

[Cite as *State v. Duvall*, 2009-Ohio-6580.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 2008-CA-80
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2008-CR-491
v.	:	
	:	
TIFFANY DUVALL	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 11th day of December, 2009.

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BROGAN, J.

{¶ 1} A grand jury indicted Tiffany Duvall in July 2008 for violating R.C. 2923.02(A)(2) and R.C. 2913.02(A)(1), complicity to commit theft from an elderly person. Duvall filed a motion the following month under R.C. 2951.041, which allows a trial court to order a defendant undergo drug treatment in lieu of conviction.

The trial court ordered Duvall to be evaluated by the Forensic Psychiatric Center for Western Ohio. After evaluating her, a clinical psychologist at the Center recommended to the court that it deny Duvall's motion because she did not need treatment and her drug use did not appear to be a factor in the criminal activity for which she was indicted. The trial court adopted the psychologist's recommendation and overruled her motion. Duvall pleaded no contest on the first day of October, and the court sentenced her to five years of community control.

{¶ 2} Duvall assigns a single error to the court's decision to overrule her motion for intervention in lieu of conviction. She contends that the psychologist who evaluated her was wrong that she does not need treatment and was wrong that her drug use was not a factor in her theft offense. The state points out that even if the psychologist were wrong, Duvall was not eligible for intervention in lieu of conviction because the alleged victims of her crime were over sixty-five years of age, which means one of the statute's conditions for granting her motion was not satisfied. We agree with the state.

{¶ 3} We commit decisions regarding whether to grant a motion for drug treatment in lieu of conviction to the sound discretion of the trial court. *State v. Drager*, 167 Ohio App.3d 47, 2006-Ohio-2329, at ¶8 (Citation omitted). "In order to find an abuse of that discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law of judgment." *Id.* We conclude that the trial court's decision to overrule Duvall's motion was not an abuse of discretion.

{¶ 4} Section 2951.041 of the Revised Code gives a trial court the option of

sending a defendant to drug treatment if “the court has reason to believe that drug or alcohol usage by the offender was a factor leading to the offender’s criminal behavior.” R.C. 2951.041(A)(1). Before the court may choose this option, the nine conditions identified by paragraph (B) of this section must be satisfied. *Drager*, at ¶9 (“The nine factors limit the trial court’s discretion to grant intervention in lieu of conviction by identifying individuals * * * who are ineligible.”). Condition seven requires the alleged victim of the defendant’s offense to be under sixty-five years of age. R.C. 2951.041(B)(7) (“An offender is eligible for intervention in lieu of conviction if the court finds all of the following: * * * The alleged victim of the offense was not sixty-five years of age or older.”). The General Assembly has seen fit to limit the trial court’s discretion by making it unlawful for the court to grant a motion for treatment in lieu of conviction when the alleged victim is sixty-five years of age or older. It has in effect removed the court’s discretion in such a situation—the situation we find here.

{¶ 5} We infer that the alleged victims of Duvall’s theft (the principal defendant’s grandparents) were sixty-five years of age or older. We note that the theft statute says, “if the victim of the [theft] offense is an elderly person or disabled adult, a violation of this section is theft from an elderly person or disabled adult.” R.C. 2913.02(B)(3). We read in the indictment that Duvall was charged under this statute with complicity in theft from an elderly person.¹ And we note that under R.C.

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Although the issue is not raised on appeal, we note in the indictment what appears to be a mistaken statutory reference. The indictment accuses Duvall of complicity in “the offense of Theft from an Elderly Person, as defined in R.C. 2913.02(A)(1), contrary to and in violation of Sections 2923.03(A)(2) and 2913.02(A)(1) of the Ohio Revised Code.”

2923.03(F) “an accomplice’s conviction is identical in degree and quality to a conviction of a principal offender under the same section.” *State v. Agee* (1990), 133 Ohio App.3d 441, 446 (Citations omitted); R.C. 2923.03(F) (“Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.”); *State v. Hanning* (2000), 89 Ohio St.3d 86, 92 (saying that “an accomplice is as culpable in a crime as the principal offender”). Finally, we see that Chapter 2913 defines “elderly person” as “a person who is sixty-five years of age or older.” R.C. 2913.01(CC). Therefore, we must conclude that Duvall was ineligible for treatment in lieu of conviction because the seventh condition was unsatisfied.

{¶ 6} The sole assignment of error is overruled, so the judgment of the trial court is Affirmed.

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FAIN and FROELICH, JJ., concur.

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(Emphasis added). We suspect that it should read, “as defined in R.C. 2913.02(B)(3).” (Emphasis added). Upon reviewing the record, we observe that, beginning with the indictment and throughout, her offense is consistently referred to as “the offense of Theft from an Elderly Person.” Thus, we do not believe that Duvall could plausibly argue that she was misled by the prosecutor’s apparent mistake.