**[Cite as *State v. Lee*, 2009-Ohio-4617.]**

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

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| STATE OF OHIO | C. A. No. 08CA009504 |
| Appellant | |
| v. | APPEAL FROM JUDGMENT ENTERED IN THE |
| IAN M. LEE, SR. | COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO |
| Appellee | CASE No. 07CR072522 |

DECISION AND JOURNAL ENTRY

Dated: September 8, 2009

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CARR, Judge.

**{¶1}** The State appeals the judgment of the Lorain County Court of Common Pleas. This Court reverses.

I.

**{¶2}** On February 8, 2007, Appellee, Ian Lee, was indicted by the Lorain County Grand Jury on two counts of assault on a police officer, violations of R.C. 2903.13, felonies of the fourth degree; one count of resisting arrest, a violation of R.C. 2921.33, a misdemeanor of the second degree; and one count of obstructing official business, a violation of R.C. 2921.31, a felony of the fifth degree.

**{¶3}** On August 27, 2008, Lee waived his constitutional right to have his case heard before a jury and the case proceeded to bench trial. At the conclusion of the State's case-in-chief, Lee moved for an acquittal of the charges pursuant to Crim.R. 29. The motion was denied. Lee also moved for a dismissal of counts one and two of the indictment on the grounds that the

omission of the words, "while in the performance of their official duties," rendered the indictment insufficient to charge assault on a police officer. The trial court took the motion under advisement. At the close of the defense's case, Lee renewed his Crim.R. 29 motion. The judge then asked Lee to submit an argument regarding, "whether the indictment is missing a necessary element." Lee agreed to submit a supplemental brief. At that time, the State moved to amend the indictment pursuant to Crim.R. 7(D) and R.C. 2945.75(A)(1). Lee objected to the amendment. The judge indicated he intended to research the issues prior to ruling on the motions before the court. After each party had made closing arguments, the judge asked Lee how much time he needed to develop the issue of whether an officer "being in the performance of his official duties," was a necessary element to charge assault on a police officer. Lee indicated he would need fourteen days. The State indicated it would likely not respond to that filing but it intended to file a memorandum in support of its position within that timeframe. The judge then requested that all submissions be filed within fourteen days.

**{¶4}** Both parties subsequently filed memoranda in support of their respective positions. The State argued that Crim.R. 7(D) permitted the indictment to be amended to include the language "while in the performance of their official duties" when the original indictment charged Lee with two counts of assault on a police officer, violations of R.C. 2903.13, felonies of the fourth degree. Lee, in his memorandum in support of his motion to dismiss the indictment, contended that the indictment, as written, charged only misdemeanors of the first degree, not felonies of the fourth degree, because neither count charged that the officers were in the performance of their official duties at the time of the offense.

**{¶5}** On September 29, 2008, the trial court issued a judgment entry granting Lee's Crim.R. 29 motion, in part, and denying the State's motion to amend the indictment. On

September 30, 2008, the State filed a reply brief in response to Lee's memorandum in support of his motion to dismiss the indictment. The record indicates the trial court treated this filing as a motion for reconsideration. On October 30, 2008, the trial court filed a judgment entry in which it made several findings of fact and reached several conclusions of law. In that entry, the trial court denied the State's motion to amend the indictment. The trial court also granted Lee's Crim.R. 29, in part, stating that the first two counts of the indictment were only sufficient to charge misdemeanor assault offenses.

**{¶6}** In reaching the above stated rulings, the trial court determined R.C. 2945.75(A)(1) was unconstitutional as applied to the enhanced offense of assault charged under R.C. 2903.13(A) because it allowed the State to charge a defendant with an offense without providing notice of all the elements of the offense. The trial court also determined the statute violated Lee's right to an indictment in violation of the Sixth Amendment to the United States Constitution, and Article I, Section 10 of the Constitution of Ohio. Specifically, the trial court concluded that 1) R.C. 2945.75(A)(1) was unconstitutional for the reason that it was a procedural statute which conflicted with a rule of criminal procedure; 2) an indictment may not be amended to allege an essential offense element which would enhance the degree of the offense or the penalty which may be imposed upon conviction; 3) furnishing a bill of particulars does not satisfy the constitutional notice requirement of an offense in the indictment; and 4) to charge the offense of assault on a peace officer as a felony of the fourth degree, the indictment must include, as a necessary element, the allegation that the assault was committed upon the officer while in the performance of his official duties.

**{¶7}** By journal entry dated November 21, 2008, the trial court found Lee guilty of two counts of assault, misdemeanors of the first degree, one count of resisting arrest, a misdemeanor of the second degree, and one count of obstructing official business, a felony of the fifth degree.

**{¶8}** On November 28, 2008 the State filed its notice of appeal with the Court, along with a motion for leave to appeal. On January 23, 2009, the trial court sentenced Lee to an aggregate term of one year incarceration.

**{¶9}** It is the October 30, 2008, judgment entry from which the State appeals. The State has raised two assignments of error. This Court has rearranged the assignments of error to facilitate review.

II.

**ASSIGNMENT OF ERROR II**

"THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO AMEND THE INDICTMENT."

**{¶10}** The State argues that the trial court erred in its October 30, 2008 judgment entry when it denied the State's motion to amend the indictment and granted, in part, a motion to reduce the charges in the indictment. This Court agrees.

**{¶11}** Lee was charged with assault on a police officer under R.C. 2903.13(A), which stated at the time of the offense, "No person shall knowingly cause or attempt to cause physical harm to another or to another's unborn." R.C. 2903.13(C)(3) stated, "If the victim of the offense is a peace officer, a firefighter, or a person performing emergency medical service, while in the performance of their official duties, assault is a felony of the fourth degree."

**{¶12}** In this case, the first two counts of the indictment read as follows:

"**COUNT ONE**
**ASSAULT ON A POLICE OFFICER, 2903.13(A)**

"The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO, Do find and present, that the above named Defendant(s) [Lee], in the County of Lorain, unlawfully on or about December 17, 2006, did knowingly cause or attempt to cause physical harm to Officer Moss, a peace officer, fire fighter, or a person performing emergency medical service, in violation of 2903.13(A) of the Ohio Revised Code, a Felony of the Fourth Degree, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

"**COUNT TWO**
**ASSAULT ON A POLICE OFFICER, 2903.13(A)**

"The Jurors of the Grand Jury, being first duly sworn, further find and present, that the above named Defendant(s) [Lee], in the County of Lorain, unlawfully on or about December 17, 2006, did knowingly cause or attempt to cause physical harm to Officer Baracskai, a peace officer, fire fighter, or a person performing emergency medical service, in violation of 2903.13(A) of the Ohio Revised Code, a Felony of the Fourth Degree, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio."

**{¶13}** The dispute in this case stems from the fact that the words, "while in performance of their official duties" are missing from the first two counts of the indictment. Lee did not challenge the sufficiency of the indictment prior to trial. However, at the close of the State's case-in-chief, Lee sought to bring the sufficiency of the indictment into question. Prior to calling his first witness, Lee moved for a judgment of acquittal pursuant to Crim.R. 29. After that motion was denied, Lee moved the Court to find the indictment defective to charge assault as a felony of a fourth degree. Lee argued that, at best, the indictment was only sufficient to charge assault as a misdemeanor. The record indicates that after stating on the record that Lee challenged the "substance" of the indictment, the judge made the following statement:

"I believe what Attorney Griffin is referring to is, he's indicating that the indictment does not contain an essential element. And because I'm not familiar

> enough with indictments reciting an offense under that particular statute, it's going to take me some time to review that. But certainly, the evidence is – is sufficient for a prima facie case. The question will be whether the indictment is sufficient to charge an offense. So I'm going to reserve ruling on that, Attorney Griffin, and ask you to proceed."

**{¶14}** From this statement, it is clear that the trial court judge denied the Crim.R. 29 motion and was considering whether the indictment was sufficient to charge Lee with assault on a police officer. Prior to closing arguments, Lee renewed his Crim.R. 29 motion for a judgment of acquittal. The trial court judge said he would take the "Rule 29 motion under advisement." The State then moved to amend counts one and two of the indictment pursuant to Crim.R. 7(D). At this point, the trial court judge again indicated he wanted to do research prior to ruling on the motions before the court. After closing arguments, the judge asked the parties to submit written arguments regarding whether the indictment was sufficient to charge Lee with a felony version of assault.

**{¶15}** Subsequently, on August 28, 2008, the State filed a document captioned, "BRIEF IN SUPPORT OF STATE'S MOTION TO AMEND CTS. 1 & 2 OF THE INDICTMENT." On September 24, 2008, Lee filed a memorandum captioned, "MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COUNTS ONE AND TWO OF THE INDICTMENT." Notably, Lee advanced arguments relating to the sufficiency of the indictment but made no mention of Crim.R. 29.

**{¶16}** On October 30, 2008, in denying the State's motion to amend the indictment and partially granting Lee's Crim.R. 29 motion, the trial court concluded the indictment was insufficient to charge Lee with assault on a police officer because the words, "while in performance of his official duties," were not included in the indictment.

**{¶17}** This Court concludes that the trial court did not, in fact, rule on a Crim.R. 29 motion in its October 30, 2008 journal entry. Crim.R. 29 allows a trial court to order an entry of judgment of acquittal on "one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses." Here, the trial court order was not based upon a consideration of whether the State had presented sufficient evidence to support a conviction on any of the charges in the indictment. Rather, the trial court's decision was reached after reviewing the constitutionality of R.C. 2945.75(A) and analyzing whether the indictment was legally sufficient to charge Lee with assault of a police officer. The trial court erred in addressing the sufficiency of the indictment in this manner.

**{¶18}** Crim.R. 12 states, in part:

> "(C) Prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue. The following must be raised before trial:
>
> "(1) Defenses and objections based on defects in the institution of the prosecution;
>
> "(2) Defenses and objections based on defects in the indictment, information, or complaint (other than failure to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceeding)[.]"

**{¶19}** Crim.R. 12(D), which outlines the timeline under which pretrial motions must be filed, states:

> "All pretrial motions except as provided in Crim.R 7(E) and 16(F) shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier. The court in the interest of justice may extend the time for making pretrial motions."

**{¶20}** Crim.R. 12(H) states:

> "Failure by the defendant to raise defenses or objections or to make requests that must be made prior to trial, at the time set by the court pursuant to division (D) of this rule, or prior to any extension of time made by the court, shall constitute waiver of the defenses or objections, but the court for good cause shown may grant relief from the waiver."

**{¶21}** Under Crim.R. 12, challenges to the sufficiency of an indictment must be made prior to the commencement of trial. Here, there is no question that the indictment charged Lee with the crime of assault. At the close of the State's case-in-chief, Lee, for the first time, challenged whether the indictment was sufficient to charge him with assault on a police officer. Because Lee did not challenge whether the indictment was sufficient to charge him with assault on a police officer prior commencement of trial, he forfeited all but plain error with respect to defects in the charging instrument. See *State v. Pasqualon*, 121 Ohio St.3d 186, 2009-Ohio-315, at ¶40. It follows that the motion challenging the sufficiency of the indictment and the subsequent memorandum filed in support of the motion were not timely. The trial court did not properly find a showing of good cause to justify granting relief from the forfeiture. Rather, the trial court merged the motion to dismiss the indictment with the Crim.R. 29 motion for a judgment of acquittal which was made by Lee prior to closing arguments. Because Lee's motion challenging the sufficiency of the indictment was not properly before the court, the trial court erred in finding that the felony offenses were not properly charged in its October 30, 2008 judgment entry.

**{¶22}** The State's second assignment of error is sustained. Lee's conviction must be vacated and this case must be remanded so that the trial court can render a verdict on the offenses charged in the indictment.

**ASSIGNMENT OF ERROR I**

"THE TRIAL COURT ERRED WHEN IT DECLARED R.C. 2945.75(A)(1) UNCONSTITUTIONAL."

**{¶23}** The State argues that the trial court erred when it declared R.C. 2945.75(A) unconstitutional. Because our resolution of the second assignment of error is dispositive of this

appeal, this Court declines to address the first assignment of error as it is rendered moot. See App.R. 12(A)(1)(c).

III.

**{¶24}** The State's second assignment of error is sustained. This Court declines to address the State's first assignment of error. The judgment of the Lorain County Court of Common Pleas is reversed, the conviction vacated, and the cause remanded to the trial court for proceedings consistent with this decision.

Judgment reversed,
conviction vacated,
and cause remanded.

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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 Lorain, 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.

DONNA J. CARR
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

DENNIS WILL, Prosecuting Attorney, and BILLIE JO BELCHER, Assistant Prosecuting Attorney, for Appellant.

PAUL A. GRIFFIN, Attorney at Law, for Appellee.