

[Cite as *State v. Moore*, 2010-Ohio-1848.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
GALLIA COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 09CA6
 :
 vs. :
 :
 DAVID D. MOORE, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. :

APPEARANCES:

COUNSEL FOR APPELLANT: Timothy Young, Ohio Public Defender, and Jeremy J. Masters, Assistant Ohio Public Defender, 250 East Broad Street, Ste. 1400, Columbus, Ohio 43215

COUNSEL FOR APPELLEE: C. Jeffrey Adkins, Gallia County Prosecuting Attorney, and Eric R. Mulford, Gallia County Assistant Prosecuting Attorney, 18 Locust Street, Gallipolis, Ohio, 45631

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 4-22-10

ABELE, J.

{¶ 1} This is an appeal from a Gallia County Common Pleas Court judgment that overruled a motion for new trial. A jury found David D. Moore, defendant below and appellant herein, guilty of drug possession in violation of R.C. 2925.11(A). Appellant assigns the following error for review:

“THE TRIAL COURT ERRED BY CONVICTING MR. MOORE OF POSSESSION OF DRUGS AS A FELONY OF THE THIRD DEGREE WHEN THE VERDICT FORM ONLY

SUPPORTED A CONVICTION FOR A MISDEMEANOR OF THE THIRD DEGREE UNDER R.C. 2945.75(A)(2) AND STATE V. PELFREY, 112 OHIO ST.3d 422, 2007-OHIO-256.”

{¶ 2} On January 3, 2008, Ohio State Highway Patrol Trooper R.J. Jacks observed traffic on U.S. 35 when he noticed appellant’s car slow and cause a truck to hit its breaks. Trooper Jacks followed appellant’s vehicle and, signaled it to stop after he observed it travel left of center and fail to properly activate a turn signal. While the trooper checked appellant’s license and registration, another trooper walked a drug-sniffing canine around the vehicle. The dog subsequently detected the presence of drugs. After the officers found crack-cocaine in the vehicle's gas cap, they placed him under arrest.

{¶ 3} On February 28, 2008, the Grand Jury returned an indictment charging appellant with drug possession. He pled not guilty and the matter came on for jury trial. After hearing the evidence, the jury returned a guilty verdict. The trial court sentenced appellant to serve a five year prison term. Appellant filed a motion for new trial, which was overruled, but did not file an appeal.¹ We later granted appellant leave to file a delayed appeal and the case is now properly before us for review.

{¶ 4} Appellant asserts in his assignment of error, and the State concedes in its brief, that the trial court erred by convicting him for the greater degree of drug possession in violation of R.C. 2945.75. See State v. Pelfrey, 112 Ohio St.3d 422, 860 N.E.2d 735, 2007-Ohio-256. After our review, we reluctantly agree.

¹ The entry that denied the motion for new trial is the final appealable order in this case. See State v. Waulk, Ross App. No. 02CA2649, 2003-Ohio-11, at ¶9.

{¶ 5} Ohio law provides that “[a] guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.” R.C. 2945.75(A)(2). The Ohio Supreme Court held that if a verdict form does not include (1) the degree of the offense, or (2) a statement that aggravating circumstances have been found to justify a conviction on the greater offense, then a defendant may only be convicted and sentenced for the lowest degree of the offense. 2007-Ohio-256, at ¶14.

{¶ 6} In the case sub judice, the verdict form states “[w]e, the jury in this case . . . find the Defendant, David D. Moore, Guilty of Possession of Drugs in a manner and form as he stands charged in the Indictment.” This form does not set out the degree of the offense nor does it list aggravating factors or the drug that appellant possessed. Thus, the verdict does not comply with the requirements of R.C. 2945.75(A)(2) and appellant may only be convicted and sentenced for the least degree of the offense for which he was charged.²

{¶ 7} As we noted supra, the State concedes in this matter that the verdict form does not comply with Pelfrey. However, the State urges us to distinguish this case from Pelfrey because (1) appellant did not raise the defect at trial and, thus, waived the issue, and (2) the trial court’s August 26, 2008 sentencing entry states that appellant was

² The “as charged in the indictment” language in the verdict form in the case at bar does not cure the defect, even though the degrees of the offense were included in the indictment. The same language appeared on the verdict forms in Pelfrey and the majority of the court in that case nevertheless found a violation of the statute. See 2007-Ohio-256, at ¶17 (O’Donnell, J., Dissenting).

convicted of a third degree felony offense. We find neither argument persuasive.

{¶ 8} First, before Pelfrey reached the Ohio Supreme Court, the Second District Court of Appeals had already rejected a waiver argument. That rejection was, at the least, affirmed *sub silentio* when the Ohio Supreme Court affirmed the second appellate district decision *in toto*. See *id.* at ¶¶ 5 & 15. Second, the syllabus in Pelfrey states that the verdict form must state the degree of the offense or the aggravating circumstance. The Court made no exception to that rule for sentencing entries that set out the degree of the offense.

{¶ 9} Suffice it to say, we are bound by Ohio Supreme Court decisions. State v. Brown, Pike App. No. 07CA757, 2008-Ohio-665, at ¶7; State v. Hardesty, Pickaway App. No. 07CA2, 2007-Ohio-3889, at ¶14. In light of the clear directive in Pelfrey, although we are somewhat sympathetic with the State's view of this matter, we are not inclined to carve out exceptions to the Supreme Court's holding when such an exception would fly in the face of clear and unequivocal wording to the contrary.

{¶ 10} For all these reasons, appellant's first assignment of error is well taken. Therefore, we hereby reverse the trial court's judgment and remand this matter for further proceedings consistent with this opinion.

JUDGMENT REVERSED AND
CASE REMANDED FOR
FURTHER PROCEEDINGS
CONSISTENT WITH THIS
OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be reversed and the case be remanded for further proceedings consistent with this opinion. Appellant to recover of appellee the costs

herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Gallia County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, P.J. & Kline, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.