[Cite as *State v. Reynolds*, 2009-Ohio-3998.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-13
KEITH B. REYNOLDS	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas Case No. 1995-CR-875D
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	August 6, 2009

APPEARANCES:

For Plaintiff-Appellee:

JAMES J. MAYER, JR.
RICHLAND COUNTY PROSECUTOR
38 S. Park St.
Mansfield, Ohio 44902

KIRSTEN PSCHOLKA-GARTNER
0077792
Assistant Prosecuting Attorney
(Counsel of Record)

For Defendant-Appellant:

KEITH B. REYNOLDS, pro se
Inmate Number A514-531
Ross Correctional Institution
P.O. Box 7010
Chillicothe, Ohio 45601

Delaney, J.

{¶1} Defendant-Appellant, Keith Reynolds, appeals from the judgment of the Richland County Court of Common Pleas, denying his Motion to Vacate Judgment pursuant to Civ. R. 60(B). The State of Ohio is Plaintiff-Appellee.

{¶2} On November 10, 2005, the Richland County Grand Jury indicted Appellant on two counts of illegal conveyance of drugs of abuse onto grounds of a detention facility in violation of R.C. 2921.36. These charges arose from incidents wherein Appellant hid marijuana under the stamps of two letters and sent them to an inmate in the Mansfield Correctional Institution.

{¶3} A jury trial commenced on November 2, 2006. The jury found Appellant guilty as charged. By judgment entry filed November 7, 2006, the trial court sentenced Appellant to an aggregate term of five years in prison.

{¶4} Appellant filed a direct appeal of his conviction, claiming ineffective assistance of counsel based on trial counsel's failure to challenge for cause the seating of a particular juror and based on trial counsel's failure to object to testimony regarding a homosexual relationship between Appellant and the inmate to whom he was sending drugs. This court affirmed Appellant's convictions on December 3, 2007. See *State v. Reynolds*, 5th Dist. No. 06CA101, 2007-Ohio-6473.

{¶5} Subsequently, Appellant filed a pro se appeal to the Ohio Supreme Court, challenging the decision of this court. The Supreme Court declined to accept jurisdiction. *State v. Reynolds*, 117 Ohio St.3d 1460, 884 N.E.2d 68, 2008-Ohio-1635

{¶6} Appellant additionally filed a pro se motion to modify sentence on December 16, 2006. In that motion, he alleged juror misconduct, trial court misconduct,

and ineffective assistance of counsel as well as prosecutorial misconduct. Appellant voluntarily dismissed that motion on May 9, 2007.

{¶7} On October 27, 2008, Appellant filed a Motion to Vacate Judgment pursuant to Civ.R. 60(B), claiming for the first time that his convictions are invalid based on R.C. 2945.75(A). The trial court denied Appellant's motion on January 21, 2009, finding his claims to be barred by res judicata.

{¶8} Appellant raises three Assignments of Error:

{¶9} "I. THE TRIAL COURT ERRED WHEN IT STATED AT FOOTNOTE THREE OF IT'S [SIC] 'CONCLUSION OF LAW/RECOMMENDED JUDGMENT' THAT 'IT SHOULD BE NOTED THAT MR. REYNOLD'S [SIC] CLAIM WOULD FAIL BECAUSE HIS CONVICTIONS WERE NOT ENHANCED OFFENSES AND THUS R.C. 2945.75 DOES NOT APPLY' AS A REASON FOR DENYING APPELLANT'S CIV.R. 60(B) MOTION TO VACATE VOID JUDGMENT.

{¶10} "II. THE TRIAL COURT ERRED WHEN IT MISCONSTRUED APPELLANT'S CIV.R. 60(B)(4) MOTION TO VACATE VOID JUDGEMENT [SIC] AS A POST CONVICTION RELIEF MOTION PURSUANT TO R.C. 2953.21.

{¶11} "III. THE TRIAL COURT ERRED WHEN IT BARRED APPELLANT'S ARGUMENTS RES JUDICATA."

I, II, & III

{¶12} Appellant filed his motion to vacate judgment pursuant to Civ.R. 60(B). Civil Rule 60(B) allows relief from a judgment or order based on mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, or "any other reason justifying relief from the judgment." Civ.R. 60(B)(1) through (5). A motion pursuant to Civ.R.60(B)

"shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken." Civ.R. 60(B). Civil Rule 60(B) can apply in limited instances in criminal cases through the application of Crim.R. 57, which states, "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists."

{¶13} The Supreme Court recently held, "the plain language of Crim.R. 57(B) permits a trial court in a criminal case to look to the Rules of Civil Procedure for guidance when no applicable Rule of Criminal Procedure exists." *State v. Schlee*, 117 Ohio St.3d 153, 882 N.E.2d 431, 2008-Ohio-545, at ¶10.

{¶14} As, the Supreme Court in *Schlee* pointed out, Crim.R. 35 sets forth the procedure by which criminal defendants can file petitions for post-conviction relief. This procedure was available to Appellant and serves the same purpose as the Civ.R. 60(B) motion he filed. *Schlee*, supra, at ¶11.

{¶15} The court in *Schlee* determined that a motion for relief from judgment may be treated as a petition for post-conviction relief even when the motion has been unambiguously presented as a Civ.R. 60(B) motion. Specifically, the *Schlee* court stated:

{¶16} "Schlee's Civ.R. 60(B) motion was labeled a 'Motion For Relief From Judgment.' Courts may recast irregular motions into whatever category necessary to identify and establish the criteria by which the motion should be judged. *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522, citing *State v. Reynolds* (1997),

79 Ohio St.3d 158, 679 N.E.2d 1131. In *Reynolds*, we concluded that a motion styled 'Motion to Correct or Vacate Sentence' met the definition of a petition for postconviction relief pursuant to R.C. 2953.21(A)(1), because it was '(1) filed subsequent to [the defendant's] direct appeal, (2) claimed a denial of constitutional rights, (3) sought to render the judgment void, and (4) asked for vacation of the judgment and sentence.' Id. at 160, 679 N.E.2d 1131. The Civ.R. 60(B) motion filed by Schlee was filed subsequent to his direct appeal, claimed a denial of constitutional rights, and sought reversal of the judgment rendered against him. We conclude, therefore, that the Civ.R. 60(B) motion filed by Schlee could have been filed as a petition for postconviction relief. Thus, it is not necessary to look to the Civil Rules or other applicable law for guidance in the way Crim.R. 57(B) intends, because a procedure 'specifically prescribed by rule' exists, i.e., Crim.R. 35."

{¶17} Appellant's motion for relief from judgment could have been filed as a post-conviction relief petition or are issues that could have been raised in his direct appeal, as the issues raised are matters that were contained within the original record. In fact, Appellant has previously filed a post-conviction petition and a direct appeal, and could have raised the issue of whether his conviction under R.C. 2921.36(C) of illegal conveyance of drugs of abuse onto the grounds of a detention facility is an enhanced offense pursuant to R.C. 2945.75(A) previously.

{¶18} Having had a prior opportunity to litigate the claims that Appellant sets forth in his latest motion, Appellant's arguments are barred under the doctrine of res judicata. *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104. The *Perry* court explained the doctrine at 180-181 as follows:

{¶19} "Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment."

{¶20} Accordingly, the trial court did not err in treating Appellant's motion as a petition for post-conviction relief or in declaring the claims barred by the doctrine of res judicata.

{¶21} Moreover, the trial court correctly indicated in its footnote that Appellant's claims would not survive on the merits as R.C. 2921.36(C) is not an enhanced offense requiring the guilty verdict to state either the degree of the offense of which Appellant was found guilty or that such additional element(s) are present. See R.C. 2945.75(A)(2).

{¶22} The illegal conveyance statute found in R.C. 2921.36 is a statute in which each division stands alone. R.C. 2921.36, provides:

{¶23} "(A) No person shall knowingly convey, or attempt to convey, onto the grounds of a detention facility or of an institution, office building, or other place that is under the control of the department of mental health, the department of mental retardation and developmental disabilities, the department of youth services, or the department of rehabilitation and correction any of the following items:

{¶24} "(1) Any deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code, or any part of or ammunition for use in such a deadly weapon or dangerous ordnance;

{¶25} "(2) Any drug of abuse, as defined in section 3719.011 of the Revised Code;

{¶26} "(3) Any intoxicating liquor, as defined in section 4301.01 of the Revised Code.

{¶27} "(B) Division (A) of this section does not apply to any person who conveys or attempts to convey an item onto the grounds of a detention facility or of an institution, office building, or other place under the control of the department of mental health, the department of mental retardation and developmental disabilities, the department of youth services, or the department of rehabilitation and correction pursuant to the written authorization of the person in charge of the detention facility or the institution, office building, or other place and in accordance with the written rules of the detention facility or the institution, office building, or other place.

{¶28} "(C) No person shall knowingly deliver, or attempt to deliver, to any person who is confined in a detention facility, to a child confined in a youth services facility, to a prisoner who is temporarily released from confinement for a work assignment, or to any patient in an institution under the control of the department of mental health or the department of mental retardation and developmental disabilities any item listed in division (A)(1), (2), or (3) of this section.

{¶29} "(D) No person shall knowingly deliver, or attempt to deliver, cash to any person who is confined in a detention facility, to a child confined in a youth services facility, or to a prisoner who is temporarily released from confinement for a work assignment.

{¶30} "(E) No person shall knowingly deliver, or attempt to deliver, to any person who is confined in a detention facility, to a child confined in a youth services facility, or to a prisoner who is temporarily released from confinement for a work assignment a cellular telephone, two-way radio, or other electronic communications device.

{¶31} "(F)(1) It is an affirmative defense to a charge under division (A)(1) of this section that the weapon or dangerous ordnance in question was being transported in a motor vehicle for any lawful purpose, that it was not on the actor's person, and, if the weapon or dangerous ordnance in question was a firearm, that it was unloaded and was being carried in a closed package, box, or case or in a compartment that can be reached only by leaving the vehicle.

{¶32} "(2) It is an affirmative defense to a charge under division (C) of this section that the actor was not otherwise prohibited by law from delivering the item to the confined person, the child, the prisoner, or the patient and that either of the following applies:

{¶33} "(a) The actor was permitted by the written rules of the detention facility or the institution, office building, or other place to deliver the item to the confined person or the patient.

{¶34} "(b) The actor was given written authorization by the person in charge of the detention facility or the institution, office building, or other place to deliver the item to the confined person or the patient.

{¶35} "(G)(1) Whoever violates division (A)(1) of this section or commits a violation of division (C) of this section involving an item listed in division (A)(1) of this section is guilty of illegal conveyance of weapons onto the grounds of a specified

governmental facility, a felony of the third degree. If the offender is an officer or employee of the department of rehabilitation and correction, the court shall impose a mandatory prison term.

{¶36} "(2) Whoever violates division (A)(2) of this section or commits a violation of division (C) of this section involving any drug of abuse is guilty of illegal conveyance of drugs of abuse onto the grounds of a specified governmental facility, a felony of the third degree. If the offender is an officer or employee of the department of rehabilitation and correction or of the department of youth services, the court shall impose a mandatory prison term.

{¶37} "(3) Whoever violates division (A)(3) of this section or commits a violation of division (C) of this section involving any intoxicating liquor is guilty of illegal conveyance of intoxicating liquor onto the grounds of a specified governmental facility, a misdemeanor of the second degree.

{¶38} "(4) Whoever violates division (D) of this section is guilty of illegal conveyance of cash onto the grounds of a detention facility, a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to a violation of division (D) of this section, illegal conveyance of cash onto the grounds of a detention facility is a felony of the fifth degree.

{¶39} "(5) Whoever violates division (E) of this section is guilty of illegal conveyance of a communications device onto the grounds of a specified governmental facility, a misdemeanor of the first degree, or if the offender previously has been convicted of or pleaded guilty to a violation of division (E) of this section, a felony of the fifth degree."

{¶40} Merely because there are different levels of offenses contained within one statute does not mean that the statute is subject to the language of R.C. 2945.75. See *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735.

{¶41} The defendant in *Pelfrey* was convicted of tampering with records, a felony of the third degree pursuant to R.C. 2913.42(B)(4). Tampering with records is a first-degree misdemeanor; however, there are additional elements in the statute that can enhance the crime to a felony of the fifth, fourth, or third degree. A conviction of the most severe level of the statute can only occur if the records at issue belonged to the government. See R.C. 2913.42(B)(4). Under the statute, whether the records belonged to the government is an essential element of the crime which must be proven to the jury beyond a reasonable doubt. *State v. Kepiro*, 10th Dist. No. 06AP-1302, 2007-Ohio-4593, ¶31, citing *In re Winship* (1970), 397 U.S. 358, 361, 90 S.Ct. 1068 (holding that the prosecution must prove each element of the crime charged beyond a reasonable doubt).

{¶42} The jury in *Pelfrey* convicted the defendant specifically of tampering with records, "as charged in the indictment." *Pelfrey*, at ¶ 17 (O'Donnell, J., dissenting). The jury failed to explicitly find that the records belonged to a governmental entity, nor did they specify that they were convicting him of a third-degree felony.

{¶43} Pelfrey argued that under R.C. 2945.75 he could only be guilty of the least severe crime unless the jury's verdict form stated otherwise. The Supreme Court strictly applied R.C. 2945.75, holding that it requires that the guilty verdict state either: (1) the degree of the offense; or (2) that the additional element making it more serious is present. *Pelfrey*, at ¶ 4. The court remanded the case with instructions to enter a

conviction under the misdemeanor, interpreting R.C. 2945.75(A)(2) to mean that an unspecified guilty verdict can only constitute a finding of guilty as to the least degree of the offense charged.

{¶44} *Pelfrey* does not control in this case because the tampering with records statute only prohibits a single type of conduct. *Kepiro*, supra, at ¶33. "Depending on the attendant circumstances, that conduct can be punished in varying ways. This is similar, for example, to the theft statute, which, more or less prohibits "stealing." See R.C. 2913.02. Obviously, the punishment for stealing $13,000,000 in rare coins will be more severe than the punishment for stealing a candy bar from 7-Eleven." Id.

{¶45} R.C. 2921.36, which Appellant was convicted under, prohibits different kinds of conduct, i.e., (1) bringing a deadly weapon or dangerous ordinance onto detention facility grounds; (2) bringing drugs of abuse onto detention facility grounds; and (3) bringing intoxicating liquors onto detention facility grounds. Bringing a drug of abuse onto detention facility grounds is a felony of the third degree. See R.C. 2921.36(G). There is no enhancement necessary to make this crime a felony of the third degree.

{¶46} Accordingly, we find Appellant's assignments of error to be without merit and overrule his first, second and third assignments of error. The judgment of the Richland County Court of Common Pleas is affirmed.

By: Delaney, J.

Farmer, P.J. and

Gwin, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. W. SCOTT GWIN

[Cite as *State v. Reynolds*, 2009-Ohio-3998.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
KEITH B. REYNOLDS	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-13
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to Appellant.

_____
HON. PATRICIA A. DELANEY

_____
HON. SHEILA G. FARMER

_____
HON. W. SCOTT GWIN