves were unaware of what the verdict regarded.

II. R.C. 2945.75 Should Apply Only Where An Offense is Aggravated

Appellee argues the State of Ohio failed to address what a court of appeals should do in this situation; that is, when the verdict form reflects a different level of offense than that which the trial court applied at the time of sentencing. That did not happen here. The State of Ohio clearly stated on pages 6-7 of its brief that, following the precedent set in *State v. Pace*, Franklin App. No. 10-AP-547, 2011-Ohio-320, and *Portsmouth v. Wrage*, Scioto App. No. 08CA3237, 2008-Ohio-3390, it is necessary and proper to look to the charging instrument to determine what offense was charged. Not only does the statute contemplate such analysis, common sense dictates the same.

The State of Ohio submits its position because lower courts have consistently applied 2945.75 inconsistently. Amicus adroitly summarizes that the tenth, eighth, fifth and fourth districts all apply the statute in varying degrees. The State of Ohio submits this Court can solve the discrepancies by finding that courts should look to the indictment to determine what the actual charging offense is. This solution not only provides defendants with the constitutional right of notice of the charge(s) against them, but also that they are only held answerable for crimes they actually commit. It is clear from Appellee's trial that he was notified of the charge against him and was thus held answerable to that charge and that charge only. Therefore, Appellee's proposed application, which "create[s] the need for a new trial" (Appellee's Merit Brief at 7, citing *State v. Whiting* (1987), 41 Ohio App.3d 107, 108) is unwarranted.

III. The Eighth District Court of Appeals Applied *Pelfrey* Too Broadly

Appellee states the problem in this case is that there is a different offense charged in the indictment than that reflected in the verdict form. (*Appellee's Merit Brief* at 9.) But Appellee's suggestion of how to cure that defect is inconsistent with the purpose of R.C. 2945.75. If

adopted, it would create an even greater discrepancy in how these issues are decided going forward. Appellee claims *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, suggests that anytime a verdict form fails to list the offense charged that R.C. 2945.75 requires the defendant be charged with the lowest possible offense. This is too broad of an interpretation of *Pelfrey*, as it applies only when there are aggravating elements to the crime charged. As discussed in Appellant's merit brief, possession of cocaine is not an aggravating factor, it is the actual offense. Thus, in this case the actual offense is absent from the verdict form, which makes it necessary for the court to look, at a minimum, at the charging instrument to determine the offense to be charged.

CONCLUSION

The State of Ohio respectfully requests that this Court uphold Mr. Eafford's conviction for the crime which the jury found him guilty of: possession of drugs, cocaine. If this conviction is not upheld, this Honorable Court would be suggesting the use of jury deliberations, and possibly the entire trial process, are meaningless.

Respectfully submitted,

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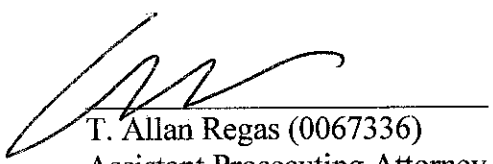

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CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief of Appellant was sent by regular U.S. mail this 17th day of November, 2011 to:

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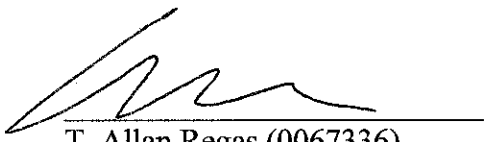

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