

[Cite as *State v. Brown*, 2011-Ohio-1124.]

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 10CA0044
vs.	:	T.C. CASE NO. 2005CR961
DAWN BROWN	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 11th day of March, 2011.

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GRADY, P.J.:

{¶ 1} Defendant, Dawn Brown, appeals from her conviction and sentence for various drug trafficking offenses.

{¶ 2} Defendant was indicted on one count of trafficking in hydrocodone, R.C. 2925.03(A)(1), one count of possession of

criminal tools, R.C. 2923.24(A), one count of trafficking in propoxyphene, R.C. 2925.03(A)(1), two counts (four and seven) of complicity to aggravated trafficking in oxycodone, R.C. 2923.03(A)(2), 2925.03(A)(1), one count (five) of complicity to trafficking in oxycodone, R.C. 2923.03(A)(2), 2925.03(A)(1), and one count (six) of complicity to trafficking in hydrocodone, R.C. 2923.03(A)(2), 2925.03(A)(1).

{¶3} Defendant filed a motion to dismiss counts two, four, five, six and seven of the indictment. As to counts four, five, six and seven, Defendant complained that those counts fail to include any culpable mental state and, pursuant to *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, they fail to charge an offense and are therefore fatally defective.

{¶4} The trial court sustained Defendant's motion in part, dismissing count two, the possession of criminal tools charge, and overruled Defendant's motion in part, refusing to dismiss counts four, five, six and seven, which charge complicity to commit drug trafficking and complicity to commit aggravated drug trafficking. The court concluded that because those counts repeat the language in the complicity statute, R.C. 2923.03(A)(2), that Defendant must act with the kind of culpability required for the commission of the offense, and make reference to R.C. 2925.03(A)(1) which includes the culpable mental state of knowingly, those counts provide Defendant with adequate notice

of the elements of the charges against her, including the culpability requirement.

{¶ 5} Defendant thereafter entered into a negotiated plea agreement. In exchange for Defendant's no contest pleas to counts one, four, five, six and seven, the State dismissed count three and the parties jointly recommended a total sentence of two years.

The trial court accepted Defendant's pleas, found her guilty, and sentenced Defendant to prison terms totaling two years.

{¶ 6} Defendant timely appealed to this court. She challenges only the trial court's decision overruling her motion to dismiss counts four, five, six and seven.

FIRST ASSIGNMENT OF ERROR

{¶ 7} "THE TRIAL COURT ERRED IN NOT DISMISSING COUNTS FOUR THROUGH SEVEN, VIOLATING CONSTITUTIONAL AND STATUTORY RIGHTS TO AN INDICTMENT THAT IDENTIFIES ALL ELEMENTS OF THE OFFENSE."

{¶ 8} Relying upon *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, Defendant argues that because counts four through seven of the indictment which charge Defendant with complicity to commit drug trafficking offenses in violation of R.C. 2923.03(A)(2) and 2925.03(A)(1) fail to include the culpable mental state of "knowingly," those counts fail to charge an offense and are fatally defective. Accordingly, the trial court erred by overruling Defendant's motion to dismiss those counts of the indictment.

{¶ 9} The complicity statute, R.C. 2923.03, provides, in relevant part:

{¶ 10} "(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

{¶ 11} "* * * *

{¶ 12} "(2) Aid or abet another in committing the offense."

{¶ 13} The drug trafficking statute, R.C. 2925.03, provides in pertinent part:

{¶ 14} "(A) No person shall knowingly do any of the following:

{¶ 15} "(1) Sell or offer to sell a controlled substance."

{¶ 16} Counts four through seven specify that Defendant "acting with the kind of culpability required for the commission of an offense, did aid or abet others in committing the offense of trafficking in drugs or aggravated trafficking in drugs, . . . a violation of R.C. 2925.03(A)(1) . . ." Defendant is correct that those counts do not specifically allege the mens rea element of "knowingly." That does not, however, render those counts fatally defective.

{¶ 17} Recently, in *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, the Ohio Supreme Court overruled its decision in *Colon*, and held:

{¶ 18} "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." Syllabus at ¶1.

{¶ 19} *Horner* went on to hold that when an indictment fails to charge a mens rea element of the crime, but tracks the language of the criminal statute describing the offense, the indictment provides the defendant with adequate notice of the charges against him and is, therefore, not defective. *Id.*, at ¶45.

{¶ 20} The complicity statute, R.C. 2923.03(A)(2), does not specify any culpable mental state, but requires the person to act with the kind of culpability required for the commission of an offense when aiding or abetting others in committing the offense.

The drug trafficking statute, R.C. 2925.03(A)(1), specifies a culpable mental state that requires the person to "knowingly" sell or offer to sell a controlled substance. Counts four to seven track the language used in the complicity statute, R.C. 2923.03(A)(2).

{¶ 21} Although counts four to seven of the indictment do not set forth the elements of the offense Defendant aided and abetted, drug trafficking in violation of R.C. 2925.03(A)(1), or its mens rea element of "knowingly," those counts do identify by numeral reference, R.C. 2925.03(A)(1), the specific offense Defendant is alleged to have aided or abetted others in committing. Because the section specifically referenced, R.C. 2925.03(A)(1), expressly

identifies the elements of that offense, including the culpable mental state of knowingly, the indictment is not defective for failing to set forth the degree of culpability of the aiding and abetting offense Defendant allegedly committed. See: *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707; *Horner*. Defendant was therefore provided adequate notice of the charges against her.

{¶ 22} Defendant's sole assignment of error is overruled.

FAIN, J. And FROELICH, J., concur.

Copies mailed to:

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Hon. J. Timothy Campbell