2-24-2000

Motion of Defendant State of Ohio for Limiting Instruction

William D. Mason
Cuyahoga County Prosecutor

Kathleen A. Martin
Cuyahoga County Assistant Prosecutor

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CHARLES MURRAY, Administrator of the Estate of Samuel H. Sheppard,	)	CASE NO. 312322
	)	
	)	JUDGE RONALD SUSTER
Plaintiff,	)	
v.	)	MOTION OF DEFENDANT STATE OF OHIO FOR LIMITING INSTRUCTION
	)	
STATE OF OHIO,	)	
	)	
Defendant.	)	

Now comes Defendant State of Ohio who, pursuant to Evid. R. 105, moves this Court to provide a limiting instruction at the commencement of proceeding this day as to the limited purpose for which the evidence regarding the conviction of Richard Eberling for the murder of Ethel Durkin has been admitted.

Evid. R. 105 reads as follows:

> When evidence which is admissible ... for one purpose but not admissible ... for another purpose, the court, upon request of a party, shall restrict the evidence to its proper scope and instruct the jury accordingly.

The language of the rule is mandatory. Evid. R. 105 serves as a safeguard to attempt to avoid confusion and undue prejudice to a party when "other acts" evidence is introduced for a limited purpose under Evid. R. 404(B), despite the prohibition against its introduction as "propensity" evidence.

The operation of the Evid R. 105 was explained in State v. Valentine (Ohio App.2 Dist. 1992), Case No. 13192, unreported (attached). There, the Court explained:

> A part is entitled under the Rule to a limiting instruction directed to the jury whenever evidence might be misapplied by the jury in reaching its verdict. Professor Weissenberger has commented that, "the Rule imposes mandatory duty upon the court to issue the instruction upon such a request." Weissenberger, Ohio Evidence, Vol. 1, Section 105.2.
>
> The unfair prejudice inherent in evidence of other wrongdoing, particularly evidence of a prior criminal conviction, is that a jury will infer from it a propensity of the accused to commit the crime charged. That, clearly, is an improper inference ....

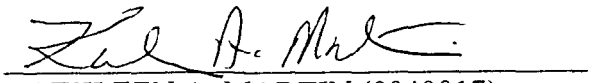
On February 12, 2000, this Court entered an order regarding "other acts" of Richard Eberling. This Court ordered, "... no mention shall be made of these 'other acts' without the prior approval of the court."

The State of Ohio has been prejudiced by the introduction of the fact that Eberling has been convicted of another murder. The jury should be instructed that the re is no connection to be made between the murder of Marilyn Sheppard and the murder of Ethel Durkin and that Eberling's conviction is not evidence that he killed Marilyn Sheppard.

The State of Ohio's proposed limited instruction is attached.

Respectfully submitted,

WILLIAM D. MASON, Prosecuting Attorney
Of Cuyahoga County, Ohio



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CERTIFICATE OF SERVICE

A copy of the foregoing Motion of Defendant, State of Ohio, for Limiting Instruction was sent by ordinary United States Mail, postage prepaid, to Terry H. Gilbert, 1370 Ontario Street, Cleveland, Ohio 44113, and also via facsimile transmission to Terry H. Gilbert at (216) 621-0427, this 24th day of February, 2000.

KATHLEEN A. MARTIN (0040017)
Litigation Manager, Civil Division

DEFENDANT'S PROPOSED LIMITING INSTURCTION

Ladies and gentlemen of the jury, yesterday I allowed testimony that Richard Eberling was convicted in 1989 of the murder of Ethel Durkin. That crime occurred in 1984, nearly 30 years after the murder of Marilyn Sheppard.

I permitted that testimony for the limited purpose of allowing Kathie Dyal to explain why, according to her, she waited so long to come forward to report the conversation she says she had with Richard Eberling regarding Marilyn Sheppard.

I instruct you that the fact that Eberling was convicted of that other crime is not evidence that Richard Eberling killed Marilyn Sheppard. I advise you that you may not make any conclusion or draw any inference that the murder of Ethel Durkin is in any way related to murder of Marilyn Sheppard 30 years earlier.

STATE of Ohio, Plaintiff-Appellee,
v.
Patrick VALENTINE, Defendant-Appellant.

No. 13192.
Court of Appeals of Ohio, Second District, Montgomery County.
June 19, 1992.

Lorine M. Reid, Asst. Pros. Atty., Dayton, for plaintiff-appellee.

David L. Hall, Dayton, for defendant-appellant.

OPINION

GRADY, Judge.

**1 On November 4, 1991, Patrick Valentine was convicted of Aggravated Trafficking in Cocaine, in violation of R.C. 2925.03(C)(1). Previously, on May 16, 1990, Valentine had been convicted of Aggravated Drug Trafficking, in violation of R.C. 2925.03(A)(1). Pursuant to 2925.03(C)(1), the prior conviction elevated the subsequent offense from a third degree felony to a second degree felony.

Valentine argues that the trial court erred in permitting evidence of his prior conviction to be presented to the jury, or, in the alternative, in failing to give a cautionary instruction to the jury regarding the prior conviction. Valentine also argues that he was prejudiced by ineffective assistance of counsel.

We find that the trial court erred in failing to give the jury a cautionary instruction requested by Valentine, which was pertinent to the issues and a correct statement of the law. The conviction will be reversed and the case remanded for a new trial.

I

On August 28, 1991 the Dayton Police Department conducted a "sting" operation along a portion of Highview Avenue. Detective Mauch, dressed in street clothes, drove through the area several times in an unmarked car. Mauch was wired so that any transactions could be recorded and monitored by other detectives. Mauch described several individuals, including Valentine, over the wire. On his first pass by Valentine the two men made eye contact. On the second pass Mauch stopped his car. Valentine approached Mauch and asked what he was "looking for". Mauch replied that he wanted a "twenty dollar rock" of crack cocaine.

Valentine got into Mauch's car and the two rode about for several minutes. Valentine eventually handed Mauch a rock of crack cocaine and Mauch offered Valentine a twenty dollar bill. Valentine told Mauch to lay the money on the ground and drive away. Mauch did so, and through his rear view mirror saw Valentine pick up the money. As Mauch drove away he made a radio report of the events to the other detectives on the team.

About five minutes later other police officers entered the area and, based on the information from Mauch, approached Valentine and several other men and asked them for identification. They detained Valentine and patted him down. The pat down produced a crack pipe. Valentine was arrested, searched more thoroughly, and taken to jail.

Valentine was charged with Aggravated Trafficking, in violation of R.C. 2925.03(C)(1). He was found guilty and sentenced to four to fifteen years incarceration.

Valentine has filed a timely notice of appeal. He presents three assignments of error.

II

Appellant's first assignment of error, presented in the form of a question, states:

IS THE PRIOR CONVICTION FOR (sic) LANGUAGE OF O.R.C. 2925.03(C)(1) AN ELEMENT OF THE OFFENSE CHARGED UNDER 2925.03(A)(1)?

R.C. 2925.03 provides:

(A) No person shall knowingly do any of the following:

(1) Sell or offer to sell a controlled substance in an amount less than the minimum bulk amount;

* * *
* * *

**2 (C) If the drug involved is any compound,

mixture, preparation, or substance included in schedule I, with the exception of marihuana, or in schedule II, whoever violates this section is guilty of aggravated trafficking.

(1) Where the offender has violated division (A)(1) of this section, aggravated trafficking is a felony of the third degree, except that, *if the offender ... has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the second degree.* (Emphasis supplied).

Valentine argues that his prior conviction for aggravated trafficking is not an element of the offense with which he was charged but is, rather, a penalty enhancement. For this reason, Valentine argues, evidence of the prior conviction should not have been presented to the jury, but should have been considered only by the judge for sentencing purposes.

As this court stated recently in *State v. Harowski* (September 20, 1991), Mont.App. No. 12232, unreported:

The issue of when a prior offense is a necessary element of a subsequent offense was clearly resolved by the Ohio Supreme Court in *State v. Allen* (1987), 29 Ohio St.3d 53. In *Allen,* the court examined the precedent cases of *State v. Gordon* (1971), 28 Ohio St.2d 45 and *State v. Henderson* (1979), 58 Ohio St.2d 171 and reaffirmed their holdings that where a prior conviction transforms the offense to be tried by increasing its degree, the prior conviction is an essential element which must be pled and proved by the State. The court further held that this requirement is limited to those cases in which the prior conviction elevates the degree of the subsequent offense, and does not apply in cases in which the prior conviction merely enhances the penalty for the subsequent offense.

In order to determine whether (Appellant's) prior drug conviction elevated the degree of the drug trafficking offense( ) in question, we need only turn to the statute under which (Appellant) was charged. Revised Code 2925.03(C)(1) states: 'Where the offender has violated division (A)(1) of this section, aggravated trafficking is a felony of the third degree, and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the second degree.' Thus, (Appellant's) prior drug conviction would, under this statute, elevate his subsequent offense( ) from (a) felon(y) of the third degree to (a) felon(y) of the second degree. This resulting transformation, according to *Allen,* mandated that the prior conviction be pled and proven by the State as an element of the subsequent offense( ).

In accordance with the language of R.C. 2925.03(C)(1) and the rule of *Harowski,* we find that the trial court did not err in determining that Valentine's prior drug conviction was an element of the charge he faced at trial.

The first assignment of error is overruled.

III

Appellant's second assignment of error states:

**3 WHETHER THE COURT BELOW ERRED IN PERMITTING THE JURY TO RECEIVE EVIDENCE OF DEFENDANT'S PRIOR CONVICTION?

Valentine makes several distinct arguments under this assignment of error. He first argues that, even assuming the prior conviction is an element of the offense charged, the trial court erred by submitting evidence of the prior conviction to the jury. We do not agree. The jury was required to find beyond a reasonable doubt that Valentine had previously been convicted of Aggravated Trafficking. Evidence must be presented to the jury for that purpose and the trial court did not err in admitting such evidence.

Valentine also argues that a Termination Entry was not competent to prove the prior conviction and that it should not have been admitted in evidence. He contends that a "certified judgment entry" is required to prove a prior conviction, pursuant to R.C. 2941.142. However, that statute concerns proof of prior convictions for purposes of penalty enhancement. Its requirements are not applicable to proof of an element of the offense. Furthermore, the use of a certified judgment entry to show a prior conviction is permissive, not mandatory, under R.C. 2941.142. Its use was proper here.

Valentine's last argument under this assignment is that the trial court erred in declining to give a cautionary or limiting instruction to the jury concerning evidence of his prior offense. Valentine had requested the following instruction:

Evidence has been presented that Patrick Valentine was previously convicted of a felony drug abuse offense. That evidence is not proof that Patrick Valentine sold "crack" cocaine on August 28, 1911.

You must make no inference that Patrick Valentine committed the offense with which he is presently charged based upon his prior conviction.

Every criminal defendant is "entitled to a fair trial, and a requisite part of that fair trial is to have a fairly instructed jury." *State v. Nelson* (1973), 36 Ohio St.2d 79, 85. Crim.R. 30(B) sets forth the procedure for delivering cautionary instructions to the jury:

At the commencement and during the course of the trial, the court may give the jury cautionary and other instructions of law relating to trial procedure, credibility and weight of the evidence, and the duty and function of the jury and may acquaint the jury generally with the nature of the case.

Action by the trial court pursuant to Crim.R. 30(B) is discretionary and should not be disturbed on review unless the court abuses its discretion. *State v. Frost* (1984), 14 Ohio App.3d 320. In a criminal context, an abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unlawful. *State v. Adams* (1980), 62 Ohio St.2d 151.

The scope of the trial court's discretion under Crim.R. 30(B) is substantially curtailed when the requested cautionary instruction concerns not procedure, the regularity and validity of which is supported by a rebuttable presumption, but, instead, concerns an issue of evidence. Evid.R. 105 provides:

**4 When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request of a party, shall restrict the evidence to its proper scope and instruct the jury accordingly.

The *Staff Note* to Rule 105 observes that it has a close relationship to Evid.R. 403, which permits exclusion of otherwise competent evidence "if to admit the evidence would cause the 'dangers of unfair prejudice.' " Evid.R. 105 does not contemplate exclusion of evidence. Here, evidence of the Appellant's prior conviction could not excluded as it was required to prove an element of the offense alleged. However, a proper cautionary instruction could be given limiting the jury's consideration of the prior conviction.

A party is entitled under the Rule to a limiting instruction directed to the jury whenever evidence might be misapplied by the jury in reaching its verdict. Professor Weissenberger has commented that, "the Rule imposes mandatory duty upon the court to issue the instruction upon such a request." Weissenberger, Ohio Evidence, Vol. 1, Section 105.2.

The unfair prejudice inherent in evidence of other wrongdoing, particularly evidence of a prior criminal conviction, is that a jury will infer from it a propensity of the accused to commit the crime charged. That, clearly, is an improper inference as it is inconsistent with the right of the accused to a fair trial on those charges. An accused who requests an instruction against such an inference is entitled to have it. If "the requested instructions contain a correct, pertinent statement of the law and are appropriate to the facts they must be included, at least in substance, in the court's charge to the jury." *State v. Nelson, supra. Cincinnati v. Epperson* (1969), 20 Ohio St.2d 59.

The instruction requested by Defendant-Appellant Valentine is appropriate to the facts of the case and is a correct and pertinent statement of the law. Each element of the offense charged must be proved beyond a reasonable doubt. The jury may make reasonable inferences from the evidence before it. However, the functional elements of the alleged crime, a sale of crack cocaine on August 28, 1991, are not directly proved by the fact of a prior conviction, and no reasonable inference can be drawn from the prior conviction to prove the functional elements circumstantially. Any inference that the accused committed those functional elements or acts out of a propensity to commit crime is an unreasonable inference that denies the accused his right to a fair trial on the discrete offense charged. Therefore, a cautionary instruction to the jury that they may not make such an inference is warranted, and is mandated by Evid.R. 105 if requested.

The particular instruction requested is, perhaps, overly broad in cautioning that the jury may not "infer" commission of the charged crime from the prior conviction. The prior conviction is an element of the crime charged, so that inference is proper. However, the purpose of the cautionary instruction may be met by revising the third sentence to state: "You must make no inference that Patrick Valentine sold crack cocaine on August 28, 1991, based upon his prior conviction." Alternatively, the third sentence may be omitted to preserve the meaning and value of the instruction. On these facts, and in view of the extreme prejudice resulting from evidence of the prior conviction, we find that the trial court erred

when it refused to give the requested instruction, at least in substance.

**5 An error may be harmless if other evidence of guilt is so overwhelming that guilt may yet be found beyond a reasonable doubt. We cannot find the other evidence of guilt overwhelming in this case. The alleged sale was a one-on-one transaction. Other officers heard parts by radio, but the transmission was interrupted and incomplete. The Defendant was found after arrest to have a "crack pipe", which Officer Mauch testified he saw during the sale transaction. While that evidence supports Mauch's credibility, it does not prove the alleged sale of cocaine. The evidence, while compelling, is not such that we can find the error harmless beyond a reasonable doubt.

To the extent it argues that the requested jury instruction regarding Valentine's prior conviction was required, Appellant's second assignment of error is sustained.

IV

Appellant's third assignment of error states:

WHETHER DEFENDANT'S RIGHTS WERE PREJUDICED DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL?

Valentine argues that three specific actions of trial counsel amounted to ineffective assistance. To establish a violation of the Sixth Amendment on the grounds of ineffective assistance of counsel, a criminal defendant must show (1) that counsel's performance was deficient and (2) that counsel's deficient performance resulted in prejudice. *State v. Lytle* (1976), 48 Ohio St.2d 391; *Strickland v. Washington* (1984), 466 U.S. 668.

Valentine first argues that his trial counsel should have filed a motion to suppress evidence of the crack pipe found on him when he was "patted down" by officers. He relies on *Terry v. Ohio* (1968), 392 U.S. 1, which requires a reasonable and articulable suspicion of criminal activity and a belief that the suspect may be armed and a danger to the officer as a prerequisite to the "pat down". Valentine argues that the officers who searched him had no knowledge or basis to suspect him of criminal activity or that he was dangerous. The State argues that the officers relied on information from Officer Mauch concerning the sale transaction, and that the "investigative stop" of Valentine and several other men was simply a pretextual means to take Valentine into custody for the trafficking offense without alerting other subjects of the existence of the "sting" operation. Apparently, such encounters are not out of the ordinary events in this high crime area.

Valentine's reliance on *Terry v. Ohio, supra,* is misplaced. The search of Valentine was not a "pat down" pursuant to a *Terry* stop. It was a search incident to his arrest. Valentine was stopped and searched based on evidence that he was the person who had a few minutes earlier sold crack cocaine to Detective Mauch. Valentine had been identified by Detective Mauch over his wire and by radio; other officers then stopped and arrested him. Information obtained by officers engaged in a common investigation may be used by one of them as probable cause for an arrest. *State v. Henderson* (1990), 51 Ohio St.3d 54. A search incident to a lawful arrest is, of course, proper. *State v. Kuns* (October 2, 1990), Mont.App. No. 11823, unreported; *Chimel v. California* (1969), 395 U.S. 752. on the argument presented, we conclude that trial counsel was not deficient in his representation because he did not file a motion to suppress.

**6. Second, Valentine argues that trial counsel was ineffective because he was unprepared for cross-examination of Detective Mauch. He first claims that trial counsel failed to move to strike after a question calling for hearsay was objected to but the answer was given. Valentine cites to page 18 of the Transcript, wherein Officer Mauch was asked whether in his experience marked money given to a subject is sometimes not found on him after arrest. An objection was made and sustained, but Mauch answered, "Yes". It was not hearsay, however, and Valentine has not demonstrated how the answer could have prejudiced his case.

Valentine also cites pages 34 and 38 of the transcript. He makes no attempt to elucidate for this court, however, any failures trial counsel's performance at these points, other than to state generally that failure to prepare for cross examination and failure to object to hearsay testimony amounts to ineffective assistance of counsel. No hearsay evidence was given at either of these passages of the transcript. Again, the record does not demonstrate that trial counsel was unprepared for cross examination.

Valentine also asserts that trial counsel failed to move for acquittal pursuant to Crim.R. 29 at the close of the State's evidence. A motion for acquittal is not required. There is no basis in the record from which

to conclude that a motion would have resulted in an acquittal.

The third assignment of error is overruled.

V

CONCLUSIONS

Having sustained Appellant's second assignment of error upon a finding that the trial court erred in failing to give a requested jury instruction, and because we cannot find that the error was harmless beyond a reasonable doubt, the judgment of conviction will be reversed and the case remanded for a new trial.

FAIN, P.J., and WOLFF, J., concur.