

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio

Court of Appeals No. OT-09-001

Appellant/Cross-appellee

Trial Court No. 07CR157

v.

Lesley L. Nickel

DECISION AND JUDGMENT

Appellee/Cross-appellant

Decided: November 13, 2009

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, for appellant.

Jeffrey P. Nunnari for appellee.

* * * * *

SINGER, J.

{¶ 1} This is a state's appeal from an order of the Ottawa County Court of Common Pleas, which dismissed 21 counts of a 50 count indictment, alleging multiple sexual improprieties with a minor. Appellee cross-appeals the court's decision not to dismiss one other count. For the reasons that follow, we reverse, in part, and affirm, in part.

{¶ 2} Appellee is Lesley L. Nickel. In June 2004, appellee's girlfriend and her then 11-year-old daughter moved with him into his Port Clinton home. By all accounts, at least initially, the three lived a comfortable family life. According to the daughter, this was to change.

{¶ 3} On September 13, 2007, the now 14-year-old daughter sought out a school counselor. The girl told the counselor that, beginning approximately a year earlier, appellee began to behave inappropriately toward her. She reported that, while her mother was at work, appellee would walk around the house without any clothing, interrupt her while she was taking a shower and, she believed, watch her through a hole while she was taking a shower. The girl also told the counselor that appellee had touched her breasts and vaginal area both through and beneath her clothing. She reported that appellee had also asked her to touch his penis.

{¶ 4} The school counselor reported this conversation to a police school resource officer, who, in turn, contacted the Children's Services Division of the county Department of Jobs and Family Services ("DJFS"). That evening a DJFS worker called the child's mother, advised her of the girl's allegations and set up an interview with mother and daughter the next day. When the mother, on advice of counsel, canceled the interview, DJFS obtained an emergency custody order and placed the girl in foster care that evening.

{¶ 5} The same afternoon, a DJFS worker and a deputy sheriff conducted an interview with the girl who told them that the incidents with appellee began when she

was 13 and in the middle of the seventh grade, continuing to only a few days earlier. Additionally, the girl stated that on several occasions appellee would call her to look at adult videos and pictures on the computer. On one occasion, the girl said, appellee removed her underwear and licked her vagina.

{¶ 6} On this information, deputies obtained a search warrant for appellee's home. On execution of the warrant, deputies seized appellee's computer and several X-rated videos.

{¶ 7} Foster care for the girl was continued following a September 17, 2007 shelter care hearing. She would eventually be adjudicated an abused child and placed with her natural father.

{¶ 8} On September 25, 2007, the 13-year-old girl was re-interviewed by a sheriff's detective and a DJFS caseworker. She reiterated her allegations of the incidents that had occurred in appellee's home while her mother was at work and reported other incidents of touching in a house appellee was renovating in Gypsum, Ohio.

{¶ 9} On October 7, 2007, an Ottawa County Grand Jury handed down a 50 count indictment, charging appellee with five counts of disseminating harmful material to a juvenile (R.C. 2907.31); three counts of public indecency (R.C. 2907.09 (B)(1)); ten counts of gross sexual imposition (R.C. 2907.05(A)(1)); ten counts of sexual imposition (R.C. 2907.06 (A)(4)); ten counts of voyeurism (R.C. 2907.08 (A)); ten counts of public indecency (R.C. 2907.09 (B)(4)); one count of rape (R.C. 2907.02 (A)(2)); and, one count

of sexual battery (R.C. 2907.03 (A)(5)).¹ Each of these offenses was stated in its statutory language. The disseminating harmful material counts and three counts of public indecency were alleged to have occurred between December 1, 2006 and September 13, 2007. Single counts of gross sexual imposition, sexual imposition, voyeurism and public indecency were alleged in each of consecutive months from December 2006 until September 2007. The rape and sexual battery were alleged to have occurred between March 23 and September 13, 2007.

{¶ 10} Appellee was arrested and at arraignment entered a plea of not guilty to all charges. Appellee requested a bill of particulars on November 1, 2007. On January 22, 2008, the state provided a bill of particulars, essentially reiterating the statutory language of the indictment, providing little new detail. On January 25, 2008, appellee moved to compel a "more specific" bill of particulars, noting that appellee's accuser had already testified in a December 18, 2007 juvenile proceeding. In that proceeding, appellee observed, the girl testified to specific locations and events that formed the basis of the indictment.

{¶ 11} On February 29, 2008, the state provided a "More Particular Bill of Particulars." For the counts alleging sexual imposition and gross sexual imposition, the state specified, inter alia, that improper touching occurred in appellee's barn and while riding in, or on, vehicles (white car, big red truck, little red truck and a Harley Davidson motorcycle).

¹Omitted from the original indictment filed with the court is a page containing counts nine through 13. Given the outcome of this appeal, this has no significance.

{¶ 12} Appellee waived his right to a jury trial and the matter proceeded to a six day bench trial. The state's principal witness, and the only witness testifying to the essential elements of the offenses charged, was appellee's 14-year-old accuser.

{¶ 13} At the conclusion of the state's case in chief, the defense interposed what it characterized as a "comprehensive" Crim.R. 29 (A) motion. Appellee asked for a judgment of acquittal on four of the five counts of disseminating harmful matter, because the state had presented evidence of only one incident in which the girl alleged that appellant had shown her an erotic movie. One count of gross sexual imposition and an alternatively charged sexual imposition count should be dismissed because the state failed to present any evidence of force or threat of force in the white car incident. All public indecency counts should be dismissed because the state failed to present evidence that the victim was not appellant's spouse. Another count of gross sexual imposition/sexual imposition should be dismissed for lack of evidence of venue because the victim testified the alleged activity occurred in a truck while traveling to Amish country. Moreover, with respect to offenses arising from improper touching, appellee argued that they should be dismissed because the state failed to present evidence that any incident occurred within one of the specific one-month time frames stated in the indictment and a bill of particulars.

{¶ 14} Over appellee's objection, the trial court permitted the state to reopen its case to establish venue and that the victim was not appellee's spouse. Nevertheless, when the state again rested its case, the court granted appellee's Crim.R. 29 motion with respect

to eight counts of voyeurism, four counts of disseminating harmful material and one count each of gross sexual imposition and sexual imposition.

{¶ 15} In his defense, appellee called the complaining witness's mother and other relatives who recounted that appellee's accuser had until shortly before the accusations enjoyed a cordial relationship with appellee and a relatively undisciplined life. A few days before the accusation, however, the girl's mother discovered her talking on a cell phone to a boy from Iowa that she had met at a NASCAR event. The mother testified that she confiscated the girl's phone, later discovering sexually explicit messages via text message from the girl's local friends. Appellee asserted that the girl believed that the discipline her mother meted out was at appellee's urging, resulting in a motive to fabricate her accusations.

{¶ 16} At the conclusion of the trial, the court found appellee guilty of eight counts of gross sexual imposition, eight counts of sexual imposition, four counts of public indecency, one count of disseminating harmful material, one count of rape and one count of sexual battery.

{¶ 17} Appellee moved for a new trial, complaining that the state had failed to present any evidence that the offenses alleged occurred within the time frames specified in the indictment and the bills of particulars. Lack of such specificity, appellee argued, brought into question whether specific times were presented to the grand jury. Were they not, appellee maintained, he was improperly tried on facts which had not been before the grand jury.

{¶ 18} Appellee subsequently moved for a release of grand jury minutes and to dismiss the indictment. According to appellee, since the complaining witness, from her initial interviews until her testimony at trial, had been consistently unable to recall specific time frames for the various acts alleged, it was unlikely that such specifics as appeared in the indictment and the bill of particulars had been presented to the grand jury. Since it would be a violation of his right to due process to try him on facts that had not been presented to the grand jury, appellee argued, the indictment should be dismissed.

{¶ 19} The trial court declined to release the grand jury minutes, but, during a hearing on the motion, itself conducted an in camera review of the transcript of the grand jury proceeding. Following the examination, the court found that the grand jury testimony was "absolutely devoid of any testimony about incidents happening in any vehicle or in the barn area." As to the dates of the offenses, the testimony was, "* * * speculative at best, pure guesswork at worst." The court noted that "a child of tender years" is ordinarily allowed latitude in recalling the date and time of a particular offense. Here, however, the court concluded, "we don't have a child of tender years * * * [w]e have a minor person. [The witness] is more, more an adult than a minor, and so the standard is greater." Consequently, the court ruled, except for the rape and sexual assault counts, the balance of the charges were "pure guesswork." Save for those two counts, the court dismissed the remainder of the indictment.

{¶ 20} When the court issued its written judgment entry on the motion, however, it amended its rationale. The court concluded that although the complaining witness was

not of tender years, she did have a learning disability. As a result, the "inexactitude" of her allegations was not fatal to the prosecution. What did constitute a "constitutional error" was the state's decision to include unsupported "temporal specificity" within its bill of particulars.

{¶ 21} "[T]he State's decision to constrain itself to the temporal allegations set forth in its bills of particulars requires that it also link those multiple charges to multiple identifiable offenses. Numerous charges cannot be made out through estimation or inference. Due process requires this minimal step. Courts cannot uphold multiple convictions when they are unable to discern the evidence that supports each individual conviction. Here, this Court cannot discern which offenses apply to certain charges.

{¶ 22} "Defendant also argues that evidence of alleged acts for which he was charged was not presented to the grand jury. As such, he argues that he was not indicted for the crimes upon which the grand jury found probable cause. A defendant can be indicted only for the crimes upon which the grand jury found probable cause. A review of the grand jury testimony reflects that while there was no evidence specifically setting forth a number of times an offense occurred or even when such offenses occurred, evidence was presented of crimes committed by the Defendant, giving the grand jury probable cause upon which to indict." (Citations omitted.)

{¶ 23} The court granted appellee's motion to likewise dismiss the rape count pursuant to *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, but denied a similar

motion for the sexual assault count. The court then adjudicated appellee a Tier III sexual offender and sentenced him to a five-year term of imprisonment.

{¶ 24} From this judgment of conviction, the state now brings this appeal, setting forth the following two assignments of error:

{¶ 25} "1. The trial court erred when it dismissed 21 counts of the indictment because [:]

{¶ 26} "A. based on grand jury proceedings, or

{¶ 27} "B. a variance between the bill of particulars and evidence does not merit dismissal.

{¶ 28} "2. The trial court erred by granting defendant's motion to dismiss Count 49 of the indictment pursuant to the holding in *Colon I*."

{¶ 29} Appellee has interposed a cross-appeal with the following single assignment of error:

{¶ 30} "The trial court erred to the prejudice of the defendant by failing to dismiss the indictment in its entirety after defendant successfully demonstrated that the indictment was obtained on the basis of false or misleading information and an abuse of the grand jury process by the prosecution, as well as prosecutorial misconduct occurring during the course of the trial, the net effect of which amounted to structural error which permeated the entire course of the proceedings in the trial court."

{¶ 31} Both Section 10, Article I of the Ohio Constitution and the Fifth Amendment to the United States Constitution guarantee that, "no person shall be held to

answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury * * *." The grand jury functions both to determine whether there is probable cause to believe that an offense has been committed and to protect citizens from unfounded prosecutions. *United States v. Sells Engineering, Inc.* (1983), 463 U.S. 418, 423.

{¶ 32} Once an indictment has been returned by a grand jury, it may not be substantively amended without reconvening the grand jury. *Stirone v. U.S.* (1960), 361 U.S. 212, 215-216. A substantive amendment occurs when the prosecution or the court literally or constructively alters the terms of the indictment after it has been returned by the grand jury. See, *id.* at 217. A court may not convict a defendant on a charge essentially different from that found by the grand jury. *State v. Headley* (1983), 6 Ohio St.3d 475, 478-479.

{¶ 33} The principle is embodied in Crim.R. 7(D). In material part, the rule provides that a court may, "* * * at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. * * *"

{¶ 34} The charging instrument need not contain great specificity. "* * * 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.* * *" Crim.R. 7(B). If

an accused finds the allegations contained in the indictment insufficient, he or she may request from the prosecution a bill of particulars. On proper request, "* * * the prosecuting attorney shall furnish the defendant with a bill of particulars setting up specifically the nature of the offense charge [sic] and of the conduct of the defendant alleged to constitute the offense." Crim.R. 7(E). The prosecution may amend a bill of particulars at any time, as justice requires, but once the bill is issued, the state, "* * * should be restricted in its proof to the indictment and the particulars as set forth in the bill." *State v. Miller* (1989), 63 Ohio App.3d 479, 485-486; *State v. Vitale* (1994), 96 Ohio App.3d 695, 700.

I. Grand Jury Proceedings

{¶ 35} In its first assignment of error, the state simply asserts that the trial court cannot dismiss charges on account of grand jury proceedings. The state avoids discussion of the trial court's rationale presented orally at the motion hearing, properly noting that a court speaks only through its journal, not by oral pronouncement. See *State ex rel. Hanley v. Roberts* (1985), 17 Ohio St.3d. 1, 4. This is likely just as well as the court's oral rationale is unsustainable.

{¶ 36} Even if, as appellee insisted, there was no evidence before the grand jury of white cars, red trucks and motorcycles, this does not negate indictments rendered following more general testimony of misconduct. Prosecutors are never barred from presenting later discovered evidence in support of indictments premised on evidence that

was before the grand jury. This distinguishes this case from *State v. Vitale*, supra, upon which appellee relied in the trial court and here.

{¶ 37} *Vitale* stands for the proposition that a defendant must be tried on the same essential facts on which the grand jury found probable cause. *Id.* at 699, citing *State v. Headley*, supra, 478-479. In *Vitale*, the state sought to amend an indictment to change the date of the offense from June 14, 1991, to "June 14, 1991 through June 21, 1991 inclusive."

{¶ 38} The *Vitale* trial court found that the offense had occurred on June 21. The appeals court concluded that, since it was clear that the grand jury had found probable cause on the June 14 date, amendment of the indictment, changing the allegation to another date, constituted an unwarranted change in the identity of the crime charged. *Id.* at 701-702.

{¶ 39} A variance of proof outside the parameters of the time stated in the indictment can constitute a separate offense. Unless a separate or supplemental indictment is obtained for this separate offense, a defendant is deprived of the process due in the guarantees embodied in Section 10, Article I of the Ohio Constitution and the Fifth Amendment to the United States Constitution that an accused be tried only on evidence upon which a grand jury has found probable cause. *Id.*

{¶ 40} In the present matter, there was no amendment of time frames. There was no change in the offenses charged.

{¶ 41} With respect to the rationale that the court stated in its written entry, the state insists that, since the court mentioned no facial invalidity or other insufficiency concerning the indictment, it should be presumed valid. Citing this court's decision in *State v. Morgan* (May 11, 2001), 6th Dist. No. L-00-1114, the state maintains that the date of a crime is not an essential element of an offense and the amendment of a time reference in an indictment is proper, absent proof of prejudice to a defendant. The state also asserts that any reliance by the trial court on matters contained in the bill of particulars is misplaced, because the state's open file policy negates any reliance appellee may have placed on such a bill. Moreover, any variance between the bill of particulars and the evidence do not merit dismissal.

{¶ 42} From the language the trial court employs in its entry, it is clear that the court placed great reliance in a decision from the Sixth Circuit, *Valentine v. Konteh* (6 CA 2005), 395 F.3d 626. Valentine was convicted by a Cuyahoga County jury of 40 counts of sexual abuse on an indictment containing 20 "carbon copy" counts of child rape and 20 counts of felonious sexual penetration, each stated in statutory language, each alleged to have occurred between March 1, 1995 and January 16, 1996. He was sentenced to 40 consecutive life sentences. An Ohio appeals court affirmed his conviction on 20 counts of rape, but reversed five sexual penetration convictions. The Supreme Court of Ohio denied further appeal.

{¶ 43} After Valentine unsuccessfully exhausted postconviction relief, he petitioned the federal court for a writ of habeas corpus, arguing that his constitutional

right to due process of law was denied on an indictment that did not specify a date or distinguish between conduct on any given date. The District Court issued the writ, finding that the indictment denied his right to be notified of the crime charged with reasonable certainty so as to fairly protect him from double jeopardy.

{¶ 44} The federal appeals court noted that, pursuant to *Russell v. United States* (1962), 369 U.S. 749, 763-764, "* * * an indictment is only sufficient if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy." *Valentine* at 631. A failure to meet any of these requirements in either a federal or state indictment constitutes a due process violation. *Id.* With respect to *Valentine*, the court concluded, neither the notice nor the double jeopardy requirement was met.

{¶ 45} "The exigencies of child abuse cases necessitate considerable latitude in the construction of criminal charges. The prosecutors in this case, however, abused this wide latitude by piling on multiple identical counts. Numerous charges cannot be made out through estimation or inference. Instead, if prosecutors seek multiple charges against a defendant, they must link those multiple charges to multiple identifiable offenses. Due process requires this minimal step. Courts cannot uphold multiple convictions when they are unable to discern the evidence that supports each individual conviction." *Id.* at 636-637.

{¶ 46} In the present matter, the indictment charged multiple undifferentiated charges of sexual imposition, gross sexual imposition, public indecency and

disseminating harmful material. Remaining in the case at the conclusion of evidence were the rape, sexual assault, eight counts of sexual imposition and gross sexual imposition, four counts of public indecency and one count of disseminating. The trial court reversed itself on the disseminating count because the facts upon which the court found appellant guilty were not those alleged in the indictment.

{¶ 47} The only testimony supporting any conviction for public indecency was that appellant had been without clothing in his home with the complaining witness present a "couple of times, several times." Such testimony is insufficient to differentiate multiple counts. *State v. Tobin*, 2d Dist. No. 2005-CA-150, 2007-Ohio-1345, ¶ 15.

{¶ 48} The remaining sexual imposition and gross sexual imposition counts are premised upon the same acts which are alleged to have occurred monthly from December, 2006 until July, 2007. There was no differentiation in the indictment or either of the bills of particulars as to when during these eight periods any discrete act occurred. The "more particular" bill of particulars and the complaining witness's testimony referenced acts of improper touching that occurred in the white car, the little red truck, the big red truck, the dump truck, on the motorcycle and at the Gypsum house. This specificity would seem to negate any double jeopardy issue, at least with respect to these six occasions.

{¶ 49} Nevertheless, no discrete act was linked to any discrete allegation. The trial court stated that it was unable "to discern the evidence that supports each individual conviction." In such circumstances, we must concur with the court that the defendant was

not given sufficient notice of the "charge against him as will enable him to make his defence * * *." *Valentine* at fn. 1, quoting *U.S. v. Cruikshank* (1875), 92 U.S. 542. Accordingly, the state's first assignment of error is not well-taken.

II. *State v. Colon*

{¶ 50} In its second assignment of error, the state suggests that the trial court improperly dismissed the rape count because the indictment failed to state a mens rea, and that this constituted a structural error, pursuant *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624.

{¶ 51} Subsequent to its initial *Colon* decision, the Ohio Supreme Court dramatically constrained its holding. *State v. Colon*, 119 Ohio St. 3d 204, 2008-Ohio-3749. "[T]he facts in the *Colon* I decision were 'unique' in that 'the defective indictment resulted in several other violations of the defendant's rights,'" *id.* at ¶ 6, including the fact that during closing arguments the state treated robbery as a strict liability offense. *Id.* The court then concluded that the structural-error analysis is appropriate only in "rare" cases and that "in most defective indictment cases, the court may analyze the error pursuant to Crim.R. 52(B) plain-error analysis." *Id.* at ¶ 8." *State v. Solether*, 6th Dist. No. WD-07-053, 2008-Ohio- 4738, ¶ 74, appeal not allowed, 120 Ohio St.3d 1526, 2009-Ohio-614.

{¶ 52} In *Solether*, as in the present matter, the indictment charged rape without an express mens rea stated. In its jury instruction, however, the *Solether* trial court charged the jury to convict only if it found that the defendant "purposely" forced sexual conduct. *Id.* at ¶ 76. On consideration, we concluded that the *Colon* structural error analysis did

not apply to the offense of rape, *id.* at ¶ 91, and that, if it did, any error did not rise to plain error. *Id.* at 92.

{¶ 53} It is presumed that, in a trial to the court, the law was correctly applied. *State v. Eubank* (1979), 60 Ohio St. 2d 183, 187. Applying that standard, even if the omission of a specific mens rea in the indictment was error, the presumption of correctness by the court cures any error. Accordingly, this assignment of error is found well-taken.

III. Failure to Dismiss the Indictment Entirely

{¶ 54} In his cross-appeal, appellee insists that the trial court should have dismissed the indictment in its entirety after he demonstrated that the indictment was obtained by false or misleading information and prosecutorial misconduct during the trial.

{¶ 55} As we have discussed above, although details about white cars and red trucks were not available when the case was presented to the jury, such details do not alter the validity of the indictment. Moreover, we have carefully examined the pleading and the transcripts of these proceedings and fail to detect the prosecutorial misconduct of which appellee complains.

{¶ 56} Accordingly, appellee's cross-assignment of error is not well-taken.

{¶ 57} On consideration the judgment of the Ottawa County Court of Common Pleas is reversed, in part, and affirmed, in part. This matter is remanded to said court for

further proceeding consistent with this decision. Appellee is ordered to pay the court costs of this appeal, pursuant to App.R. 24.

JUDGMENT REVERSED, IN PART,
AND AFFIRMED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Charles D. Abood, J.
CONCUR.

JUDGE

Judge Charles D. Abood, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.