[Cite as *State v. Vaughn*, 2011-Ohio-394.]

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

STATE OF OHIO Appellee v. MARVIN VAUGHN Appellant	C.A. No. 10CA009820 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 08CR076483

DECISION AND JOURNAL ENTRY

Dated: January 31, 2011

MOORE, Judge.

{¶1} Appellant, Marvin Vaughn, appeals from the judgment of the Lorain County Court of Common Pleas. This Court affirms the trial court's judgment.

I.

{¶2} Vaughn worked as a corrections officer at the Lorain Correctional Institution. He also served in the United States Air Force Reserve. While employed as a state corrections officer, Vaughn was entitled to paid leave for the time that he served on duty for the Reserve. On a number of occasions, Vaughn requested and received paid military leave, but he did not attend to his military duties on the requested dates.

{¶3} Vaughn was charged with theft in office related to his receipt of paid military leave. The State filed a bill of particulars and, after Vaughn moved to dismiss the indictment, a supplemental bill of particulars. Vaughn also filed two supplements to his motion to dismiss.

He argued that the indictment failed to charge an offense because it did not state specifically which predicate theft offense Vaughn committed.

{¶4} The trial court denied the motion to dismiss. Vaughn pleaded no contest and appealed. He has asserted one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

> "VAUGHN'S CONVICTION FOR THEFT IN OFFICE WAS UNCONSTITUTIONAL BECAUSE THE INDICTMENT WAS PROCEDURALLY DEFECTIVE AS IT FAILED TO GIVE MEANINGFUL NOTICE TO APPELLANT OF THE ELEMENTS OF THE PREDICATE THEFT OFFENSE AND EXPOSED APPELLANT TO DOUBLE JEOPARDY."

{¶5} Vaughn argues that the indictment failed to provide him with adequate notice of the charge he faced because the State "attempted to substitute a broad definition for many prohibited acts instead of providing meaningful notice of the offense charged and what predicate acts the grand jury considered." The key question is this: is it sufficient for the indictment to refer to the predicate offense – commission of a theft offense – or must it specifically identify which theft offense he committed. We begin with the language of the indictment:

> "That MARVIN VAUGH[N], as a continuous course of conduct from on or about October 14, 2006, to on or about January 05, 2008, at Lorain County, Ohio, did being a public official or party official, commit any theft offense, as defined in division (K) of section 2913.01 of the Revised Code, when the property or service involved is owned by this state, any other state, the United States, a county, a municipal corporation, a township, or any political subdivision, department, or agency of any of them, is owned by a political party, or is part of a political campaign fund. [sic] in violation of Section 2921.41(A)(2) of the Ohio Revised Code * * *."

Specifically, Vaughn complains that the State's inclusion of "any theft offense, as defined in division (K) of section 2913.01 of the Revised Code" in the indictment allowed the State to charge 33 possible predicate offenses – the number of offenses defined as theft offenses in R.C.

2913.01(K) – without specifying which specific act Vaughn was accused of committing. Vaughn concludes, therefore, that the indictment was procedurally defective because it failed to give him meaningful notice of the elements of the predicate offense.

{¶6} Vaughn's brief relies on *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, and *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, to support his position. *Colon* and *Colon II* concluded that an indictment which failed to include a mens rea was defective and constituted a structural error under the facts of that case. After Vaughn and the State filed their briefs in this case, however, the Supreme Court of Ohio revisited *Colon* and *Colon II* in *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830. In *Horner*, the Court held:

> "Today we recognize the confusion created by *Colon I* and *II* and 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. See *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, 853 N.E.2d 1162 (an indictment that does not identify the elements of a predicate offense provides adequate notice by citing the statute defining the predicate offense)." Id. at ¶ 45.

Contrary to the holding in the *Colon* cases, *Horner* held that an indictment that tracks the language of the criminal statute provides the defendant with adequate notice. *Horner* relied on *State v. Buehner*, a pre-*Colon* decision that is directly on point.

{¶7} In *Buehner*, the Court considered an indictment that referred to a predicate offense only by the statute number. The Court held that

> "an indictment that tracks the language of the charged offense and identifies a predicate offense by reference to the statute number need not also include each element of the predicate offense in the indictment. The state's failure to list the elements of a predicate offense in the indictment in no way prevents the accused from receiving adequate notice of the charges against him." *Buehner* at ¶ 11.

{¶8} In this case, Vaughn concedes that the indictment tracked the language of the statute. As noted above, the relevant portion of the indictment states:

> "That MARVIN VAUGH[N], * * * did being a public official or party official, commit any theft offense, as defined in division (K) of section 2913.01 of the Revised Code, when the property or service involved is owned by this state, or any other state, the United States, a county, a municipal corporation, a township, or any political subdivision, department, or agency of any of them, is owned by a political party, or is part of a political campaign fund. [sic] in violation of Section 2921.41(A)(2) of the Ohio Revised Code * * *."

Theft in office, in violation of R.C. 2921.41(A)(2), provides that:

> "(A) No public official or party official shall commit any theft offense, as defined in division (K) of section 2913.01 of the Revised Code, when either of the following applies:
>
> "(2) The property or service involved is owned by this state, any other state, the United States, a county, a municipal corporation, a township, or any political subdivision, department, or agency of any of them, is owned by a political party, or is part of a political campaign fund."

We agree with Vaughn that the language of the indictment tracked the statute. Pursuant to *Buehner* and *Horner*, therefore, the indictment was not defective.

{¶9} Vaughn also argued, consistent with *Colon*, that he lacked notice of what predicate offense he was alleged to have committed. Although *Horner* resolves this argument, because the Supreme Court has now held that this form of an indictment is not defective, we are not persuaded that Vaughn lacked notice. The State filed a bill of particulars that provided additional information about the charge in the indictment. It informed Vaughn that the theft offense related to the time period during which he served in the Air Force Reserve while also serving as a corrections officer. During that time, corrections officers were permitted to take paid time off from the state of Ohio while on duty for the Reserve. The bill of particulars continues that, although Vaughn requested and received paid military leave, he did not attend to his Reserve duty on a number of dates.

{¶10} In a supplemental bill of particulars, the State specifically identified that the theft offense Vaughn committed in receiving military pay but not attending military duty included at

least one of four enumerated statutory provisions that fall under the definition of a theft offense in R.C. 2913.01(K). The supplemental bill of particulars provided additional notice to Vaughn of the facts the State alleged and the predicate offenses at issue. "[W]hen the indictment sufficiently tracks the wording of the statute of the charged offense, the omission of an underlying offense in the indictment can be remedied by identifying the underlying offense in the bill of particulars." *Buehner* at ¶ 10. Here, the indictment precisely tracked the language of the statute and, beyond that, the bill of particulars and supplemental bill of particulars provided additional notice.

{¶11} The indictment was not defective. Accordingly, we hold that Vaughn's conviction did not violate his constitutional rights, as he alleged in his assignment of error, and it is overruled.

III.

{¶12} Vaughn's assignment of error is overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

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 Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
CONCURS

BELFANCE, P. J.
DISSENTS, SAYING:

{¶13} I respectfully dissent because I would find that the indictment was defective in this case. Although at first glance it would appear that *Horner* and *Buehner* are determinative of this case, I believe that both cases are distinguishable from the circumstances of this case.

{¶14} In *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, the Supreme Court of Ohio considered whether an indictment was defective when it tracked the language of the criminal statute but failed to identify a culpable mental state. Id. at ¶¶18-19. In answering that question in the negative, the *Horner* Court held that "[a]n 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." Id. at paragraph one of the syllabus. Thus, the holding in *Horner* is precisely tailored to the specific question presented in that case.

{¶15} The majority correctly points out that *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, stands for the proposition that an indictment that follows the language of the charged offense and identifies the predicate offense by statute number is sufficient and need not include the elements of the predicate offense. Id. at syllabus. However, *Buehner* differs significantly from this case because *Buehner* involved one single predicate offense, which was identified in the indictment. Id. at ¶12. In the case before us, Mr. Vaughn was not charged with a crime that had one single predicate offense that was identified in the indictment. Rather, he was charged with a crime that had over 30 possible predicate offenses.

{¶16} In *Buehner*, the defendant was charged with ethnic intimidation under R.C. 2927.12. Id. at ¶1. The predicate offense for ethnic intimidation is aggravated menacing as set forth in R.C. 2903.21. Id. The ethnic intimidation statute specifically identifies R.C. 2903.21 in the text of the statute. R.C. 2927.12(A). Buehner's indictment specifically tracked the language of the ethnic intimidation statute, which included a specific reference to R.C. 2903.21. *Buehner* at ¶12. Buehner moved to dismiss the indictment because of the failure to list the elements of aggravated menacing. Id. at ¶2. The Supreme Court of Ohio rejected Buehner's argument; reasoning that the state's failure to list the actual elements of the predicate offense of aggravated menacing in the indictment did not prevent him from receiving adequate notice of the charges against him. Id. at ¶12.

{¶17} Unlike the case before us, in *Buehner,* the parties were arguing about whether the state had to list each element of *one* underlying offense identified in an indictment that precisely tracked the language of the offense itself and identified the predicate offense by its statute number. Id. at ¶6. There was no question that upon indictment, Buehner knew that the predicate offense was aggravated menacing. In this case, the issue is not whether the state had to list the

elements of one identifiable predicate offense; rather, it is whether the state must actually identify *the* predicate offense in the indictment. In this case, Mr. Vaughn was charged with committing "any theft offense," as defined in R.C. 2913.01(K). There are over 30 possible predicate theft offenses defined in R.C. 2913.01(K), which each contain dramatically different elements. Thus, unlike *Buehner*, in examining the indictment in this case, it was impossible for Mr. Vaughn to have notice of the actual predicate offense for which he was charged and hence, impossible to have notice of the material and essential facts which identify the crime upon which Mr. Vaughn was indicted. See *Harris v. State* (1932), 125 Ohio St. 257, 264.

{¶18} Notably, *Buehner* was not a unanimous opinion. The late Chief Justice Moyer and Justice Pfeiffer dissented. See *Buehner* at ¶¶14-18 (Moyer, C.J., dissenting and Pfeiffer, J., concurring in the dissent). Although the dissent agreed that Buehner may have had "notice" of the charges against him, an additional constitutional protection was at issue, namely, the requirement that the grand jury consider every element of the offense before issuing an indictment. Id. at ¶14. As Chief Justice Moyer noted,

> "the grand-jury requirement found in Section 10, Article I of the Ohio Constitution does not merely guarantee notice and guard against double jeopardy. Section 10 also requires a grand jury to consider every element of a charged offense before issuing an indictment. When an indictment refers to a predicate offense only by statute number, uncertainty exists as to whether the grand jury considered the elements of the underlying offense. Because the indictment in this case offers no support that the grand jury considered—or even was aware of—the elements of R.C. 2903.21, I dissent from the decision of the majority." (Internal citation and quotation omitted.) Id.

Chief Justice Moyer further cautioned that in considering the sufficiency of the indictment, "[t]he grand jury was required to find probable cause that Buehner violated R.C. 2927.12 *and* 2903.21[.]" (Emphasis in original.) Id. at ¶16. Thus, "the elements of R.C. 2903.21 necessarily constitute[ed] essential elements of the crime[.]" Id. However, "[t]hese elements were not

contained in the indictment, and there [was] no evidence that the grand jury found probable cause for each of them." Id.

{¶19} It is true that as with any indictment, the accused can seek a bill of particulars providing more factual specificity as to a charge. However, a bill of particulars does not cure the inherent constitutional infirmity that is present in this case and as identified by the *Buehner* dissent. Grand jury indictments are secret and the accused can never know what transpired during that process. In this case, the grand jury could have indicted based upon a finding of probable cause that Mr. Vaughn committed the offense of misuse of credit cards as defined in R.C. 2913.21. See R.C. 2913.01(K)(1). However, the State could proceed to try the case on the basis of tampering with records as defined in R.C. 2913.42—an offense whose facts may not have been considered by the grand jury. See id. The constitutional violation is patent: the grand jury would have considered the elements of one predicate offense as the basis of indicting the accused, while the state could actually seek a conviction based upon a predicate offense that was not brought before the grand jury and upon which the grand jury did not find probable cause. That risk was not present in *Buehner* where there was only one possible predicate offense that was specifically identified by statute number in the indictment. See *Buehner* at ¶6.

{¶20} Accordingly, under the circumstances presented in this case, I would find that the indictment was defective because the State should have identified the predicate theft offense that formed the basis of the indictment.

APPEARANCES:

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