



Ohio Prosecuting Attorneys Association

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Steve Taylor
Chief Counsel, Appeals Division, Franklin County

Elements vs. Special Findings vs. Specifications

The Court's decisions in *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260, confirmed, 121 Ohio St.3d 409, 2009-Ohio-787, have introduced the unhelpful concept of "special findings."

In *Smith*, the defendant had been charged with robbery by force. In a bench trial, the court found the defendant not guilty of robbery but guilty of theft over \$500. The issue on appeal became whether the offense of theft over \$500 was a lesser included offense.

In *Smith I*, the Court concluded that every robbery by theft includes theft as a lesser included offense. But, because the lesser-included standard requires that the lesser offense be committed every time the greater offense is committed, the Court struggled with how theft over \$500 could be a lesser. Not every robbery by theft includes a theft over \$500, and so it could be argued that only simple M-1 theft would be a true lesser.

To address this problem, the Court in *Smith I* concluded that the \$500 value was not really an element but rather was only a "special finding" that increased the degree of the offense. The Court stated that "the elements of theft do *not* include value. Rather, value is a special finding to determine the degree of the offense, but is not part of the definition of the crime." As a "special finding," the \$500 value would not factor into the application of the lesser-included-offense test.

When the defendant sought reconsideration, the Court ordered supplemental briefing and ultimately reaffirmed the "special finding" concept. The *Smith II* Court conceded that the \$500 value was critical in the sense that it must always be submitted to the trier of fact for determination and that, if the offense is separately charged, the \$500 value would need to be alleged. But the \$500 value was only a "special finding" that did not defeat the conclusion that theft over \$500 was a lesser included offense of robbery.

On the whole, the "special finding" concept is unwarranted and creates the danger of confusion and uncertainty, not only on the lesser-included issue but also on issues like merger and double jeopardy.

The concept was unnecessary in *Smith* because the robbery charge not only alleged a "theft"; it alleged a "theft offense," and theft over \$500 is a theft offense. The Court could have concluded

that robbery by “theft offense” included theft over \$500 as a lesser, and the Court thereby would not have needed to invoke a “special finding” concept.

The law would be better served by a clear demarcation of what constitutes an “element.” For facts like \$500 value that increase the offense by one or more degrees, the Court has treated such facts as elements that must be proven beyond a reasonable doubt. *State v. Allen* (1987), 29 Ohio St.3d 53. *Smith II* still concedes as much when it states that such a fact must be included in the charge if the theft is separately charged. But the *Smith* decisions confusingly call value a “special finding.”

Any fact that raises the degree of the offense should be treated as an element that must be alleged in the charging instrument and proven beyond a reasonable doubt. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-156. Any fact (except a prior conviction) that raises the maximum sentence should also be alleged and proven beyond a reasonable doubt. *Id.* And any degree-raising fact must be reflected in the verdict, either by the verdict referencing the degree level or by the verdict referencing that the trier of fact found the degree-raising fact. R.C. 2945.75(A)(2).

Sometimes such degree-raising facts are also confusingly referred to as “specifications.” But true specifications are those matters addressed in R.C. 2941.14 et seq., such as firearm specifications. True specifications address matters above and beyond the elements necessary to determine the degree of the offense. Degree-raising facts really should be considered elements, not “specifications.”

“Element” terminology is most helpful in the merger context. Under the first prong of the merger test under R.C. 2941.25, the elements of the offenses are compared in the abstract. It becomes easier to distinguish offenses under this first prong when the offenses have more elements to distinguish them. Calling a degree-raising fact a “special finding” instead of an “element” will cause some courts to conclude that such “special findings” do not factor into the merger analysis. But such “findings” are part of the enhanced offense and should be considered as “elements” in determining whether the enhanced offense is subject to merger or is the “same offense” for double-jeopardy purposes.

Timely New-Trial Motion Precludes Appeal Absent Express Ruling on Motion

In *State v. Marcoff*, 8th Dist. No. 92698, 2010-Ohio-69 a jury found the defendant guilty of aggravated riot. Nine days later, the defendant filed a timely motion for judgment of acquittal or, in the alternative, motion for new trial, based on claims of insufficient evidence and instructional error. Without expressly ruling on the motions, the court proceeded to sentence the defendant to one year of community control and three years of post-release control.

The defendant appealed, and the case proceeded through full briefing. But the 8th District concluded that the appeal was premature and must be dismissed.

{¶ 3} * * * Because the trial court failed to rule upon his motion for judgment of acquittal or his motion for a new trial pursuant to Crim.R. 33, we decline to address the merits of appellant’s appeal and dismiss the matter for lack of a final, appealable order.

{¶ 4} The Ohio Constitution limits an appellate court’s jurisdiction to reviewing only final orders or judgments. Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2505.02. Accordingly, this court must “sua sponte dismiss appeals which are not from final appealable orders.” *State v. Martin*, Wayne App. No. 06CA0069, 2007-Ohio-5764, at ¶6.

{¶ 5} App.R. 4(B)(3) provides that “[i]n a criminal case, if a party timely files a motion for arrest of judgment or a new trial for a reason other than newly discovered evidence, the time for filing a notice of appeal begins to run when the order denying the motion is entered.” However, if a notice of appeal is filed while the motions are still pending, in that the trial court has yet to deny them, the notice of appeal is considered premature and does not impose jurisdiction upon an Ohio appellate court. *Dayton v. Huber*, Montgomery App. No. 19838, 2003-Ohio-6667, at ¶5, citing *State v. Soward* (1975), 47 Ohio App.2d 59, 60, 352 N.E.2d 155. See, also, *State v. Turner*, Cuyahoga App. No. 88489, 2007-Ohio-3264, at ¶17-18; *Cleveland v. Kline*, Cuyahoga App. No. 86665, 2006-Ohio-2087, at ¶2.

{¶ 6} In this matter, the trial court has not ruled upon appellant’s motion for acquittal or motion for a new trial in which he argues, not that there is newly discovered evidence, but that there was insufficient evidence to sustain his conviction and the jury was given improper instructions. Accordingly, we dismiss this appeal for lack of jurisdiction.

Several observations come to mind in relation to this ruling. First, a prosecutor wishing to have finality will encourage the trial court to make an express ruling on the motion for new trial and to include such ruling in the judgment of conviction. Otherwise, appellate courts will consider the judgment non-final and will allow appeals long after the usual thirty-day deadline.

Second, although the ruling is supported by other case law, the concept seems odd. The trial court necessarily had refused to grant a new trial and refused to find instructional error when it proceeded to sentence the defendant. A motion is usually deemed denied unless it is affirmatively granted. Such a “deemed denied” approach should apply when the trial court takes affirmative action (such as sentencing) that is inconsistent with the motion for new trial.

Third, the concept that an express ruling is required at most should mean that the appeal clock has not *begun*, not that the judgment is not a final appealable order. An order can be final and appealable, and yet the appeal clock may have been tolled for various reasons. Appellate Rule 4(A) can be read as allowing an appeal within thirty days, and the exceptions in App.R. 4(B) can be read as extending the deadline. Appellate Rule 4(B)(3) itself uses “extend” language. This should give the appellant the option of waiting for the prescribed ruling, but it should also give the appellant the option of appealing right away.

Finally, it should be noted that the motion for judgment of acquittal would not have tolled the time for appeal by itself, as such a motion is not one of the motions listed in App.R. 4(B)(3). It was the inclusion of a motion for new trial that affected the appeal clock.

No Right to Counsel on Delayed Motion for New Trial

In *State v. Clumm*, 4th Dist. No. 08CA32, 2010-Ohio-342, the defendant filed a delayed motion for new trial several years after his conviction was affirmed on appeal. The trial court denied the motion, and, on appeal, the defendant contended that the court should have appointed counsel to represent him on the motion.

The 4th District rejected the right-to-counsel argument, concluding there is no right to counsel regarding post-sentence motions under the Criminal Rules.

{¶9} Crim.R. 44 requires the appointment of counsel “from [a defendant’s] initial appearance before a court through [the defendant’s] appeal as of right[.]” Crim.R. 44(A).

{¶10} In addition, a defendant’s right to appointed counsel under the United States Constitution “extends to the first appeal of right, and no further.” *Pennsylvania v. Finley* (1987), 481 U.S. 551, 555. Likewise, under the Ohio Constitution the right to appointed counsel does not extend to postconviction proceedings. *State v. Crowder* (1991), 60 Ohio St.3d 151, 152. Ohio Courts have also held that the right to appointed counsel does not extend to post-sentence motions filed under the Criminal Rules. See *State v. McNeal*, Cuyahoga App. No. 82793, 2004-Ohio-50, at ¶6-8 (“Ohio courts have not granted greater rights than those in the federal constitution” and concluding that the movant had no right to appointed counsel for his Crim.R. 32.1 motion), citing *State v. Watts* (1989), 57 Ohio App.3d 32, 33.

{¶11} Here, we decided Clumm’s first appeal on February 13, 1980. *State v. Clumm* (Feb. 13, 1980), Athens App. No. CA 926. Clumm filed his present motion for a new trial on September 29, 2008. Therefore, Clumm’s right to appointed counsel under either the Criminal Rules or the Ohio or United States Constitutions has long since passed.

One *Brooks* Notice Enough to Allow Imposition of Prison

R.C. 2929.19(B)(5) provides that a sentencing court imposing community control must notify the defendant of what prison term he faces if he violates community control. In *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, the court found that an inadequate notification deprived the court of the ability to impose a prison term upon a subsequent violation.

In *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, the defendant was not adequately notified at the initial sentencing, but, at a subsequent violation hearing, the court reimposing community control had adequately notified the defendant of the prison term he faced if he violated again. When Fraley violated again, the sentencing court imposed prison. The Supreme Court found that the adequate notification after the previous violation was sufficient to allow imposition of prison after another violation.

In *State v. Hodge*, 8th Dist. No. 93245, 2010-Ohio-78, the 8th District faced the problem of there having been an adequate notification at the initial sentencing but no notification when the sentencing court reimposed community control after the first violation. When the defendant’s next violation resulted in the imposition of a prison term, the defendant appealed, claiming a *Brooks* violation.

In a 2-1 ruling, the 8th District concluded that the absence of notification after the first violation did not preclude the sentencing court from imposing prison after a second violation. The adequate notification of the possible prison term at the original sentencing was sufficient to allow imposition of prison.

The majority refused to read *Fraley* as requiring a renotification of the possible prison term every time a violator was put back on community control.

{¶ 9} We construe the holding of the Supreme Court in *Fraley* narrowly to mean that a trial court that fails to notify a defendant of the specific penalty he will face upon violation of community control sanctions at the initial sentencing, may “cure” that failure at a subsequent violation hearing by then advising the defendant of the definite term of imprisonment that may be imposed upon any subsequent finding of violation. We find nothing in the statute or *Fraley* that requires a legally adequate notification in the first instance be given over and over again.

“[W]e hold that neither R.C. 2929.19(B) nor any case law require that [Hodge] had to be constantly readvised of [the available prison term] each time he appeared in court upon a violation.”

Claim of *Brooks* Violation Barred on Post-Conviction Review

In *State v. Johns*, 8th Dist. No. 93226, 2010-Ohio-162, the defendant was convicted for failing to verify address as a sex offender. He was placed on community control. After he violated community control through a new conviction for assault, the court imposed a prison term.

The defendant later filed a post-conviction petition, contending under *Brooks* that the sentencing court had failed to advise him of the prison term he faced if he violated community control. The trial court denied the petition as untimely.

The 8th District concluded that the *Brooks* claim was barred by res judicata. “Res judicata bars a defendant who was represented by counsel from raising an issue in a postconviction petition if he could have raised the issue on direct appeal. * * * The imposition of a community control sanction and notification of the length of prison term that would be imposed for a violation of community control are sentencing matters that could have been raised on direct appeal.”

In response to the defense argument that an appeal would not have been ripe on the failure-to-notify issue until a prison term was imposed, the 8th District concluded that a failure-to-notify error would be appealable from the original sentencing and that the remedy on direct appeal would be a remand for a resentencing.

Because the issue was appealable from the original sentencing, the court also concluded that the petition was untimely, as more than 180 days had elapsed since the time for such appeal had expired. R.C. 2953.21(A)(2).

Inaccurate SORN Information Can Invalidate Plea

In *State v. Roberts*, 8th Dist. No. 92789, 2010-Ohio-156, the defendant had pleaded guilty to unlawful sexual conduct with a minor and importuning. During the plea colloquy, the court and parties indicated that defendant would be a Tier I offender (10 years registration with annual verification). At sentencing, though, the court indicated that he would be a Tier II offender (25 years registration with biannual verification).

Upon the defendant's appeal, the 8th District concluded that the plea was invalid because of the mistaken understanding of Tier classification.

{¶ 7} The State correctly argues that the trial court was not required to advise Roberts of the sexual offender classification and registration obligations as a prerequisite to accepting his guilty plea. Roberts recognizes that the trial court was not required to advise him of the collateral consequences of his plea (the sex offender classification), but rather he claims that when the trial court chose to inform him, it was obliged to correctly inform him of the collateral consequences attendant to his plea. We agree.

{¶ 8} * * * "It is commendable that some trial judges go beyond the express requirements of Crim.R. 11(C) in assuring that pleas are knowingly and voluntarily made. In doing so, however, the trial judge must impart accurate information." * * *

No Suppression of New Crimes

In *State v. Roberts*, 2nd Dist. No. 23219, 2010-Ohio-300, the defendant committed several traffic violations while riding his bicycle. It was a high-crime area. An officer stopped the defendant and began to conduct a pat-down search. The officer immediately felt a large handgun in the defendant's pocket. The officer grabbed the defendant's arms to prevent him from reaching for the gun. The defendant resisted and fought the officer. The defendant was subdued and handcuffed, and the police thereupon seized the gun from the pocket.

The defendant was charged with assault on an officer, weapon under disability, and CCW. The assault charge included a firearm specification. The trial court denied the motion to suppress in all respects. The defendant was allowed to plead no contest to the assault and WUD charges in exchange for the dismissal of the specification and CCW.

Concluding that the pat-down search was invalid, the 2nd District reversed the WUD conviction. But the court upheld the assault conviction because the defendant's new crime of assault could not be suppressed.

{¶ 22} We have held that "where the officers lacked cause to effectuate an original arrest yet where the accused responded to an illegal arrest by physically attacking the officer, the evidence of this new independent crime is admissible." *State v. Stargell*, Montgomery App. No. 20631, 2005-Ohio-312, ¶19, citing *State v. Jobes*, Montgomery App. No. 20210, 2004-Ohio-1167; *State v. Nelson* (Mar. 9, 2001), Champaign App. No. 00CA12; *State v. Barnes* (Dec. 5, 1997), Montgomery App. No. 16434. "In such cases, no exploitation of the prior illegality by police is involved." *Jobes* at ¶15, quoting *Nelson*, supra.

{¶ 23} In *Stargell*, we held that, even though the officers lacked a reasonable and articulable suspicion to stop the defendant, the police had probable cause to arrest the defendant for assault of a police officer based on the defendant's hitting the officer with his vehicle when he tried to flee from the scene. * * *

* * *

{¶ 25} “We further stated in *Barnes* that in a case of an attack on the police officers subsequent to an unlawful arrest involves no exploitation of the prior illegality and the rationale of the exclusionary rule does not justify its extension to this extreme. ‘Application of the exclusionary rule in such fashion,’ as one court put it, ‘would in effect give the victims of illegal searches a license to assault and murder the officers involved – a result manifestly unacceptable.’ *Id.*” *Stargell* at ¶19-20.

{¶ 26} *Stargell* and *Barnes* apply to this case, as well. Although [Officer] Fuller lacked a reasonable and articulable suspicion to search Roberts for weapons, thus making the seizure of the handgun unlawful, the officers were nonetheless permitted to arrest Roberts for his assault on a police officer. Roberts was not entitled to resist arrest upon the officer's discovery of the handgun; his decision to do so led to an independent, unrelated offense – i.e., assault of a peace officer – which did not result from exploitation of the prior unlawful discovery of the weapon. Accordingly, the exclusionary rule does not apply to bar evidence of Roberts' assault on Fuller.

It should be noted that the logic of the new-crime principle arguably should have supported upholding the WUD charge as well. Although the gun was felt before the new crime, it was not fully retrieved until after the new crime. The seizure of the gun therefore could have been upheld as a search incident to arrest for the new crime.