



Ohio Prosecuting Attorneys Association

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Co-Conspirator Statements

Evid.R. 801(D)(2)(e) provides that a statement is not hearsay if it is offered against a party and was made by a co-conspirator of that party “during the course and in furtherance of the conspiracy * * *.” The rule only allows admission thereunder “upon independent proof of the conspiracy,” meaning that the conspiracy must be established by means other than the statement itself. Prima facie proof of the conspiracy must precede the admission of the out-of-court statement under the rule, although premature admission will be deemed harmless if other evidence eventually provides the proof. *State v. Carter* (1995), 72 Ohio St.3d 545; *State v. Milo* (1982), 6 Ohio App.3d 19.

When a prosecutor seeks to introduce statements between would-be co-conspirators, a common defense objection is that the State has not yet established the existence of the conspiracy under Evid.R. 801(D)(2)(e). But there are several possible responses to such objection: (1) the statement is offered for the non-hearsay purpose of showing the formation of the conspiracy; (2) the statement is not offered for its truth; (3) the statement fits within another hearsay exception, as the co-conspirator exception is not the exclusive means of admitting such statements.

Consider the scenario in *State v. Strickland*, 10th Dist. No. 06AP-1269, 2008-Ohio-1104, in which the defendant shot and killed the victim in a shopping mall during a robbery. Earlier in the day, the defendant’s apparent accomplice/co-conspirator had told the defendant “Hey, man, he [the victim] had money, he had weed. *** [W]e ought to get him.”

Such statements by the would-be accomplice/conspirator to the defendant-killer were admissible non-hearsay because they were not offered for the truth of the matter asserted. See Evid.R. 801(C). To constitute hearsay:

[T]wo elements are needed. First, there must be an out-of-court statement. Second, the statement must be offered to prove the truth of the matter asserted. If either element is not present, the statement is not “hearsay.” In *State v. Thomas* (1980), 61 Ohio St. 2d 223, 232, this court held that testimony which explains the actions of a witness to whom a statement was directed, such as to explain the witness’ activities, is not hearsay. Likewise, it is nonhearsay if an out-of-court

statement is offered to prove a statement was made and not for its truth, *Cassidy v. Ohio Public Service Co.* (1947), 83 Ohio App. 404,410; to show a state of mind, *Stewart v. State* (1850), 19 Ohio 302; or to explain an act in question ***.

State v. Maurer (1984), 15 Ohio St.3d 239, 262 (fn. and some citations omitted).

In *Strickland*, the accomplice's statements were admissible as a "verbal act" to show the defendant's complicity and conspiracy. A conspiracy consists of a plan or agreement, and plans or agreements often consist of words; proving complicity also often involves proving the words exchanged by the accomplices. Since words are often an important component of the conspiracy or complicity, it often is necessary to prove the words uttered by the participants. See *Cassidy*, 83 Ohio App. at 410-11 (statements admissible to prove agreement); *Stewart*, 19 Ohio at 306. The words spoken by the accomplice were admissible to show that the words were uttered and that the words served as the basis for their complicity and conspiracy.

Statements forming the basis for the conspiracy are admissible. *State v. Newlin* (1995), 10th Dist. No. 95AP-379; *State v. Whiteside* (1987), 10th Dist. No. 86AP-325.

Conspiracy need not be charged in an indictment in order for the prosecution to rely on a theory of conspiracy for purposes of admitting evidence. See *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶¶ 105-106. Conspiracy was one of the ways in which the accomplice and the defendant were complicit. R.C. 2923.03(A)(3).

The accomplice's statements also were admissible to prove the state of mind of the defendant. *Maurer*, supra. The State was required to show that defendant was committing an aggravated robbery. Therefore, it was relevant to show that the defendant believed that there was money and marijuana to be robbed from the victim.

The accomplice's "we should rob him" statement was non-hearsay because it did not contain an "assertion." "An 'assertion' for hearsay purposes 'simply means to say something is so,' e.g., that an event happened or that a condition existed." *Carter*, 72 Ohio St.3d at 549. If a statement is incapable of being proved true or false, it cannot be considered an "assertion." *Id.* The accomplice's statement that they should rob the victim merely amounted to the accomplice's opinion about what course of action should be pursued. *United States v. Gibson* (C.A. 6, 1982), 675 F.2d 825, 834.

The objection under Evid.R. 801(D)(2)(e) was meritless. That rule is not the exclusive means of admitting out-of-court statements of a co-conspirator. One of the hearsay exceptions under Evid.R. 803 and 804 could apply, and, in many cases, the out-of-court statements will not be "hearsay" to begin with because they are not offered for their truth. See *State v. Riley* (1995), 6th Dist. No. L-94-007 (statement was not offered for truth; no need to review under Evid.R. 801(D)(2)(e)); *State v. Weaver* (1984), 9th Dist. No. 11700 (same).

Even for cases proceeding solely under Evid.R. 801(D)(2)(e), the rule's requirement of prima facie proof of a conspiracy necessarily assumes that conspiracy-forming words will

be admissible. If Evid.R. 801(D)(2)(e) barred admission of conspiracy-forming words, then many conspiracies would not be provable, thereby defeating the rule's inclusionary purpose.

Such statements do not create a confrontation problem, because they are not offered for their truth, see *Crawford v. Washington* (2004), 541 U.S. 36, 59 n. 9, and because they are not "testimonial" as they are not made to known law enforcement officer(s). See *id.* at 58, citing *Bourjaily v. United States* (1987), 483 U.S. 171, 181-84.

Special Prosecutors Applied to Motions for New Trial

In *State v. Davis*, 5th Dist. No. 09-CA-0019, 2009-Ohio-5175, the defendant had filed a delayed motion for new trial, which the common pleas court denied because the defendant could not establish that he had been unavoidably prevented from learning of the DNA-expert evidence he now wished to present.

On the defendant's appeal, however, the 5th District concluded that the court had lacked jurisdiction under the *Special Prosecutors* case to entertain the motion. The defendant had appealed his convictions earlier, and those convictions had already been affirmed. As stated by the 5th District:

{¶10} In *State ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St.2d 94, the Supreme Court of Ohio granted the relator's request for a writ of prohibition to prevent the trial court from granting a motion to withdraw a guilty plea and conducting a new trial. The Court held the trial court lost jurisdiction to grant a motion to withdraw a guilty plea and grant a new trial when the defendant lost the appeal of his conviction based upon a guilty plea. *Id.* at 97.

{¶11} The Ohio Supreme Court further held the trial court did not regain jurisdiction subsequent to the court of appeals' decision affirming the defendant's conviction. *Id.* The Court reasoned allowing the trial court to consider a Crim.R. 32.1 motion to withdraw a guilty plea subsequent to an appeal and affirmance by the appellate court "would affect the decision of the reviewing court, which is not within the power of the trial court to do." *Id.* at 97-98. Thus, the Supreme Court found "a total and complete want of jurisdiction by the trial court to grant the motion to withdraw [the defendant's] plea of guilty and to proceed with a new trial." *Id.* at 98.

{¶12} For the same rationale set forth in *Special Prosecutors*, we find the trial court's granting of Appellant's motion for new trial would be inconsistent with the judgment of the Ohio Supreme Court, affirming Appellant's convictions and sentence. Accordingly, we find the trial court was without jurisdiction to entertain Appellant's motion for new trial subsequent to the Ohio Supreme Court's decision.

As applied to motions to withdraw plea, the *Special Prosecutors* rule is often inoperable because the defendant pleaded guilty and did not appeal from his conviction(s). With this extension to motions for new trial, however, the *Special Prosecutors* rule will have an expanded effect, since the vast majority of defendants convicted by trial do appeal their convictions. See, also, the recent reaffirmance of *Special Prosecutors* in *State ex rel. Cordray v. Marshall*, ___ Ohio St.3d ___, 2009-Ohio-4986, ¶ 33 (no jurisdiction to entertain motion for relief from judgment after appellate affirmance).

Pelfrey Inapplicable to Offense Having Single Degree

R.C. 2945.75(A)(2) provides that, “[if] 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 *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, syllabus, the Supreme Court held that, “[under] the clear language of [Section] 2945.75, a verdict form signed by a jury 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.”

In *State v. Fisk*, 9th Dist. No. 24622, 2009-Ohio-4657, the defendant claimed that his guilty verdicts for aggravated robbery were violative of R.C. 2945.75(A)(2) because the verdicts did not set forth the additional elements that set aggravated robbery apart from robbery.

The 9th District rejected the argument. Robbery and aggravated robbery are different offenses. R.C. 2945.75(A)(2) and *Pelfrey* are only relevant when a single offense potentially has multiple degrees. Aggravated robbery has only a single degree, as all forms of that offense are first-degree felonies. As there is no degree-raising fact distinguishing one form of aggravated robbery from another, *Pelfrey* was inapposite and the verdict “guilty of aggravated robbery” was sufficient.

It should be emphasized here that, even for offenses having potential multiple degrees, *Pelfrey* will be inapplicable in many cases. In substance, *Pelfrey* only applies when the higher-degree form of the offense that is charged includes a lesser-degree form of the offense as a lesser-included offense. Only then can it be said that there is an *additional* degree-raising fact that should be found by the jury in order to distinguish the higher-degree offense from some lesser form of that offense. See, e.g., *State v. Kepiro*, 10th Dist. No. 09AP-19, 2009-Ohio-4654.

Warrantless Arrest

In *State v. Jones*, 2nd Dist. No. 2008 CA 26, 2009-Ohio-4606, the police had stopped the car in which defendant was riding in order to arrest him based on probable cause pertaining to prior controlled drug buys from the defendant and based on reliable information he was currently in possession of drugs. The search incident to arrest led to

the discovery of crack cocaine, which the defendant attempted to destroy. After the defendant was charged with crack-cocaine possession and tampering with evidence, the defense moved to suppress based on the contention that there was no probable cause to make the arrest. The court concluded probable cause existed.

On appeal, the defense made the no-probable-cause contention, which the 2nd District rejected. However, the court sua sponte raised the issue of whether the lack of a warrant invalidated the arrest. The court concluded that the police had ample opportunity to obtain an arrest warrant, and the prosecution had made no showing that it was impractical to do so. As a result, the court concluded that the warrantless arrest violated the Fourth Amendment.

Inexplicably, the court failed to take note of the holding in *United States v. Watson* (1976), 423 U.S. 411, which held that warrantless arrests based on probable cause in a public place are valid under the Fourth Amendment, even when the police had sufficient opportunity to obtain an arrest warrant. The 2nd District cited two Ohio Supreme Court cases that predated *Watson* as supporting the need for a showing of impracticability, but the 2nd District failed to address the Ohio Supreme Court's more recent case law following *Watson*:

{¶ 38} The warrantless arrest of an individual in a public place upon probable cause does not violate the Fourth Amendment. See *United States v. Watson* (1976), 423 U.S. 411, 423-424, 96 S.Ct. 820, 46 L.Ed.2d 598; *United States v. Santana* (1976), 427 U.S. 38, 42, 96 S.Ct. 2406, 49 L.Ed.2d 300. Moreover, in Ohio, warrantless arrests are permitted by statute. R.C. 2935.04 provides: "When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained." Thus, the question becomes whether there was probable cause for making the arrest.

State v. Elmore, 111 Ohio St.3d 515, 2006-Ohio-6207.

Discharge of Retained Counsel

The decision in *State v. Daily*, 2nd Dist. No. 23069, 2009-Ohio-4582, demonstrates that a defendant's retained counsel should not be discharged absent a substantial reason for doing so. Retained counsel in *Daily* had obtained a continuance of a pretrial conference date because he had been undergoing extensive medical testing. At the next pretrial date, the counsel sought another continuance of the pretrial and of the upcoming trial because of counsel's unspecified continuing health problems.

Instead of addressing the continuance motion, the court discharged the counsel and appointed another counsel. The court later indicated that the retained counsel must be removed because his health issues interfered with his ability to appear on the defendant's

case. Upon the advice of the new counsel, the defendant pleaded no contest but later sought to withdraw his plea because of the discharge of counsel.

The 2nd District emphasized that the lower court had not taken care to determine the nature of the counsel's medical problems or how long those problems might persist. Also, because the court had acted without giving the defendant notice and an opportunity to be heard, the court had not determined whether the defendant wished to retain another counsel. The appellate court found that the discharge was erroneous and that such error was structural. See *United States v. Gonzalez-Lopez* (2006), 548 U.S. 140.

A concurring judge pointed out that courts have wide latitude in balancing the right to counsel of choice against the demands of managing their docket. See *Gonzalez-Lopez*, 548 U.S. at 141. But there was no indication in the present case that the requested continuance was a delaying tactic.

Search and Seizure – File-sharing programs

In *State v. Thornton*, 10th Dist. No. 09AP-108, 2009-Ohio-5125, the defendant had downloaded a peer-to-peer file-sharing program called Limewire on his wife's computer. The program allows its users to access each other's computers and to download files. Using Limewire, a police officer searched others' computers for child pornography. His search turned up a computer having an IP address associated with Time Warner Road Runner service in the Columbus area. The officer obtained a court order to learn the identity of the IP address holder, and, after obtaining that information from Time Warner, the officer obtained a search warrant for the wife's home.

The defendant was charged with multiple counts of creating and possessing sexually-oriented matter involving a minor. A motion to suppress was denied, and a bench trial resulted in convictions on the possession charges.

The 10th District upheld the denial of the motion to suppress. The defendant had no reasonable expectation of privacy in the computer or the IP address, as he had knowingly exposed these things to the public through the Limewire program.

The court also rejected the contention that the evidence should be suppressed because of an alleged violation of the Electronic Communications Privacy Act, 18 U.S.C. 2701 et seq.. Even if the Act was violated, and even if the defendant had standing to complain about disclosure of the wife's subscriber information, the remedy would be a damages action, not suppression.

Allied Offenses – Merger of Attempted Murder and 2 Counts Felonious Assault

In *State v. Ortiz*, 8th Dist. No. 91819, 2009-Ohio-4982, the defendant had stabbed the victim three times, once in the potentially-lethal heart area and twice in the rib cage. At least one of the stab wounds occurred after the defendant pursued the fleeing victim. The victim remained in the hospital for a month because of the injuries.

The defendant was convicted on one count of attempted murder and two counts of felonious assault. One of the felonious assault counts had charged the defendant with knowingly causing serious physical harm, and the other charged him with causing or attempting to cause physical harm with a deadly weapon.

The defendant argued that all of the counts must merge, and the 8th District agreed. “[A]lthough there were several knife wounds, because the stabbings occurred close together in time, we conclude they were committed with a single animus.”

This conclusion fails to address the fundamental premise of merger under the allied-offenses statute. To be mergeable, the statute makes it clear that the offenses must arise out of the “same conduct,” see R.C. 2941.25(A), and it brings home the point by emphasizing that merger shall not occur “where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus * * *.” R.C. 2941.25(B). “[A] court need only engage in the allied-offense analysis when the same conduct, or single act, results in multiple convictions.” *State v. Cooper*, 104 Ohio St.3d 293, 2004-Ohio-6553, ¶ 17. “R.C. 2941.25(A) applies when the state obtains multiple convictions arising out of the same conduct of a defendant that can be construed to constitute two or more allied offenses of similar import.” *Id.* at paragraph one of the syllabus.

Thus, even if motivated by the same animus, separate conduct is simply not mergeable. For example, slamming a child against a hard surface and shaking the same child are separate acts. *Id.* at ¶ 29. It should make no difference that the separate acts occurred close in time. An offender should not get “freebie” felonious assaults or “freebie” attempts at murder.