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THE STATE OF OHIO, APPELLANT, *v.* NAGEL, APPELLEE.

[Cite as *State v. Nagel*, 1999-Ohio-507.]

Criminal procedure—Trial—Requirements of R.C. 2945.05 for waiving a jury trial in "criminal cases" do not apply to requests made by defendant under former R.C. 2941.142 or 2941.143 to have the trial judge, in a case tried by a jury, determine the prior-conviction specifications.

The requirements of R.C. 2945.05 for waiving a jury trial in "criminal cases" do not apply to requests made by defendant under former R.C. 2941.142 or 2941.143 to have the trial judge, in a case tried by a jury, determine the prior-conviction specifications.

(Nos. 97-2120 and 97-2274—Submitted September 28, 1998—Decided January 6, 1999.)

APPEAL from and CERTIFIED by the Court of Appeals for Lucas County, No. L-95-382.

{¶ 1} In September 1995, David Edward Nagel, appellee, was indicted by the Lucas County Grand Jury for crimes that were alleged to have been committed by him on August 22, 1995. Count One of the indictment charged appellee with aggravated burglary, an aggravated felony of the first degree, in violation of former R.C. 2911.11(A)(3), 140 Ohio Laws, Part I, 590. Count Two and Count Three each charged appellee with felonious assault, an aggravated felony of the second degree, in violation of former R.C. 2903.11(A)(2), *id.* at 589. Count Four charged appellee with carrying a concealed weapon in violation of former R.C. 2923.12(A), and also alleged that appellee had previously been convicted of an offense of violence, aggravated burglary, thereby elevating the charge of carrying a concealed weapon to a felony of the third degree. See former R.C. 2923.12(D), 141 Ohio Laws, Part

I, 1206. Additionally, Counts One, Two, and Three each carried a specification alleging, in accordance with the provisions of former R.C. 2941.142, that appellee had a prior (September 29, 1981) conviction of aggravated burglary. Similarly, Count Four of the indictment carried a specification alleging, in accordance with the provisions of former R.C. 2941.143, that appellee had previously been convicted of an offense of violence, *i.e.*, the 1981 aggravated burglary conviction.

{¶ 2} In November 1995, the matter proceeded to trial by jury. After the jury was empaneled and sworn, but before the presentation of evidence, the following discussion took place in chambers between the trial judge, defense counsel, and the prosecution:

"THE COURT: Let the record reflect that we are outside the presence of the jury. * * * Mr. Candiello [defense counsel], you have a motion to make at this time?

"MR. CANDIELLO: Yes, Your Honor. As a matter of fact, I have two motions to make. I believe as indicated to the Court, it is the Defendant's desire to have the specifications tried to the Court rather than to the jury.

"There are four counts in the indictment and attached to each of those counts is a specification of a crime of violence, aggravated burglary. We wish to have all those tried before the Court rather than the jury, and I believe this is the desire of the Defendant, and he would waive his right to a jury regarding those specifications.

"My second motion would be to delete the prior offense of violence [allegations from the body of Count Four of the indictment]. * * *

" * * *

"THE COURT: Thank you. Mr. Kountouris [the assistant prosecutor], would you like to respond to that?

"MR. KOUNTOURIS: As to the specifications, * * * I have no objection. I know some courts require a written waiver of that. I'll leave it to the Court's discretion.

" * * * I don't think he can require the Court to [delete the prior offense of violence allegation from the body of Count Four] * * * in view of the fact that it has been charged as an element [of the felony offense of carrying a concealed weapon].

"THE COURT: Okay. As it relates to the first portion of the Defendant's motion, the specifications pursuant to [R.C. 2941.142 and 2941.143], those sections indicate that the Defendant may request of the Judge, not the jury, to determine the existence of specifications to be conducted at a sentencing hearing. And if that request is being made, I will make those determinations as it relates to the specifications at the time of sentencing.

"MR. CANDIELLO: That request is being made, Your Honor.

"THE COURT: Now, as it relates to the — which would include the specification attached to the [charge of] carrying a concealed weapon, which is the fourth count of the indictment. And also in the fourth count of the indictment there is a prior offense of violence which is set forth [in the body of the charge] which the Court finds is an element [of the felony offense of carrying a concealed weapon] * * *.

" * * *

" * * * I'll allow the State to present the prior conviction as it relates to the offense of violence in the fourth count of the indictment * * *."

{¶ 3} The trial court did not require appellee to execute a written jury waiver form with respect to defense counsel's request that the specifications be tried by the court and not by the jury. Thereafter, the matter proceeded to a jury trial on Counts One through Four of the indictment, but not on the specifications. During trial, defense counsel stipulated that appellee had been convicted of aggravated burglary on September 29, 1981, as alleged in Count Four, thereby eliminating the need for any further evidence of the prior conviction as it related to the felony charge of carrying a concealed weapon.

{¶ 4} At the conclusion of the state's case-in-chief, the trial court granted a Crim.R. 29 motion by the defense to acquit appellee of the charge in Count Three of the indictment. On November 15, 1995, at the conclusion of all the evidence, the jury returned its verdicts on Counts One, Two, and Four. With respect to Count One, the jury found appellee not guilty of aggravated burglary but guilty of the lesser offense of attempted aggravated burglary, an aggravated felony of the second degree. See former R.C. 2911.11 and 2923.02(E), 144 Ohio Laws, Part III, 3738. On Count Two, the jury found appellee not guilty of felonious assault but guilty of aggravated assault in violation of R.C. 2903.12, a felony of the fourth degree. On Count Four, the jury found appellee guilty of carrying a concealed weapon, a felony of the third degree, and also determined, as part of its findings on Count Four, that appellee had previously been convicted of an aggravated burglary offense in September 1981.

{¶ 5} Thereafter, at the sentencing hearing, the trial court considered the specifications relating to Counts One, Two, and Four of the indictment. At the commencement of the hearing, the trial judge stated:

"Counsel for the defendant, prior to commencement of the trial, requested that the Court separately make determinations as to the specifications attached to [Counts One, Two, and Four], the specification being that the defendant has previously been convicted of aggravated burglary on the 29th day of September of 1981. I know that that was an element of Count # 4 and was stipulated to during the course of the trial. Any need for evidence as it relates to that, those specifications, Mr. Candiello?"

{¶ 6} Defense counsel responded, "No, Your Honor." At that point, following an unrecorded bench conference, the trial judge found appellee guilty of the prior-conviction specifications to Counts One, Two, and Four. The trial judge then sentenced appellee to indefinite terms of imprisonment of ten to fifteen years on Count One, two to five years on Count Two, and three to ten years on Count

Four, pursuant to former R.C. 2929.11(B)(2)(b), (B)(7), and (B)(6), respectively.[1] See 143 Ohio Laws, Part I, 1433. The trial court ordered that the sentences were to be served consecutively for a total aggregate sentence of fifteen to thirty years' imprisonment.

{¶ 7} On appeal, the court of appeals, in a split decision, reversed the judgment of the trial court in part, holding that the jury-waiver requirements of R.C. 2945.05 applied to appellee's request to have the trial judge determine the prior-conviction specifications alleged in the indictment. Specifically, the court of appeals' majority stated:

"In his second assignment of error, Nagel argues that his conviction of the sentence enhancement specification and sentence is void because the trial court lacked jurisdiction to try the specification.

"We agree. R.C. 2941.143 provides that a defendant may request that the trial court determine the existence of a specification at the sentencing hearing. We can find no Ohio case which has held that the R.C. 2941.143 request must comply with the jury waiver requirements of R.C. 2945.05 (the waiver of a trial by jury must be made in open court, in a writing signed by the defendant, and made a part of the record).

"Two Ohio appellate courts that were presented with the issue avoided it by holding that even if there was error, it was harmless. * * * However, the harmless error doctrine cannot be applied in this type of case. The Ohio Supreme Court has held that strict compliance with R.C. 2945.05 is necessary for a trial court to have

1. The trial court's sentencing decision would have been different in the absence of the specifications. For instance, without the specification to Count One, the trial court could not have sentenced appellee under former R.C. 2929.11(B)(2)(b) to a minimum term of ten years of actual incarceration on that count. See former R.C. 2941.142 and former R.C. 2929.11(F). Rather, the trial court presumably would have imposed sentence on Count One under former R.C. 2929.11(B)(2)(a), which authorized minimum terms of three, four, five, six, seven, or eight years of actual incarceration. Further, without the specification to Count Four, the trial court could not have imposed an *indefinite* term of incarceration on Count Four but, rather, would have imposed a *definite* term of incarceration on that count. See former R.C. 2941.143 and former R.C. 2929.11(G).

jurisdiction to try the defendant without a jury. *State v. Pless* (1996), 74 Ohio St.3d 333 [658 N.E.2d 766], paragraph one of the syllabus. See, also, *State v. Haught* (1996), 76 Ohio St.3d 645 [670 N.E.2d 232]. * * *

"Some Ohio appellate courts, including this court, have stated in dicta that the R.C. 2941.143 request must comply with the jury waiver requirements of R.C. 2945.05. See *State v. Moss* (Feb. 10, 1989), Lucas App. No. L-87-378, unreported, 1989 WL 10253[,] and *State v. Barnett* (Sept. 26, 1985), Franklin App. No. 85 AP-265, unreported, 1985 WL 9676. Other Ohio appellate courts have stated that a less formal request is sufficient. See *State v. Farris* (1991), 71 Ohio App.3d 817, 821 [595 N.E.2d 453, 456], and *State v. Kidd* (Apr. 24, 1986), Cuyahoga App. No. 47510, unreported, 1986 WL 5023. We believe that the only appropriate conclusion is that the requirements of R.C. 2945.05 must be applied to an R.C. 2941.143 request because the request involves removal of a guilt determination from the jury.

"In the case before us, although Nagel's attorney requested that the specification be tried to the court and stipulated to the fact that he had an [*sic*] prior conviction of an offense of violence, he did not make that request in a file-stamped signed writing pursuant to R.C. 2945.05. Therefore, the trial court lacked jurisdiction to convict him of the specification and enhance his sentence."

{¶ 8} Accordingly, the court of appeals' majority reversed the judgment of the trial court "only insofar as Nagel was convicted of the enhancement specification and his sentence was enhanced," and remanded the cause "for retrial of the specification and resentencing."[2] In a dissenting opinion, Judge Glasser

2. We note, in passing, that the court of appeals' majority seemingly assumed that there was only one sentence-enhancement specification at issue on appeal, *i.e.*, the specification to Count Four. The specification to Count Four was included in the indictment pursuant to former R.C. 2941.*143*, but was not the only specification at issue. The specification to Count One of the indictment, for instance, involved former R.C. 2941.*142*, not former R.C. 2941.*143*, and was evidently used to enhance Nagel's sentence on Count One. See fn. 1, above. On appeal to the court of appeals, Nagel asserted, as his second assignment or error, that his "election to try the specifications to the trial

disagreed with the majority's judgment that "the requirements of R.C. 2945.05 must be applied to an R.C. 2941.143 request for a court determination of a specification to support an indefinite term of sentence." Judge Glasser noted that "no Ohio case has determined that an R.C. 2941.143 request for a court determination in regard to a specification must comply with the jury waiver requirements of R.C. 2945.05," and he concluded that the judgment of the trial court should have been affirmed on all issues.

{¶ 9} Thereafter, the court of appeals, finding its judgment to be in conflict with the judgments of the Eighth Appellate District in *Farris* and *Kidd*, entered an order certifying a conflict on the question "whether the requirements of R.C. 2945.05 are applicable to the specification waiver." The cause is now before this court upon our determination that a conflict exists (case No. 97-2274), and pursuant to the allowance of a discretionary appeal (case No. 97-2120). This court, *sua sponte*, ordered the consolidation of case Nos. 97-2120 and 97-2274. See 80 Ohio St.3d 1479 and 1480, 687 N.E.2d 474 and 475.

Julia R. Bates, Lucas County Prosecuting Attorney, *Brenda J. Majdalani* and *Louis E. Kountouris*, Assistant Prosecuting Attorneys, for appellant.

Jeffrey M. Gamso, for appellee.

DOUGLAS, J.

{¶ 10} The issue for our consideration is whether the requirements of R.C. 2945.05 apply to requests made by a defendant pursuant to former R.C. 2941.142 and 2941.143 to have the trial judge, in a case tried by a jury, determine guilt or

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court rather than to the jury * * * was invalid absent a written, signed, file-stamped jury waiver placed in the trial court's record, and the court was without jurisdiction to try the specifications." (Emphasis added.) Therefore, Nagel challenged his convictions on all specifications, not just the specification to Count Four. Thus, former R.C. 2941.143 and 2941.142 are both clearly implicated on the facts of this case, even though the court of appeals' majority focused solely on R.C. 2941.143.

innocence on prior-conviction specifications. For the reasons that follow, we find that R.C. 2945.05 does not apply to such requests. Accordingly, we reverse the judgment of the court of appeals on that issue, and we reinstate the judgment of the trial court.

{¶ 11} Former R.C. 2941.142 provided that "[i]mposition of a term of actual incarceration upon an offender pursuant to division (B)(1)(b), (2)(b), or (3)(b) of section 2929.11 of the Revised Code because the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree * * * is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender has previously been convicted of or pleaded guilty to such an offense." R.C. 2941.142 provided further that "[i]f an indictment, count in an indictment, or information that charges a defendant with an aggravated felony contains such a specification, *the defendant may request that the trial judge, in a case tried by a jury, determine the existence of the specification at the sentencing hearing*." (Emphasis added.) 140 Ohio Laws, Part I, 602.

{¶ 12} Similarly, former R.C. 2941.143 provided that "[i]mposition of an indefinite term pursuant to division (B)(6) or (7) of section 2929.11 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies either that, during the commission of the offense, the offender caused physical harm to any person or made an actual threat of physical harm to any person with a deadly weapon * * *, or that the offender has previously been convicted of or pleaded guilty to an offense of violence." R.C. 2941.143 also provided that "[i]f an indictment, count in an indictment, or information that charges a defendant with a third or fourth degree felony contains such a specification, *the defendant may request that the trial judge, in a case tried by a jury, determine the existence of the specification at the sentencing hearing*." (Emphasis added.) *Id*. at 602-603.

{¶ 13} Here, each of the four counts in the indictment against appellee carried a specification alleging that he had previously been convicted of aggravated burglary. The specifications were included in the indictment to comply with the requirements of former R.C. 2941.142 and 2941.143. As was authorized by those statutes, appellee, through his counsel, made a "request" to have the trial judge, and not the jury, determine the specifications alleged in the indictment. The trial court granted that request. Therefore, after the jury had returned its verdicts on each of the three counts that had been tried by jury, the trial judge, at the sentencing hearing, determined the specification in connection with each count. Although the procedure employed by the trial court was expressly authorized under former R.C. 2941.142 and 2941.143, the court of appeals' majority nevertheless concluded that something more was required for appellee to have waived a jury trial on the prior conviction specifications—*i.e.*, compliance with the requirements of R.C. 2945.05. We disagree with the judgment of the court of appeals on that issue.

{¶ 14} R.C. 2945.05 provides:

"In all *criminal cases* pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof." (Emphasis added.)

{¶ 15} R.C. 2945.05, by its very terms, applies to pending "criminal cases." Therefore, the question whether R.C. 2945.05 applies to requests by a defendant pursuant to former R.C. 2941.142 or 2941.143 to try prior-conviction specifications to the trial judge, and not to the jury, is entirely dependent on the meaning of the phrase "criminal cases." Our understanding of the phrase is that it encompasses the underlying charge or charges in the criminal action against the accused but does not necessarily encompass the specification or specifications attached thereto. The reason, of course, is that a specification is, by its very nature, ancillary to, and completely dependent upon, the existence of the underlying criminal charge or

charges to which the specification is attached. Therefore, we have difficulty understanding precisely how it is that R.C. 2945.05 could be found to apply in circumstances where, as here, a defendant has received a jury trial on the merits of the underlying charges alleged in the indictment.

{¶ 16} The conclusion that R.C. 2945.05 does not apply in the context of the present appeal becomes even more obvious when we look to the provisions of former R.C. 2941.142 and 2941.143. Those statutes affirmatively answer the question of what constitutes a criminal "case" in the context of the case at bar. R.C. 2941.142 and 2941.143 stated that "the defendant may request that the trial judge, in a *case* tried by a jury, determine the existence of the specification at the sentencing hearing." (Emphasis added.) The use of the word "case" in these former statutes lends meaning to the word "cases" in R.C. 2945.05. Obviously, the "case" to which former R.C. 2941.142 and 2941.143 refer is composed solely of the underlying charges against the defendant, and does not include a specification that the defendant has requested the trial judge to determine. Therefore, reading these statutes and R.C. 2945.05 together leads to the inescapable conclusion that the phrase "criminal cases" in R.C. 2945.05 does not encompass the type of specifications addressed in former R.C. 2941.142 and 2941.143.

{¶ 17} Appellee protests, however, that *Pless*, 74 Ohio St.3d 333, 658 N.E.2d 766, supports the holding of the court of appeals. In *Pless*, paragraph one of the syllabus, we held:

"In a criminal case where the defendant elects to waive the right to trial by jury, R.C. 2945.05 mandates that the waiver must be in writing, signed by the defendant, filed in the criminal action and made part of the record thereof. Absent strict compliance with the requirements of R.C. 2945.05, a trial court lacks jurisdiction to try the defendant without a jury."

{¶ 18} *Pless* mandates strict compliance with the requirements of R.C. 2945.05, but does not mandate compliance with R.C. 2945.05 where that statute is

clearly inapplicable. Here, R.C. 2945.05 had no applicability to appellee's request to have the trial judge determine the existence of the prior-conviction specifications, and the criminal case against appellee was, in fact, tried by jury. Therefore, appellee's reliance on *Pless* is misplaced.

{¶ 19} Accordingly, for the foregoing reasons, we reverse the judgment of the court of appeals on the sole issue before us, and we reinstate the judgment of the trial court. We hold that the requirements of R.C. 2945.05 for waiving a jury trial in "criminal cases" do not apply to requests made by a defendant under former R.C. 2941.142 or 2941.143 to have the trial judge, in a case tried by a jury, determine the prior-conviction specifications.

Judgment reversed.

MOYER, C.J., KOEHLER, F.E. SWEENEY, PFEIFER and LUNDBERG STRATTON, JJ., concur.

COOK, J., concurs separately.

RICHARD N. KOEHLER, J., of the Twelfth Appellate District, sitting for RESNICK, J.

COOK, J., concurring.

{¶ 20} I agree with the conclusion of the majority that the requirements of R.C. 2945.05 do not apply to requests made by a defendant, pursuant to former R.C. 2941.142 or 2941.143, to have the trial judge determine the prior-conviction specifications. I cannot, however, join the opinion of the majority because I am unconvinced that the phrasing "criminal case" justifies our conclusion.

{¶ 21} Though I continue to believe that this court's decision in *State v. Pless* (1996), 74 Ohio St.3d 333, 658 N.E.2d 766, is incorrect and that the requirements in R.C. 2945.05 are directory rather than mandatory, see *id.* at 341-342, 658 N.E.2d at 771-772 (Cook, J., dissenting), *Pless* is inapposite to the separate trial of these specifications. This court decided *Pless* on statutory

construction, not constitutional, grounds. The majority of the *Pless* court simply reasoned that the words selected by the General Assembly in R.C. 2945.05 were to be enforced as written. *Id.* at 340, 658 N.E.2d at 770. Though the court of appeals here seemed to read it otherwise, *Pless* is a narrow opinion; it does not hold that every nonjury determination of guilt must meet the R.C. 2945.05 requirements.

{¶ 22} By the same token, then, no contradiction results from applying a strict statutory construction to inform our decision as to bifurcation of the trial of these specifications. The words of former R.C. 2941.142 and 2941.143 permit bifurcation upon the "request" of a defendant. There is no reason in either the language or the purpose of the statutes to reach out for an overlay from R.C. 2945.05.

{¶ 23} Moreover, these statutes have very different purposes and do not intersect or conflict. The patent motivation of the General Assembly in enacting R.C. 2945.05 was to ensure that a defendant's waiver of his constitutional right to trial by jury was express and recorded. By contrast, the intent of the General Assembly in former R.C. 2941.142 and 2941.143 was to *shield* a defendant from a prejudiced jury by allowing evidence of a prior conviction to be withheld from the jury. See *State v. Allen* (1987), 29 Ohio St.3d 53, 55, 29 OBR 436, 438, 506 N.E.2d 199, 201 ("The existence of a prior offense is such an inflammatory fact that ordinarily it should not be revealed to the jury unless specifically permitted under statute or rule.").

{¶ 24} I therefore concur in the decision of the majority to reverse the judgment of the court of appeals, but offer different reasons.
