[Cite as *State v. Brown*, 2010-Ohio-4453.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. TOBY DEE BROWN Appellant	C. A. No. 25077 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 96 08 2041(A)

DECISION AND JOURNAL ENTRY

Dated: September 22, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, Toby Dee Brown, appeals from his conviction and sentence in the Summit County Court of Common Pleas. This Court affirms in part and reverses in part.

I

{¶2} In 1996, a grand jury indicted Brown on the following counts: (1) aggravated murder, in violation of R.C. 2903.01(B), with attendant firearm and death specifications; (2) two counts of aggravated robbery, in violation of R.C. 2911.01(A)(1), both with attendant firearm specifications; (3) aggravated burglary, in violation of R.C. 2911.11(A)(2), with an attendant firearm specification; (4) tampering with the evidence, in violation of R.C. 2921.12(A)(1); and (5) failure to comply with the order or signal of a police officer, in violation of R.C. 2921.331(B). On September 5, 1997, a jury found Brown guilty on all of the foregoing counts and specifications. Subsequently, the jury recommended a sentence of life in prison with parole

eligibility after a thirty-year term. The trial court followed the jury's recommendation and sentenced Brown to a life-term.

{¶3} In late September 1997, Brown filed a notice of appeal and a praecipe for the transcription of the trial. Brown's praecipe specified that "[j]ury voir dire and opening and closing statements of counsel are not necessary." Ultimately, Brown's first appeal resulted in a partial reversal and a remand for resentencing on the basis that Brown was not the principal offender. *State v. Brown* (Oct. 7, 1998), 9th Dist. No. 18766. The trial court resentenced Brown and issued another judgment entry on February 3, 1999.

{¶4} In 2009, Brown sought resentencing due to an invalid post-release control notification. The trial court held a new sentencing hearing and issued a new sentencing entry on October 27, 2009. Brown's new counsel filed a motion for the preparation and transcription of all the pretrial, trial, and post-trial proceedings. The trial court ordered the court reporter to transcribe the requested proceedings. On November 3, 2009, Brown filed his notice of appeal in this Court and a praecipe in the trial court for the preparation of an official transcript.

{¶5} On January 25, 2010, Brown filed a motion for a three-month extension to obtain an App.R. 9(C) or 9(E) statement because "significant portions of the trial transcripts are missing." In particular, the trial transcripts did not include voir dire or the opening and closing arguments of the attorneys. On February 22, 2010, this Court denied Brown's extension by way of journal entry on the bases that App.R. 9(E) was inapplicable and Brown had not obtained an App.R. 9(C) statement within the mandatory time requirements contained in App.R. 9.

{¶6} Brown raises five assignments of error for this Court's consideration. For ease of analysis, we consolidate several of the assignments of error.

II

Assignment of Error Number One

"THE NINTH DISTRICT COURT OF APPEALS VIOLATED DEFENDANT'S RIGHTS TO DUE PROCESS AND COMMITTED REVERSIBLE ERROR WHEN IT DENIED DEFENDANT'S MOTION FOR LEAVE TO AMEND THE DOCKETING STATEMENT TO INCLUDE AN APP.R. 9(C) STATEMENT, AND COMMITTED REVERSIBLE ERROR WHEN IT DENIED DEFENDANT'S MOTION FOR AN EXTENSION OF TIME TO FILE AN APP.R. 9(C) STATEMENT[.]"

Assignment of Error Number Two

"THE NINTH DISTRICT COURT OF APPEALS COMMITTED REVERSIBLE ERROR WHEN IT HELD THAT THE TIME REQUIREMENTS CONTAINED WITHIN APP.R. 9(C) ARE MANDATORY[.]"

{¶7} In his first two assignments of error, Brown argues that this Court violated his due process rights and committed reversible error by not allowing him additional time to obtain an App.R. 9(C) statement. Brown specifically challenges the journal entry this Court issued on February 22, 2010. The journal entry was signed by a single judge, and Brown now seeks a reversal of that ruling.

{¶8} Initially, this Court must consider whether it has the authority to review, by way of direct appeal, an action taken by a single member of this Court during the pendency of an appeal. App.R. 15(C) provides as follows:

"In addition to the authority expressly conferred by these rules or by law, and unless otherwise provided by rule or law, a single judge of a court of appeals may entertain and may grant or deny any request for relief, which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding, and except that a court of appeals may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court."

App.R. 15(C) clearly provides that an appellate court may review the "action of a single judge" on the court. The rule, however, does not specify how one obtains such a review. According to

Brown, a litigant may challenge the action of a single judge on an appellate court through an assignment of error on direct appeal. This Court disagrees with Brown's assertion.

{¶9} The purpose of an assignment of error is to focus the attention of an appellate court upon a potential error that occurred at the trial level. See Black's Law Dictionary (8th Ed. 2004) 129 (defining an assignment of error as "[a] specification of the trial court's alleged errors on which the appellant relies in seeking an appellate court's reversal, vacation, or modification of an adverse judgment"). In determining an appeal, this Court only reviews and affirms, modifies, or reverses final judgments and/or orders from which a party has appealed. App.R. 12(A)(1). These judgments or orders must be designated in a party's notice of appeal. App.R. 3(D). See, also, *Armbruster v. Hampton*, 9th Dist. No. 05CA008716, 2006-Ohio-4530, at ¶14-18 (noting that appellate court may disregard assignment of error targeted at an order an appellant fails to reference in his notice of appeal). Neither App.R. 3, nor App.R. 12 suggest that an appellate court may review its own orders by way of direct appeal. Moreover, App.R. 4(A) provides that a party shall appeal "within thirty days of the later of entry of the judgment or order appealed[.]" App.R. 4(D) specifies that "entry" means "when a judgment or order is entered under Civ.R. 58(A) or Crim.R. 32(C)." Obviously, no order issued by an appellate court in a direct appeal would ever be one entered under Civ.R. 58(A) or Crim.R. 32(C) because those rules only apply at the trial court level. The appellate rules simply do not support Brown's assertion that he can challenge one of this Court's orders through an assignment of error.

{¶10} While other avenues of relief, such as App.R. 15 itself or App.R. 26, might be available to a litigant who wishes to challenge an order issued by this Court on appeal, see, e.g., *May v. Savage* (May 28, 1981), 10th Dist. No. 81AP-209, a litigant may not rely upon an assignment of error to seek further review of an order issued by this Court during the pendency

of the appeal. Appeals of right, and the assignments of error contained therein, are reserved for challenges to the judgments and/or orders of trial courts. Therefore, this Court is without authority to address Brown's first two assignments of error.

Assignment of Error Number Three

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FOUND DEFENDANT GUILTY OF TWO COUNTS OF AGGRAVATED ROBBERY, ON THE GROUNDS THAT THE INDICTMENT WAS FATALLY DEFECTIVE, BECAUSE THE INDICTMENT DID NOT INCLUDE THE MENTAL CULPABILITY ELEMENT FOR THOSE OFFENSES[.]"

{¶11} In his second assignment of error, Brown argues that the trial court committed either plain or structural error by convicting him of aggravated robbery when his indictment was defective and the State failed to prove the missing element of that offense at trial. Specifically, Brown argues that his indictment had to include the mens rea element of theft, the predicate offense for his aggravated robbery convictions. We disagree.

{¶12} R.C. 2911.01(A)(2) provides that "[n]o person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall *** [h]ave a dangerous ordnance on or about the offender's person or under the offender's control." Both of Brown's aggravated robbery counts tracked the foregoing statutory language and specified that Brown committed aggravated robbery when he used a deadly weapon in attempting to commit or in committing theft, in violation of R.C. 2913.02. "An 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." *State v. Horner*, Slip Opinion No. 2010-Ohio-3830, paragraph one of the syllabus, overruling *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624. Compare id. at paragraph two of the syllabus (reaching a different result where statute includes a mens rea

element "in one discrete clause, subsection, or division of [a] statute" but not in another); *State v. Snow*, 9th Dist. No. 24298, 2009-Ohio-1336, at ¶14-16. Pursuant to *Horner*, Brown's third assignment of error lacks merit.

Assignment of Error Number Four

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND VIOLATED DEFENDANT'S RIGHTS TO DUE PROCESS IN FINDING DEFENDANT GUILTY OF AGGRAVATED BURGLARY UNDER RC §2911.11(A)(2), A FELONY OF THE FIRST DEGREE, BECAUSE THE JURY DID NOT FIND DEFENDANT GUILTY OF THIS OFFENSE[.]"

{¶13} In his fourth assignment of error, Brown argues that his aggravated burglary conviction is void as a matter of law because it is inconsistent with the jury's verdict form. He argues that because the verdict form indicates he violated R.C. 2911.12(A)(3), the jury only found him guilty of burglary, not aggravated burglary. We disagree.

{¶14} There is no dispute that the caption of the verdict form the jury signed on Brown's aggravated burglary count included a citation to the wrong statute. That is, the verdict form indicated that Brown violated R.C. 2911.12(A)(3) instead of R.C. 2911.11(A)(2). Unlike simple burglary under R.C. 2911.12(A)(3), aggravated burglary under R.C. 2911.11(A)(2) requires an offender to have committed the burglary with a deadly weapon. Brown argues that his aggravated burglary conviction is void as a matter of law because the jury only found him guilty of burglary in violation of R.C. 2911.12(A)(3).

{¶15} The body of the verdict form at issue reads as follows:

> "We, the Jury, find the Defendant, TOBY DEE BROWN, Guilty of the offense of Aggravated Burglary, a charge in the indictment, on or about the 5th day of August, 1996."

The indictment only charged Brown with aggravated burglary, and the court only instructed the jurors on aggravated burglary. It did not give an instruction on the offense of burglary. See

State v. White, 9th Dist. No. 24960, 2010-Ohio-2865, at ¶18-19 (concluding that jury convicted defendant on particular offense where the trial court only instructed the jury on that particular offense). Moreover, the jury signed a separate verdict form, finding Brown guilty of the firearm specification linked to his aggravated burglary count. The judge specifically instructed the jury to complete the verdict form for the firearm specification only if they found Brown guilty of aggravated burglary. The verdict form for the specification provides that Brown "did have a firearm on or about his person or under his control while committing Aggravated Burglary *** and *** displayed, brandished, indicated he possessed said firearm or used it to facilitate the Aggravated Burglary." Thus, the record contains abundant evidence that the jury convicted Brown of aggravated burglary. See *State v. Tebcherani* (Nov. 22, 2000), 9th Dist. No. 19535, at *3.

{¶16} While the caption of Brown's verdict form included a citation to the wrong statute number, the jury had no reason to know that the citation referred to simple burglary rather than aggravated burglary. Moreover, Brown forfeited any argument with regard to the verdict form itself by failing to object to it at trial. *State v. Williams*, 9th Dist. No. 24169, 2009-Ohio-3162, at ¶60. The jury followed the instructions the trial court issued and convicted Brown of aggravated burglary based on the description, not the citation, of the crime set forth on the verdict form. The record simply does not support the conclusion that Brown suffered any prejudice as a result of the incorrect citation included in the caption of the jury's verdict form. See *State v. McDonald* (Jan. 12, 1994), 9th Dist. No. 89CA004720, at *2 ("This Court cannot conclude that use of a verdict form that complied with [the statute at issue] in this case would have resulted in a different outcome."). Nor are we convinced by Brown's final argument that his conviction is void under *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256. "*Pelfrey* [only] applies to

charging statutes that contain separate sub-parts with distinct offense levels, such as R.C. 2921.04." *State v. Allison*, 9th Dist. No. 24719, 2010-Ohio-1340, at ¶7. The aggravated burglary statute only contains one offense level. See R.C. 2911.11(B). Therefore, *Pelfrey* is inapplicable. Brown's fourth assignment of error is overruled.

Assignment of Error Number Five

> "DEFENDANT'S CONVICTION FOR FAILURE TO COMPLY WITH ORDER OF SIGNAL OF POLICE OFFICER, A FELONY OF THE FOURTH DEGREE, VIOLATED RC §2945.75(A)(2) AND *STATE V. PELFREY*, 112 OHIO ST.3D 422, 860 N.E.2D 735, 2007-OHIO-25[6], BECAUSE THE JURY VERDICT DID NOT INCLUDE THE DEGREE OF THE OFFENSE, NOR ANY AGGRAVATING ELEMENTS[.]"

{¶17} In his fifth assignment of error, Brown argues that his conviction for failing to comply with the order or signal of a police officer must be reduced from a fourth-degree felony offense to a first-degree misdemeanor offense. We agree.

{¶18} R.C. 2945.75(A)(2) provides, in relevant part, that:

> "When the presence of one or more additional elements makes an offense one of more serious degree *** [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."

In *Pelfrey*, the Ohio Supreme Court interpreted R.C. 2945.75(A)(2) pursuant to its plain language and held that a jury's verdict form "must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense." *Pelfrey* at ¶14.

{¶19} The crime of failing to comply with the order or signal of a police officer is only a fourth-degree felony if an aggravating element is present. Former R.C. 2921.331(C). Otherwise, it is a first-degree misdemeanor. Id. The State concedes that the jury's verdict form on Brown's failure to comply conviction did not include either the degree of his offense or an aggravating

element. Based on our review of the record, we conclude that Brown only should have been convicted of a first-degree misdemeanor for violating R.C. 2921.331(B). *Pelfrey* at ¶14. Brown's fourth-degree felony conviction must be vacated. Upon remand, Brown only may be convicted of a first-degree misdemeanor with regard to this offense and sentenced accordingly. Brown's fifth assignment of error has merit.

III

{¶20} This Court cannot address Brown's first two assignments of error. Brown's third and fourth assignments of error are overruled. Brown's fifth assignment of error is sustained and his fourth-degree felony conviction and sentence for his failure to comply with the order or signal of a police officer are vacated pursuant to that determination. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and remanded for further proceedings consistent with the foregoing opinion.

Judgment affirmed in part,
reversed in part,
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 Summit, 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 both parties equally.

BETH WHITMORE
FOR THE COURT

MOORE, J.
CONCURS

CARR, P. J.
DISSENTS, SAYING:

{¶21} I respectfully dissent as I would not address Brown's assignments of error.

{¶22} As the majority noted, on September 5, 1997, Brown was found guilty of all the counts in the indictment. The trial court followed the recommendation of the jury and sentenced Brown to life in prison. On October 7, 1998, this Court reversed Brown's conviction, in part, and remanded for re-sentencing. The trial court re-sentenced Brown and issued a second sentencing entry on February 3, 1999. More than ten years later, Brown sought re-sentencing due to an invalid post-release control notification. After holding a new sentencing hearing, the trial court issued a new sentencing entry on October 27, 2009. Subsequently, on November 2, 2009, Brown again filed a notice of appeal to this Court.

{¶23} Although I understand the majority's reasoning, I dissent on the basis that the life of a criminal case in which a defendant has been found guilty must be subject to some temporal limit. A consequence of holding that the failure to properly notify an offender of post-release control renders his sentence void is that the offender, upon being re-sentenced, is afforded a new opportunity to challenge his conviction on appeal. More than eleven years have now elapsed since the trial court issued its sentencing entry on February 3, 1999. Because of an invalid post-

release control notification, Brown has been afforded a new opportunity to raise issues that he could have raised in his original appeal to this Court in 1997. Allowing an offender to raise challenges in a subsequent appeal that could have been raised in his initial appeal threatens to undermine the societal interests in finality, comity, and the conservation of scarce judicial resources. Furthermore, victims of crimes, particularly the victims of traumatic crimes, have a unique interest in obtaining closure. Thus, I would not address Brown's assignments of error as they should have been raised in his original appeal to this Court.

APPEARANCES:

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