

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-547
Johnny R. Pace,	:	(C.P.C. No. 09CR-4473)
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on March 22, 2011

Ron O'Brien, Prosecuting Attorney, and *Laura Swisher*, for
appellee.

Keith O'Korn, for appellant.

ON MOTION TO CERTIFY A CONFLICT

TYACK, J.

{¶1} On February 7, 2011, appellant, Johnny R. Pace, filed a motion to certify a conflict in this case, pursuant to App.R. 25. He argues that our January 27, 2011 decision affirming his conviction of a single charge of drug possession is in violation of R.C. 2925.11. For the following reasons, we sustain appellant's motion.

{¶2} Under App.R. 25 and Article IV, Section 3 of the Ohio Constitution, any party or judge of this court who believes that a decision by this court is in conflict with a decision by another appellate district may certify such conflict to the Supreme Court of Ohio for resolution.

{¶3} Appellant proposes that we certify this matter to the Supreme Court of Ohio on the following proposition of law:

The trial court erred by convicting appellant of possession of drugs as a felony of the fifth degree when the verdict form at most supported a conviction for a misdemeanor of the first degree under R.C. § 2945.75(A)(2) and *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256.

{¶4} The issue in this case is whether a jury's verdict form, which states only that they find the defendant guilty of a specified crime "as he stands charged in Count 1 of the indictment," is sufficient to sustain a conviction for anything but the lowest degree of that specified crime.

{¶5} In this case, defendant was charged with possession of crack cocaine, in violation of R.C. 2925.11. This is a very lengthy section of the criminal code, spanning roughly three single-spaced pages. The statute provides varying levels of penalties—ranging from a minor misdemeanor, for possessing less than 100 grams of marijuana, to first-degree felony, for possessing 500 grams or more of cocaine—depending on which illegal substance the defendant is found to have possessed. Here, defendant was charged with possessing a small amount of crack cocaine. As noted in paragraph 18 of our decision, possession of less than five grams of cocaine in any form is a felony of the fifth degree, pursuant to R.C. 2925.11(C)(4)(a).

{¶6} In the indictment, the grand jury charged defendant with "did knowingly obtain, possess, or use a controlled substance included in Schedule II, to wit: methylbenzoylecgonine, commonly known as cocaine, as defined in section 2925.01 of the Ohio Revised Code." (R. 2.) There was no question during the trial as to which substance defendant was charged with possessing, but because the jury's verdict form fails to state the degree of the crime, or set forth an aggravating circumstance, another appellate district has held that a defendant may only be convicted of the lowest degree of crime in the statute.

{¶7} Despite this court's perception of a lack of ambiguity as to the jury's verdict, the question presented by this motion is not whether our prior decision was correct. The question is whether our decision conflicts with another Ohio appellate district's decision.

{¶8} Appellant cites three cases from the Fourth District Court of Appeals, which apply a strict interpretation of the Supreme Court's holding in *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256:

Pursuant to the clear language of R.C. 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.*

Id. at syllabus. (Emphasis added.)

{¶9} The most recent Fourth District case upon which appellant relies is *State v. Moore*, 188 Ohio App.3d 726, 728–29, 2010-Ohio-1848, ¶6:

In the case sub judice, the verdict form states, "We, the jury * * * find the Defendant * * * Guilty of Possession of Drugs in *a manner and form as he stands charged in the Indictment.*" This form does not set out the degree of the offense, nor does it list aggravating factors or the drug that appellant possessed. Thus, the verdict does not comply with the requirements of R.C. 2945.75(A)(2), and appellant may be convicted and sentenced only for the least degree of the offense of which he was charged.

Id. at ¶ 6. (Emphasis added.)

{¶10} The court even goes on to say that the "as charged in the indictment" language does not cure the defect, even though the degree of the offense was included in the indictment, noting: "The same language appeared on the verdict forms in *Pelfrey*, and the majority of the court in that case nevertheless found a violation of the statute." Id. at 729, fn. 2 (citing *Pelfrey* at ¶17, O'Donnell, J., dissenting).

{¶11} The language from the jury's verdict form in this case is nearly identical to the language in the *Moore* verdict: "We the jury find the defendant, Johnny Pace, GUILTY OF POSSESSION OF DRUGS as he stands charged in Count One of the indictment."

{¶12} In *State v. New*, 4th Dist. No. 08CA9, 2009-Ohio-2632, ¶26, the Fourth District vacated another defendant's conviction for drug possession based on a faulty verdict form, this time calling attention to the fact that the state even produced evidence that an aggravating element was present:

Here, the verdict form failed to specifically set forth the degree of the crime charged. In addition, the verdict form contained nothing regarding any aggravating element, i.e., that the substance was either crack cocaine or that it exceeded a certain weight. While the State presented evidence that the drug involved was crack cocaine, the jury made no specific finding in that regard. Further, although the State presented evidence that the amount of crack cocaine involved exceeded twenty-five grams, the jury made no specific finding in that regard. Therefore, the possession of drugs verdict supports a misdemeanor of the third degree conviction.

(Citations omitted.)

{¶13} Appellant also cites the Fourth District's decision in *State v. Huckleberry*, 4th Dist. No. 07CA3142, 2008-Ohio-1007, upon which the court relied in the above-cited decisions. Based on the faulty jury verdict in that case, the Fourth District vacated both of defendant's first-degree felony drug convictions. *Id.* at ¶25.

{¶14} In light of the similarities between these Fourth District cases, and the case at bar, we are required to find that a conflict exists, and grant appellant's motion to certify.

Motion to certify granted.

BROWN and SADLER, JJ., concur.
