

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO

:

Plaintiff-Appellee

CASE NO. : C.A.
2007 CA 71
2008 CA 55

v.

: T.C. NO. 01 CR
0638

01 CR 0128

CHARLES E. DAVIS

:

(Criminal appeal from
Common Pleas Court)

Defendant-Appellant

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OPINION

Rendered on the 4th day of September, 2009.

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DONOVAN, P.J.

{¶ 1} Defendant-appellant Charles E. Davis appeals from his conviction and sentence for involuntary manslaughter with a firearm specification, and tampering with

evidence. Davis filed notice of the instant appeal with this Court on June 25, 2008.

I

{¶ 2} We set forth the history of the case in *State v. Davis* (March 9, 2007), Clark App. No. 2006-CA-69, 2007-Ohio-1030 (hereinafter “*Davis IV*”), and repeat it herein in pertinent part:

{¶ 3} “Davis was indicted in 2001 on two counts of Murder, one count of Involuntary Manslaughter, one count of Tampering with Evidence, one count of Having Weapons Under a Disability, one count of Receiving Stolen Property, and one count of Trafficking in Drugs. The Murder and Involuntary Manslaughter counts all involved the same victim, and all contained firearm specifications. In 2002, a new indictment added an eighth count, for Involuntary Manslaughter, involving the same victim.

{¶ 4} “The trial court sustained Davis’s motion for a judgment of acquittal on the Receiving Stolen Property and Trafficking in Drugs counts. The jury acquitted Davis of the two Murder counts, but returned verdicts of guilty as to the remaining counts. There was, however, a defect in the form of the verdict of guilty on the eighth count, for Involuntary Manslaughter. Over objection, about two hours after the jury had been discharged, it was reconvened, and it was given a proper verdict form as to the eighth count. It again returned a verdict of guilty on this count.

{¶ 5} “A judgment of conviction was entered, and Davis was sentenced to a term of incarceration totaling nineteen years. Davis appealed. We reversed his conviction on the eighth count, holding that the trial court erred by re-convening the jury after it had been discharged. We also reversed the consecutive sentences.

State v. Davis, Clark App. No. 2002-CA-43, 2003-Ohio-4839 (hereinafter '*Davis I*'). Upon the State's application for reconsideration, we remanded the eighth count for re-trial.

{¶ 6} "Upon remand, Davis waived his right to a jury trial, and the parties agreed to submit the eighth count to the trial court solely upon the transcripts and exhibits from the first trial. The trial court found Davis guilty of the eighth count – Involuntary Manslaughter as a first-degree felony. Over Davis's objection, the State was allowed to elect to have Davis sentenced on the eighth count, rather than the third count, which charged Involuntary Manslaughter as a third-degree felony. Davis was sentenced on the eighth count, which had a firearm specification, to ten years, plus three years for the firearm specification, for a total of thirteen years, to be served concurrently with the sentences previously imposed for Tampering with Evidence and Having Weapons Under a Disability. The total sentence was thirteen years, since the other sentences did not exceed the sentence for Involuntary Manslaughter with a firearm specification.

{¶ 7} "Davis again appealed. This time he was successful in obtaining a reversal and discharge as to the eighth count.

{¶ 8} "When the case was remanded to the trial court for re-sentencing, a new judge had succeeded the original trial judge. At a hearing at which no additional evidence was submitted, the new trial judge imposed a sentence of five years on the third-degree Involuntary Manslaughter conviction (the third count of the original indictment), plus a three-year sentence for the firearm specification, for a total of eight years. The trial court imposed a sentence of five years on the

Tampering with Evidence conviction, to be served consecutively to the eight-year sentence for Involuntary Manslaughter with the firearm specification. A twelve-month sentence was imposed for Having Weapons Under a Disability, but this sentence was ordered to run concurrently with the other sentences. The total sentence imposed, then, was once again thirteen years.”

{¶ 9} “Davis appealed the sentence and argued that the trial court was without authority to change the previously concurrent sentences into consecutive sentences. Among other issues, he further argued that the imposition of maximum, consecutive sentences violated the United States Supreme Court’s holding in *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531.

{¶ 10} “In *Davis III*, we concluded that the trial court was not required to make findings of fact when it previously imposed concurrent sentences. Thus, the concurrent sentences were the result of the exercise of discretion, rather than the necessary result of required findings of fact, and Double Jeopardy was not implicated. However, pursuant to *State v. Foster* (2006), 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, we reversed the consecutive sentences imposed by the trial court and remanded for re-sentencing.

{¶ 11} “At the re-sentencing hearing on July 11, 2006, the trial court increased the previous sentence of thirteen (13) years to fourteen (14) years by ordering that the sentences for each individual offense be served consecutively. After the trial court imposed the sentence, defense counsel asked for and was granted permission to object to the increased sentence. As defense counsel was articulating his objection, the sentencing judge abruptly left the bench without ruling

on said objection.”

{¶ 12} In *Davis IV*, we ultimately concluded that the trial court erred when it imposed a longer sentence on remand. On the authority contained in Section 3(B)(2), Article IV of the Ohio Constitution and R.C. § 2953.08(G)(2)(b), we imposed a thirteen year sentence on Davis, and remanded the case to the trial court “solely for the execution of [the] modified sentence.”

{¶ 13} On remand, the trial court refused to follow our sentencing order and reimposed a fourteen year sentence. Davis subsequently filed an appeal of the trial court’s decision, as well as a mandamus action in which the trial judge was named the respondent. Following negotiations regarding the mandamus action, the trial court imposed the thirteen year sentence we ordered in *Davis IV* in an entry filed May 28, 2008.

{¶ 14} It is from this judgment which Davis now appeals.

II

{¶ 15} Because they are interrelated, Davis’ first and second assignment of errors will be discussed together:

{¶ 16} “BECAUSE COUNT III OF THE INDICTMENT FAILED TO ALLEGE A CULPABLE MENTAL STATE FOR THE COMMISSION OF THE OFFENSE (INVOLUNTARY MANSLAUGHTER AS THE RESULT OF COMMITTING A MISDEMEANOR) THE INDICTMENT WAS DEFECTIVE AND THE APPELLANT’S CONVICTION ON THIS COUNT MUST BE REVERSED.”

{¶ 17} “THE CONSECUTIVE SENTENCES IMPOSED ON APPELLANT ARE CONTRARY TO LAW.”

{¶ 18} In his first assignment, Davis contends that the indictment was defective because it specified neither a culpable mental state nor the underlying offense that Davis was charged with which resulted in the death of the victim, Randall Powers. Davis relies on the Ohio Supreme Court's holding in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 (hereinafter "*Colon I*"), which addressed "the need for a mens rea statement in indictments, and whether error in this regard is structural or simply subject to a plain error analysis."

{¶ 19} Davis notes that he first argued in *Davis I* that the indictment was fatally defective. We, however, ultimately held that the indictment was not defective and overruled that particular assignment of error. *Davis I*, 2003-Ohio-4839. Davis concedes that, in general, the law of the case doctrine would apply, and absent any extraordinary circumstances, the decision of this Court regarding the sufficiency of the indictment would remain binding on any trial and appellate level courts who subsequently reviewed the case. Davis, however, asserts that the Supreme Court's holding in *Colon I* constitutes an extraordinary circumstance which requires us to revisit the issue of whether Davis' indictment was fatally defective. We disagree as this case remains governed by the law of the case doctrine. The original language in Count III of the indictment stated that:

{¶ 20} "on or about September 17, 2001, at Clark County, Ohio Charles E. Davis, did cause the death of another, to-wit: Randall D. Powers as a proximate result of the offender committing or attempting to commit a misdemeanor in violation other than a violation of any Section contained on Title XLV (45) that is a minor misdemeanor or a municipal ordinance (sic) the (sic) is substantially equivalent to

any section contained in Title XLV (45) of the Revised Code that is a minor misdemeanor in violation of Ohio Revised Code Section 2903.04(B).”

{¶ 21} The State filed a bill of particulars, indicating that “[i]n addition to the information contained in Count III of the indictment the defendant used a norinco (sic) model assault rifle while under the influence of alcohol or a drug of abuse or negligently caused the death of Randall D. Powers.” The State subsequently filed a motion to amend the bill of particulars to substitute the word “recklessly” where the word “negligently” appeared. The trial court sustained the State’s motion.

{¶ 22} The Ohio Supreme Court explained the law-of-the-case doctrine in *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, stating:

{¶ 23} “[T]he doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.

{¶ 24} “The doctrine is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results. However, the rule is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution.

{¶ 25} “In pursuit of these goals, the doctrine functions to compel trial courts to follow the mandates of reviewing courts. Thus, where at a rehearing following remand a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court's determination of the applicable law.” (Citations omitted.) *Nolan*, supra at 3.

{¶ 26} However, the *Nolan* court held that although an inferior court may not generally disregard the mandate of a superior court in a prior appeal of the same case, it may do so in “extraordinary circumstances, such as an intervening decision by the Supreme Court.” *Id.* at 1.

{¶ 27} The Ohio Supreme Court held in *Colon I* that when an indictment for Aggravated Robbery failed to include the mens rea element of the crime, the error is a structural error. *Colon I*, 118 Ohio St.3d at 30; *State v. Perry* (2004), 101 Ohio St.3d 118, *Arizona v. Fulminante* (1991), 499 U.S. 279, 309-310, 111 S.Ct. 1246, 113 L.Ed.2d 302. A structural error is a constitutional defect because it affects the framework within which the trial proceeds. *Colon I*, 118 Ohio St.3d at 30. Furthermore, a structural error permeates the trial from beginning to end putting into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence. *Id.* at 31. *Colon I* held generally that when an indictment fails to charge a mens rea element of a crime and the defendant fails to raise that defect in the trial court, the defendant has not waived the defect in the indictment. *Id.* at 35.

{¶ 28} On a motion to reconsider *Colon I*, the Supreme Court narrowed the holding of *Colon I*. The Court held that *Colon I* was confined to the facts in that case. *State v. Colon* (2008), 119 Ohio St.3d 204, 206, 2008-Ohio-3749. (*Colon II*). In *Colon II*, the court further held that “[i]n a defective-indictment case that does not result in multiple errors that are inextricably linked to the flawed indictment such as those that occurred in *Colon I*, structural-error analysis would not be appropriate.” *Id.* at 205. The Court emphasized that structural-error analysis to a defective

indictment is appropriate only in rare cases in which multiple errors follow the defective indictment. *Id.* Finally, *Colon II* ruled that the ruling in *Colon I* was to be prospective in nature and applied only to those cases pending on the date *Colon I* was announced. *Id.*

{¶ 29} As stated previously, we specifically held in *Davis I* that the indictment was not defective. Moreover, the record fails to disclose evidence of any subsequent trial errors due to the language in the indictment. We also note that, unlike *Colon I*, the instant case does not involve a robbery. Rather, *Davis* would have us apply the holding in *Colon I* to his indictment for involuntary manslaughter.

{¶ 30} The culpable mental state of involuntary manslaughter is supplied by the underlying offense. *State v. Cutts*, Stark App. No. 2008CA000079, 2009-Ohio-3563. We stated in *Davis I*, that “Count III, itself, contains only one charged offense – involuntary manslaughter as the proximate result of the offender attempting to commit a misdemeanor. The misdemeanor is not specified, but that is not a problem, because manslaughter indictments do not need to plead the specific felony or misdemeanor forming the basis for the charge.” (Citations omitted).

{¶ 31} Moreover, any failure of the indictment to specify the underlying offense was remedied by the inclusion of that information in the bill of particulars. *State v. Skatzes*, 104 Ohio St.3d 195, 201, 2004-Ohio-6391. Count III of *Davis*’ indictment correctly tracks the language as it appears in R.C. § 2903.04(B). The amended bill of particulars indicated that “[i]n addition to the information contained in Count III of the indictment the defendant used a norinco (sic) model assault rifle while under the influence of alcohol or a drug of abuse or recklessly caused the

death of Randall D. Powers.” With the inclusion of “recklessly” into the bill of particulars, Davis was put on notice of the underlying offense, as well as the mental element of the offenses. Thus, the Supreme Court’s holding in *Colon I* does not apply, and our holding in *Davis I* regarding the sufficiency of the indictment remains the law of the case. Finally, notably this last remand was limited solely to the execution of our modified sentence; thus, this appeal is governed by the law of the case doctrine.

{¶ 32} In his final assignment, Davis argues that the consecutive sentences imposed by the trial court are contrary to law and a violation of his constitutional rights. Davis’ argument in this regard is based on his assertion that the recently decided U.S. Supreme Court case of *Oregon v. Ice* (2009), – U.S. –, 129 S.Ct. 711, 172 L.Ed.2d 517, has effectively overruled the Ohio Supreme Court’s decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. We need not address this argument given our limited remand for execution of sentence as modified by this Court.

{¶ 33} Both of Davis’ assignments of error are overruled.

IV

{¶ 34} All of Davis’ assignments of error having been overruled, the judgment of the trial court is affirmed.

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FAIN, J. and GRADY, J., concur.

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