

FILED

2011 FEB 11 A 8:27  
IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

CLERK OF COURTS  
CUYAHOGA COUNTY

STATE OF OHIO,

Plaintiff,

v.

Defendants.

CASE NO. [REDACTED]

JUDGE DICK AMBROSE

OPINION  
AND JOURNAL ENTRY

{¶1} Before the Court are the separate motions of [REDACTED] ("Defendants Motions")<sup>1</sup> to dismiss Count One of the indictment for failure to charge an offense under R.C. 2923.32(A)(1), the Ohio Corrupt Practices Act (OCPA). In addition, Defendants also seek a dismissal of remaining counts in various forms and under various theories.

{¶2} In his motion filed on Nov. 17, 2010, Defendant [REDACTED] asks the Court to dismiss Counts One and 31 of the Indictment for failure to charge an offense and to dismiss Counts 2, 3, 21, 24, and 28 because they are defective on the grounds of multiplicity and Counts 5, 6, on the grounds of duplicity. Defendant [REDACTED] also asks the Court to dismiss Counts 8, 10, 11, 13, 15, 17, 18, 20, 21, 23, 24, 26, and 28 for failure to provide adequate notice. Finally, defendant [REDACTED] seeks a dismissal of all Counts of the Indictment due to their being unconstitutionally vague.

<sup>1</sup> Defendant [REDACTED] has not filed a separate motion to dismiss, nor has he indicated to the Court that he wishes to adopt the motion of any of the other defendants. However, the Court's rulings herein will also be binding on Defendant [REDACTED].

{¶3} Defendant [REDACTED] filed her motion on Oct.26, 2010 and asked the Court to dismiss Count One for failure to charge an offense; to dismiss Counts 2, 3, 21, 24, and 28 as multiplicitous; to dismiss Counts 4 and 5 as duplicitous; to dismiss Counts 8, 10, 11, 13, 15, 17, 18, 20, 21, 23, 24, 26 and 28 for failure to provide adequate notice; and to dismiss Counts 7, 9, 12, 14, 16, 19, 22, 25, 27, 29 and 30, as well as Counts One, 2, 3, 4, 5 and 6 for charging defendant in the alternative and therefore failing to provided sufficient notice. Defendant's motion also asks the Court to dismiss all counts because the charging language used is unconstitutionally vague.

{¶4} Defendant [REDACTED] filed his motion on Oct. 18, 2010 and has moved the Court to dismiss: Count One of the Indictment on the grounds that it is defective because it fails to allege an "Enterprise" which is separate and apart from the charged Defendants; Counts 17, 20, 21, 23, 24, 26, and 28 on the grounds that they fail to charge an offense; Counts 21, 24 and 28 for essentially charging the same offense; and Count 31 for failing to properly identify the person who is the target of the alleged act of improper influence.

{¶5} The State filed an Omnibus Response to Defendants' Motions on December 10, 2010. In its Response, the State argued that the necessary elements of a claim under the OCPA have been stated in Count One of the Indictment, that defendants are persons associated (in fact) with the "Enterprise, and that the "Enterprise" is separate and apart from the pattern of corrupt activity in which it engaged. As to the balance of Defendants' claims, the State responds that the counts of the Indictment track the language of the statute and are therefore sufficient to provide Defendants with adequate notice of the charge. Beyond that, the State moves the Court to amend the language of the Indictment in Count 31 to correct a typographical error.

## STANDARD OF REVIEW

{¶6} The Sixth Amendment to the U.S. Constitution guarantees the right of a criminal defendant “to be informed of the nature and cause of the accusation” against him. An Indictment informs a defendant of the charges brought against him or her and must allege each and every element of the charged offense. *Russell v. U.S.*, 369 U.S. 749 (1962). A motion to dismiss tests the sufficiency of the indictment, without regard to the quantity or quality of evidence that may be produced at trial. *State v. Patterson* (1989), 63 Ohio App. 3d 91, 93. See also, Rule 12(C) of the Ohio Rules of Criminal Procedure. A pretrial motion must not involve a determination of the sufficiency of the evidence to support the indictment. If the indictment is valid on its face, a motion to dismiss should not be granted. *State v. Eppinger*, 162 Ohio App. 3d 795, 2005-Ohio-4155, citing *State v. Varner* (1991), 81 Ohio App. 3d 85. However, if the Indictment is defective, it cannot be cured by an amendment. *State v. Cimpritz* (1953), 158 Ohio St. 490; *State v. Davis* (2008), 121 Ohio St. 3d 239, 242.

{¶7} The purpose of an indictment is to compel the State to disclose all the material facts constituting the essential elements of the offense in order to give the defendant sufficient notice and opportunity to defend the charges against him. *State v. Childs*, 88 Ohio St.3d 194, 198, 2000-Ohio-298, citing *State v. Sellards* (1985), 17 Ohio St.3d 169. Therefore, on a motion to dismiss, the proper determination is whether the allegations contained in the Indictment make out an offense under Ohio Criminal Law. If they do, it is premature to determine, in advance of trial, whether the State can satisfy its burden of proof with respect to those charges. *Patterson, supra*, at 95.

## COUNT ONE- FAILURE TO STATE AN OFFENSE

{¶8} Defendants collectively argue that Count One of the Indictment is defective because it fails to properly allege a claim under the Ohio Corrupt Practices Act. R.C. 2923.32(A)(1) provides that:

(A) (1) No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt.

{¶9} In order to properly state a charge under the OCPA, the State must allege: 1) that the defendant was involved in some corrupt activity as defined by R.C. 2913.31(I); 2) that defendant was involved in a pattern of corrupt activity which consisted of two or more incidents of corrupt activity as prohibited by R.C. 2913.31(I); and 3) that an enterprise existed separate and apart from the defendant through which the defendant acted. *Herakovic v. Cleveland Catholic Diocese, Cuyahoga App. No. 85467, 2005 Ohio 5985, at ¶16*. Each element of an OCPA claim must be alleged in order to survive a motion to dismiss. *Herakovic, supra, at ¶17*.

{¶10} Defendants argue that Count One of the Indictment fails to identify an enterprise that is separate and apart from the Defendants themselves. The Indictment alleges that “[t]he Enterprise is an association and/or organization and/or group of persons associated in fact, although not a legal entity, including but not limited to each of the above named Defendants, and other known and/or unknown persons, all of who are persons associated with the Enterprise.” The Indictment alleges that the Defendants are persons associated with the enterprise and who performed some lawful acts while working for the entity associated with the enterprise (i.e., [REDACTED]). Although the Indictment repeatedly refers to the “Enterprise” in Count One, there is no description of the enterprise beyond that mentioned above – to wit: an association and/or organization and/or group of persons which includes Defendants.

{¶11} The State further alleges that through the enterprise, the Defendants developed a scheme to defraud investors and that the Enterprise existed separate and apart from the pattern of corrupt activity in which it engaged. However, there is no indication from the Indictment that the enterprise consists of anything other than “Persons Affiliated with the Enterprise”, the “Defendants” and “other known and/or unknown persons.” These conclusory allegations fail to establish that the Enterprise is separate and apart from the Defendants and therefore fails to set forth all of the elements of a claim under the OCPA.

{¶12} Basically, the State is alleging that the Defendants, as a group of individuals “associated in fact” conspired to commit securities fraud, theft and forgery against multiple investors. While these allegations may satisfy the “corrupt activity” and “pattern of corrupt activity” elements of a OCPA charge, they provide no assistance in identifying the enterprise through which the Defendants committed these acts. There simply is no enterprise, separate and apart from the Defendants themselves that has been identified in Count One of the Indictment. This violates the principle set forth in *Herakovic, supra*, that the individual Defendants must be separate from the Enterprise. The Court therefore finds the Defendants motions well taken as to the defects in Count One and dismisses that Count of the Indictment, without prejudice.

### **MULTIPLICITOUS COUNTS**

{¶13} In their respective motions, Defendants argue that Counts 2, and 3 (Securities Fraud – R.C. 1707.44(B)(5)), and Counts 21, 24, and 28 (Securities Fraud – R.C. 1707.44(G)) charge the same offense over the same time periods and therefore must be dismissed as multiplicitous. The State’s opposition does not acknowledge the concern that court’s have with multiplicitous indictments and a defendant’s right to due process and protection against double jeopardy. See, *State v. Holder, Cuyahoga App. No. 89709, 2008-Ohio-1271*. Instead, the State

stands on the principle that charges, which are stated in the words of the applicable statute, are sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged. *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, at ¶8. The State also offers that the Bill of Particulars will provide specifics as to each offense.<sup>2</sup>

¶14} “If prosecutors seek multiple charges against a defendant, they must link those multiple charges to multiple identifiable offenses. Due process requires this minimal step. Courts cannot uphold multiple convictions when they are unable to discern the evidence that supports each individual conviction.” *Valentine v. Konteh* (C.A. 6, 2005), 395 F.3d 626, 636-637. However, there is a procedural mechanism to insure that such evidence is furnished. Crim.R. 7(E) provides that upon a timely written request or upon court order: “the prosecuting attorney shall furnish the defendant with a bill of particulars setting up specifically the nature of the offense charged and of the conduct of the defendant alleged to constitute the offense. A bill of particulars may be amended at any time subject to such conditions as justice requires.”

{¶15} Although Defendants urge the Court to dismiss multiplicitous counts of the Indictment, the Court is compelled to afford the State the opportunity to delineate the factual bases for the separate charges, either through a bill of particulars or discovery prior to dismissing the charges. Where the state fails to distinguish the factual basis for the charges listed in the indictment at some point in the proceeding, then the undifferentiated charges must be dismissed. See *Valentine*, 395 F.3d at 638. The *Valentine* court recognized that the due process problems in the indictment might have been cured if the trial court had insisted that the prosecution delineate the factual bases for the separate incidents “either before or during the trial.” 395 F.3d at 634. For these reasons, Defendants’ Motions as to Counts 2, and 3 and Counts 21, 24, and 28 are denied.

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<sup>2</sup> The State filed a Bill of Particulars on February 9, 2011 at 4:01 P.M. Therefore, the Court has not reviewed the State’s submission in the context of this opinion. The Court reserves any ruling on the impact the Bill of Particulars may have on the opinions and rulings contained herein.

### **DUPlicitous COUNTS**

{¶16} Defendants next argue that Counts 4, 5 and 6 should be dismissed because they are duplicitous in that they charge more than a single offense in a count. The State again asserts *Horner, supra*, and indicates that a Bill of Particulars will clarify these charges. Adopting the same rationale from *Valentine, supra*, the Court denies Defendants' Motions as to Counts 4, 5 and 6.

### **UNCONSTITUTIONALLY VAGUE COUNTS**

{¶17} Defendants also argue that each count of the Indictment should be dismissed because they are all unconstitutionally vague in violation of the Sixth Amendment to the U.S. Constitution, which is made applicable to the states through the Fourteenth Amendment. Although not directly addressed in the State's Omnibus response, it is clear that the State believes that by tracking the language of the particular statutes for the respective offenses, it's responsibility to inform the Defendant of the charges he or she faces is satisfied. The Court agrees that many of the counts of the Indictment are phrased in the disjunctive and could employ the use of more specific language, however, this is not fatal to the Indictment. The Court again relies on the holding in *Valentine*, and expects the State to "fill in the blanks" in the Indictment through discovery and a Bill of Particulars. At this time, the Court will deny the Defendants' Motions to Dismiss for vagueness, but should the State fail to provide Defendants with the necessary information in order to prepare a defense, the Court will revisit this issue.

### **FAILURE TO PROVIDE ADEQUATE NOTICE**

{¶18} Defendants argue that Counts 8, 10, 11, 13, 15, 17, 18, 20, 21, 23, 24, 26, and 28 fail to provide adequate notice of the particular section of R.C. 1707 which Defendants are alleged to have violated and therefore, must be dismissed.

In these counts, the Indictment identifies R.C. 1707.44(G) (Securities Fraud) as the offense, however the language in the body of the indictment alleges that the Defendants did, in purchasing or selling securities, knowingly engage in an act or practice that is, either declared illegal, defined as fraudulent or prohibited by Chapter 1707 of the Revised Code. Defendants point out that, by failing to identify the particular section of Chapter 1707 that applies, the State has violated the Indictment Clause in Article I, § 10 of the Ohio Constitution. Defendants argue that without delineating the underlying statutory or factual basis for the charge, grand jurors could not have a full understanding of the specific offense they were indicting. Therefore, according to Defendants, the State failed to include an essential element of the offense in the Indictment, which then renders the Indictment on that count defective.

{¶19} The Court agrees that the Indictment does not identify the particular act or practice that Defendants allegedly engaged in to commit securities fraud under R.C. 1707.44(G). However, this alone does not render the Indictment defective on these counts. “An indictment that tracks the language of the charged offense and identified a predicate offense by statute number but did not include each element of the predicate offense still provided the defendant with adequate notice of the charges against him.” *Horner, supra*, at ¶11 (citing, *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707). So long as the name or identity of the crime is not changed, nor the accused been misled or prejudiced by the omission of an element, an Indictment may be amended to include the omitted element. *Horner*, at ¶9. Any due process concerns with respect to Counts 8, 10, 11, 13, 15, 17, 18, 20, 21, 23, 24, 26, and 28 can be resolved with supplementation of the charges by the State through a Bill of Particulars, and/or pre-trial discovery. For these reasons, Defendants’ Motions directed to Counts 8, 10, 11, 13, 15, 17, 18, 20, 21, 23, 24, 26, and 28 are denied.



### **COUNT 31- BRIBERY**

{¶20} Defendants argue that Count 31 of the Indictment should be dismissed because it fails to properly allege the charge of Bribery, under R.C. 2921.02(A) in that it does not reference a person being the object of the purported corruption or improper influence, rather it identifies the [REDACTED]. By its language, R.C. 2921.02(A) applies to efforts to influence a person who is a public servant or party official, not an entity.

{¶21} The State concedes this point in its Omnibus response, but requests leave of Court to amend the Indictment to correct what the State characterizes as a “typographical error”. Rule 7(D) of the Ohio Rules of Criminal Procedure provides that: “The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged.”

{¶22} At this stage in the proceedings there is no reason to believe that the Defendants have been prejudiced in any way by the State’s failure to repeat the words “school official” when referencing the [REDACTED]. Finding the State’s error in Count 31 to be of a nature and type that is correctable via Criminal Rule 7(D), the Court grants the State leave to amend Count 31 and denies Defendants’ Motions addressed to that count of the Indictment.

### **FINDINGS AND ORDER**

For the reasons set forth above, the Court finds that:

- Count One fails to properly allege a claim under Ohio’s Corrupt Practices Act in that it makes no distinction between the

Defendants and the "Enterprise" as required by R.C. 2923.32.  
Count One is therefore dismissed.

- The remaining counts of the Indictment either track the language of the statute or can be amended under Criminal Rule 7(D).  
Therefore, they are not defective at this time. As stated, these counts will require supplementation through discovery and/or bill of particulars as they do not at this time fully apprise the Defendants of the particular aspects of the crimes of which they have been charged. Should the State fail to properly supplement these counts with appropriate facts and evidence, the Court will reconsider its decision denying Defendants the requested relief on these counts. Defendants' Motions are denied as to Counts 2 through 32 of the Indictment.

IT IS SO ORDERED!

DATE: 2/10/2011

A handwritten signature in black ink, appearing to read "Dick Ambrose", written over a horizontal line.

JUDGE DICK AMBROSE