

[Cite as *State v. King*, 2009-Ohio-2812.]

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
FAYETTE COUNTY

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, : CASE NO. CA2008-10-035  
 :  
 - vs - : OPINION  
 : 6/15/2009  
 :  
 ASHLEY R. KING, :  
 :  
 Defendant-Appellant. :

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS  
Case No. 08-CRI-00133

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**YOUNG, J.**

{¶1} Defendant-appellant, Ashley King, appeals from the Fayette County Court of Common Pleas decision to amend the criminal property forfeiture specification clause found within an indictment charging her with one count of drug trafficking.

{¶2} On May 23, 2008, appellant was indicted for one count of drug trafficking in violation of R.C. 2925.03(C)(1)(a), a fourth-degree felony, after it was alleged that she

drove her vehicle, a 2000 Dodge Caravan, to meet with an undercover police officer in order to sell him drugs; two Percocet pills at \$7 a piece. The original indictment, besides charging appellant with drug trafficking, also contained a criminal property forfeiture specification clause, which stated, in pertinent part:

{¶3} "The Grand Jurors further find and specify that the [appellant] owns a vehicle subject to criminal forfeiture pursuant to Revised Code Section 2933.43, to-wit: a 2000 Dodge Caravan bearing VIN #2B4GP25G5YR726785 and Ohio License No. ECR2045."

{¶4} On July 7, 2008, appellant filed a "Motion to Dismiss Forfeiture Specification," arguing that the specification should be dismissed because the indictment incorrectly cited to R.C. 2933.43, the former criminal property forfeiture statute that was repealed on July 1, 2007, and because the specification clause did not comply with the requirements of R.C. 2981.04(A)(1), the current criminal property forfeiture statute. On July 9, just two days later, but before the state filed a response to appellant's motion, the trial court dismissed the property forfeiture specification. The next day, on July 10, the state filed a response to appellant's motion, and also filed a "Motion to Amend Indictment." On July 24, the court vacated its July 9 judgment entry dismissing the property forfeiture specification as being "improvidently granted," and amended the specification clause to read as follows:

{¶5} "The Grand Jurors further find and specify that [appellant] owns a vehicle subject to criminal forfeiture pursuant to Revised Code Section 2981.04, to-wit: a 2000 Dodge Caravan bearing VIN #2B4GP25G5YR726785 and Ohio License No. ECR2045."

{¶6} On August 4, appellant filed a "Motion to Dismiss Amended Forfeiture

Specification," arguing that the criminal property forfeiture specification clause found within the amended indictment still did not comply with the requirements of R.C. 2981.04(A)(1). Several days later, on August 13, the state filed another motion to amend the indictment, which the trial court granted. Following this final amendment, the criminal property forfeiture specification clause read as follows:

{¶17} "The Grand Jurors further find and specify that [appellant] owns a vehicle subject to criminal forfeiture pursuant to Revised Code 2981.04, to-wit: a 2000 Dodge Caravan bearing VIN #2B4GP25G5YR726785 and Ohio License No. ECR2045, and that the vehicle was used by [appellant] to facilitate the [t]rafficking offense for which she is charged in that she drove said vehicle on May 9, 2008 to a location where she sold drugs to an undercover officer."

{¶18} On August 18, appellant entered a plea of no contest to the drug trafficking charge. Appellant was then found guilty, sentenced to 30-days in jail, two-years of community control, and ordered to forfeit her vehicle.

{¶19} Appellant now appeals the decision of the trial court to twice amend the criminal property forfeiture specification clause found within the indictment, raising one assignment of error.

{¶10} "THE TRIAL COURT WAS IN ERROR IN VACATING IT'S FORMER ORDER DISMISSING SPECIFICATION TO INDICTMENT AND PERMITTING THE STATE TO AMEND SPECIFICATION TO INDICTMENT ON TWICE." [sic]

{¶11} Appellant, in her sole assignment of error, and although not particularly clear, essentially argues that the trial court erred in its decision to amend the criminal property forfeiture specification clause found within the original indictment because it

was "clearly in violation" of R.C. 2981.04(A)(1). We disagree.

{¶12} At the outset, we take this time to note the well-recognized principle that forfeitures are not favored in law or equity, and that forfeiture statutes must be strictly construed against the state. *City of Hamilton v. Callon* (1997), 119 Ohio App.3d 759, 760.

{¶13} R.C. 2981.04(A)(1), titled "Specifications Concerning Forfeiture," requires the state, before property can be forfeited in a criminal proceeding, to insert a forfeiture of property specification clause in the "complaint, indictment, or information charging the offense \* \* \*." The property forfeiture specification clause, which, in this case, was stated in the indictment, must set forth, to the extent that it is reasonably known at the time of filing, the "nature and extent" of the alleged offender's interest in the property; a description of the property; and, if applicable, the alleged use or intended use of the property in the commission of the crime charged. R.C. 2981.04(A)(1)(a)-(c).

{¶14} While we may agree that the initial criminal property forfeiture specification clause found in the original indictment did not meet the requirements of R.C. 2981.04(A)(1), and although we are aware of the exceptions found in Crim.R. 1(C),<sup>1</sup> our research has not revealed any applicable statutory provision, or any relevant case law, that would limit the trial court's ability to amend an indictment containing a criminal property forfeiture specification clause when the specification was first presented to the grand jury, and which was then included in the indictment, beyond those restrictions

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1. {¶a} Crim.R. 1(C), which provides exceptions to the Ohio Rules of Criminal Procedure, states, in pertinent part:

{¶b} "These rules, to the extent that specific procedure is provided by other rules of the Supreme Court or to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure \* \* \* upon forfeiture of property for violation of a statute of this state \* \* \*."

found in the Ohio Rules of Criminal Procedure.<sup>2</sup> Therefore, we find, pursuant to Crim.R. 7(D), a court may amend a criminal property forfeiture specification clause stated in an indictment "in respect to any defect, imperfection, or omission in form or substance," when the specification was first presented to the grand jury, so long as "no change is made in the *name or identity* of the crime charged." (Emphasis added.) To hold otherwise would effectively thwart the underlying purpose of the forfeiture law<sup>3</sup> by denying the state the ability to obtain property after making *any* error, material or otherwise, in the initial preparation, and/or placement, of the criminal property forfeiture specification clause in the body of the indictment. See R.C. 2981.04(A)(1); R.C. R.C. 2941.1417.

**{¶15}** Under Crim.R. 7(D), a court may, "at any time before, during, or after a trial amend the indictment, \* \* \* in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence," so long as "no change is made in the name or identity of the crime charged." Where the name of the crime charged remains the same, both before and after the amendment, there is, for obvious reasons, no change in the name of the charged offense. Crim.R. 7(D); *State v. Craft*, Butler App. No. CA2008-01-023, 2009-Ohio-675, ¶23, 26; see, e.g., *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, ¶5. However, even where the name of the charged offense remains the same, the court, nonetheless, is prohibited from amending an indictment "when the amendment changes the penalty or degree" of the crime charged, or where

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2. It should be noted that, contrary to appellant's claim, this is not a case in which the state attempted to amend the indictment to include a specification that was not first presented to the grand jury. See *State v. Dille* (1989), 47 Ohio St.3d 20; see, also, *State v. Green*, Lawrence App. No. 07CA33, 2008-Ohio-2844. It is clear that the criminal property forfeiture specification was first presented to the grand jury, and then, although citing to inapplicable legal authority, inserted into the original indictment.

the amendment requires the state to provide independent proof of different elements, because such amendments change the identity of the offense. *Davis* at ¶9; *State v. Rohrbaugh*, Logan App. No. 8-07-28, 2008-Ohio-4781, ¶18. Whether an amendment to an indictment changes the name or identity of the offense is a question of law, and therefore, is reviewed de novo. *Craft* at ¶22; *State v. Kittle*, Athens App. No. 04CA41, 2005-Ohio-3198, ¶12.

{¶16} In this case, the amendments to the criminal property forfeiture specification clause found within the indictment did not change the name or the identity of the crime charged. Here, the name of the offense, "Trafficking in Drugs," as well as the penalty and degree of the crime, remained the same both before and after the amendments. Further, based on our review of the record, it is clear that the amendments merely corrected the citation provided for in the indictment to reflect the appropriate legal authority allowing for property forfeiture in a criminal case, R.C. 2981.04(A)(1), and provided language indicating appellant used her vehicle, the property subject to forfeiture, in the commission of the offense. See *State v. Beckett*, Harrison App. No. 06 HA 584, 2007-Ohio-3175 (no change in identity of crime charged when indictment amended to correct citation to applicable criminal statute). In addition, there is nothing in the record to indicate appellant was prejudiced by the trial court's decision to amend the indictment because she was aware that her vehicle was subject to forfeiture based on the original, although faulty, indictment. See *Craft* at ¶30.

{¶17} Therefore, because "a specification is, by its very nature, ancillary to, and completely dependent upon, the existence of the underlying criminal charge \* \* \* to

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3. R.C. 2981.01 lists the purposes behind the forfeiture law, which include, among other things, "[t]o provide economic disincentives and remedies to deter and offset the economic effect of offenses by

which the specification is attached," and because the amendments to the indictment did not change the name or identity of the crime charged, nor hamper or prejudice her defense, we find the trial court did not err in its decision to amend the indictment with respect to the criminal property forfeiture specification clause. *State v. Bruce*, Cuyahoga App. No. 90897, 2009-Ohio-1067, ¶31, quoting *State v. Nagel*, 84 Ohio St.3d 280, 286, 1999-Ohio-507. Accordingly, appellant's sole assignment of error is overruled.

{¶18} That being said, however, and after further review of the applicable forfeiture law, we find the trial court did not comply with the requirements of R.C. 2981.04(B), something it was required to do, prior to ordering appellant to forfeit her vehicle following her drug trafficking conviction.

{¶19} When a person is convicted of a felony drug offense, such as the case here, the court is required to hold a separate proceeding to determine whether any property is subject to forfeiture. R.C. 2981.04(B); *State v. Watkins*, Jefferson App. No. 07 JE 54, 2008-Ohio-6634, ¶31. If the court determines that there is property subject to forfeiture, and such property is an "instrumentality," like appellant's vehicle here,<sup>4</sup> the court must then conduct a "proportionality review under R.C. 2981.09," which prohibits, among other things, property from being "forfeited as an instrumentality \* \* \* to the extent that the amount or value of the property is disproportionate to the severity of the offense." R.C. 2981.09; see, also, R.C. 2981.01(A)(2). Following the proportionality review, where the "owner of the property shall have the burden \* \* \* to prove by a

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seizing and forfeiting contraband, proceeds, and certain instrumentalities; \* \* \*."

4. An "instrumentality," as defined by R.C. 2981.01(6), includes, among other things, a "mobile instrumentality," which is further defined by R.C. 2981.01(8) as "any vehicle." Appellant's 2000 Dodge

preponderance of the evidence that the amount or value of the property subject to forfeiture is disproportionate to the severity of the offense," "the trier of fact shall return a verdict of forfeiture that specifically describes the extent of the property subject to forfeiture." R.C. 2981.09(A); R.C. 2981.04(B); see, e.g., *In re Hill*, Guernsey App. No. 08 CA 17, 2009-Ohio-174 (affirming trial court's finding forfeiture of vehicle disproportionate to charged offense).

{¶20} In this case, and although the record contains evidence to establish appellant's vehicle was an "instrumentality" subject to forfeiture under R.C. 2981.02(A)(3)(a), there is nothing in the record to indicate the trial court conducted the required proportionality review prior to ordering the forfeiture of her vehicle to the state. As a result, and on this basis only, we find the trial court erred by ordering appellant to forfeit her vehicle without conducting a proportionality review in accordance with R.C. 2981.04(B) and R.C. 2981.09 following her drug trafficking conviction.

{¶21} Based upon the foregoing, the trial court's judgment is reversed as to forfeiture only, and this cause is remanded to the trial court to conduct a proportionality review in accordance with the applicable forfeiture law, and to further comply with the laws of this state.

{¶22} Judgment affirmed in part, reversed in part, and remanded.

BRESSLER, P.J., and RINGLAND, J., concur.

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Caravan, her sole means of transportation, and the vehicle in which she used in the commission of the crime, a felony, would undoubtedly constitute an "instrumentality" subject to forfeiture.