[Cite as *State v. Wells*, 2009-Ohio-2673.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. CALVIN EUGENE WELLS Appellant	C.A. No. 24460 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 03 10 3242

DECISION AND JOURNAL ENTRY

Dated: June 10, 2009

BELFANCE, Judge

{¶1} Defendant-Appellant Calvin Eugene Wells appeals his conviction for possession of cocaine in violation of R.C. 2925.11(A), listed as a first degree felony on the indictment. For reasons set forth below, we reverse the judgment of the Summit County Court of Common Pleas and remand this case for proceedings consistent with this opinion.

FACTS

{¶2} On October 20, 2003, law enforcement officials were engaged in a multijurisdictional warrant sweep. Wells was not a target of the sweep, but did have an outstanding felony warrant at the time. While looking for another individual, officers noticed Wells and ultimately arrested him.

{¶3} Wells was indicted for four felony counts: (1) trafficking in cocaine in violation of R.C. 2925.03(A)(2), a first-degree felony with an accompanying major drug offender specification pursuant to R.C. 2941.1410, (2) possession of cocaine in violation of R.C.

2925.11(A), a first-degree felony, with an accompanying major drug offender specification pursuant to R.C. 2941.1410, (3) possession of cocaine in violation of R.C. 2925.11(A), a third-degree felony, and (4) having weapons while under disability in violation of R.C. 2923.13(A)(3), a felony of the fifth degree. A jury trial began on October 20, 2005. The jury could not reach a verdict on count one and that charge was subsequently dismissed in November 2005. The jury found Wells not guilty as to counts three and four, but guilty as to count two, which under the indictment was a first-degree felony possession of cocaine charge. On October 28, 2005, the trial court issued a journal entry sentencing Wells to ten years in prison for the possession offense. The trial court found Wells guilty of the major drug offender specification in connection with the above offense, but declined to sentence Wells based on the offense.

{¶4} Wells attempted several times thereafter to file an appeal in this Court, but each time we dismissed the appeal for various procedural or jurisdictional defects. Wells currently appeals the trial court's September 30, 2008 order and has raised a sole assignment of error, arguing that the verdict form for his first-degree felony possession of cocaine charge did not comply with R.C. 2945.75(A)(2).

R.C. 2945.75(A)(2)

{¶5} Wells essentially argues that the jury verdict form for his first-degree felony possession of cocaine charge was not sufficient to convict him of a first-degree felony pursuant to R.C. 2945.75(A)(2). As this raises an issue of law, our review is *de novo*. *State v. Hochstetler*, 9th Dist. No. 03CA0025, 2004-Ohio-595, at ¶10.

{¶6} R.C. 2945.75(A)(2) provides:

> "When 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 this case, the trial court treated Wells' conviction as a first-degree felony conviction for possession of cocaine in violation of R.C. 2925.11(A). R.C. 2925.11(A) states that "[n]o person shall knowingly obtain, possess, or use a controlled substance." R.C. 2925.11(C)(4)(a) provides that:

{¶7} "Whoever violates division (A) of this section is guilty of one of the following:

> "* * *
>
> "If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows:
>
> "Except as otherwise provided in division (C)(4)(b), (c), (d), (e), or (f) of this section, possession of cocaine is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender."

In order for Wells to be convicted of a first-degree felony, instead of a fifth-degree felony, the State had to prove an additional element, namely that Wells possessed over one hundred grams of crack cocaine. See R.C. 2925.11(C)(4)(f).

{¶8} While R.C. 2945.75(A)(2) specifically addresses what must be included in a guilty verdict, the Supreme Court of Ohio interpreted the statute to also provide the requirements for what must be included in a jury verdict form. *State v. Pelfrey,* 112 Ohio St.3d 422, 2007-Ohio-256, at ¶14. The *Pelfrey* Court held that "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.

{¶9} The completed jury form at issue provides: "[w]e, the Jury, find the Defendant Guilty of the offense of POSSESSION OF CRACK COCAINE. * * * We the jury, further find that the amount of crack cocaine was in the amount exceeding ten one hundred (100) grams as charged in the indictment." The improper language in the form is the "ten one hundred grams," which should have instead read, "one hundred grams." The form did not include the degree of the offense.

{¶10} We conclude that the verdict form did not comply with the Supreme Court of Ohio's mandate in *Pelfrey* or the plain language of R.C. 2945.75(A)(2). The form is unclear and we cannot determine what the jury understood "ten one hundred (100) grams" to mean. It certainly *could* have meant an amount exceeding one hundred grams, but it is possible the jury believed the form actually meant an amount exceeding less than one gram. Because numerous interpretations of the language are possible, the language was not sufficiently clear to state the presence of an additional element, as required under the statute in order to convict Wells of anything other than a fifth-degree felony. Thus, because we determine that the verdict form did not comply with the mandates of *Pelfrey* and R.C. 2945.75(A)(2), Wells could only be convicted of a felony of the fifth degree.

{¶11} The State argues that Wells has waived this error, as he did not raise it in the trial court. However, we disagree. The *Pelfrey* Court did not find merit in a waiver argument. *Pelfrey* at ¶14. Furthermore, we have stated that "[i]t is the [S]tate's responsibility, and not the defendant's, to call to the court's attention errors which prejudice the [S]tate." *State v. Gleason* (1996), 110 Ohio App.3d 240, 248. Wells has not waived this error.

CONCLUSION

{¶12} In light of the foregoing, we reverse the judgment of the Summit County Court of Common Pleas, and remand the matter for proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

EVE V. BELFANCE
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

JASON B. DESIDERIO, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.