

IN THE SUPREME COURT OF OHIO

2006-2250 & 2006-2139

STATE OF OHIO :
Appellee :
-vs- :
VINCENT COLON :
Appellant :

On Appeal and Notice of
Certified Conflict from
the Cuyahoga County
Court of Appeals, Eighth
Appellate District, Case
No. 87499

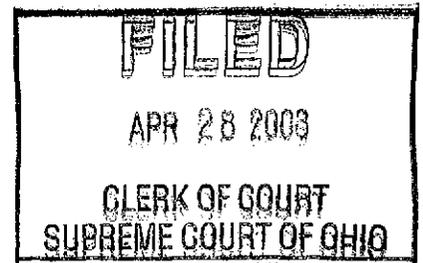
**APPELLANT VINCENT COLON'S MEMORANDUM IN OPPOSITION
TO APPELLEE'S MOTION FOR RECONSIDERATION**

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INTRODUCTION

Appellant Vincent Colon was convicted of robbery despite a defective indictment which omitted an essential element of the offense and which resulted in a fundamentally flawed criminal proceeding. On appeal, Mr. Colon argued, among other things, that the omission of this essential element constituted a structural defect that he could raise for the first time on appeal. After the Eighth District Court of Appeals rejected that argument, this Court accepted that issue both as a certified conflict and as a discretionary appeal.

On April 9, 2008, this Court released its decision in *State v. Colon*, ___ Ohio St. 3d ___, 2008-Ohio-1624, reversing the judgment of the Eighth District. Specifically, this Court held that “[w]hen an indictment fails to charge a mens rea element of a crime and the defendant fails to raise the defect in the trial court, the defendant has not waived the defect in the indictment.” *Colon*, 2008-Ohio-1624, syllabus. This Court explained that the defective indictment in this case resulted in a structural error which “permeated the defendant’s entire criminal proceeding:”

The defective indictment in this case resulted in several violations of the defendant’s constitutional rights. First the indictment against the defendant did not include all the elements of the offense charged, as the indictment omitted the required mens rea for the crime of robbery. Therefore, the defendant’s indictment was unconstitutional.

Second, there is no evidence in the record that the defendant had notice that the state was required to prove that he had been reckless in order to convict him of the offense of robbery, and thus defendant’s due process rights were violated. Further, the state did not argue that the defendant’s conduct in inflicting physical harm on the victim constituted reckless conduct.

In addition to the defendant’s being unaware of the elements of the crime with which he was charged, and the prosecutor’s failing to argue that the defendant’s conduct in this case was reckless, when the trial court instructed the jury on the elements of robbery necessary to find the defendant guilty, the court failed to include the required mens rea for the offense. The defendant’s counsel did not object to the incomplete instruction. There is no evidence in the record that the jury considered whether the defendant was reckless in inflicting, or attempting to inflict, or threatening to inflict physical harm, as is required to convict under R.C.

2911.02(A)(2). Finally, during closing argument, the prosecuting attorney treated robbery as a strict-liability offense.

Colon, 2008-Ohio-1624, ¶¶ 23-32.

In its motion for reconsideration, the State of Ohio merely rehashes arguments that were fully briefed, argued, and/or considered by this Court. Because a motion for reconsideration “shall not constitute a reargument of the case,” S.Ct. R. XI, § 2(A), the State’s request that this Court essentially reconsider its entire merit brief should be denied.

ARGUMENT

Given that the State’s motion for reconsideration simply asks this Court to consider its same arguments a second time, Colon could restructure his own merit brief into a memorandum in opposition. Because such an exercise would be unnecessarily duplicative and is precisely what this Court’s rules are designed to prevent, Colon will instead emphasize how each issue raised in the State’s motion was addressed in the briefs and/or the decision of this Court.

The State’s (and Amicus Curiae Ohio Prosecuting Attorneys Association’s) primary complaint is that this Court, in deciding *Colon*, failed to consider Crim. R. 7(D), *State v. O’Brien*, and the procedure for amending an indictment.¹ That is simply not the case. This Court thoroughly considered these issues in its decision:

Despite the language of Crim.R. 7(D) permitting amendment, an indictment must still meet constitutional requirements, and its failure to do so may violate a defendant’s constitutional rights. In order to be constitutionally sufficient, an indictment must first, contain ‘the elements of the offense charged and fairly inform[] a defendant of the charge against which he must defend, and second, enable[] him to plead an acquittal or conviction in bar of future prosecutions for the same offense.’ *State v. Childs* (2000), 88 Ohio St. 3d 558, 565, 728 N.E.2d

¹ The State and Amicus OPAA articulate the issue in several ways, arguing that *Colon* “contradicts,” “cast[s] a cloud over,” is “in direct conflict,” “throw[s] into doubt,” “has overruled,” and “does not comport” with *O’Brien*. (Appellee’s Mot. to Recon. at 2-5; Amicus OPAA Br. at 2-6)

379, quoting *Hamling v. United States* (1974), 418 U.S. 87, 117-18, 94 S.Ct. 2887, 41 L.E.2d 590.

In the instant case, the indictment did not meet constitutional requirements, as it did not include all the essential elements of the offense charged against the defendant. Thus, the defendant was not properly informed of the charge so that he could put forth his defense.

2008-Ohio-1624, at ¶¶27-28. In its motion for reconsideration, the State has not identified a new or unexplored issue. Indeed, as the lower court's decision relied almost exclusively on *O'Brien*, it was squarely before this Court:

Fifth, appellant urges that the indictment was insufficient because it did not charge the mens rea elements of robbery. He asserts that the indictment therefore failed to charge an offense. "[A]n indictment charging an offense solely in the language of a statute is insufficient when a specific intent element has been judicially interpreted for that offense." *State v. O'Brien* (1987), 30 Ohio St.3d 122, 124, 30 Ohio B. 436, 508 N.E.2d 144.

Under Crim.R. 12(C)(2) defects in an indictment are waived if not raised before trial, except failure to show jurisdiction in the court or to charge an offense, which may be raised at any time during the pendency of the proceeding. Appellant here did not raise this issue at any time during the pendency of the proceedings before the trial court. Had he raised the issue in the trial court, the state could have amended the indictment to include the mens rea elements. Crim.R. 7(D); *O'Brien*, 32 Ohio St.3d at 125-26. Therefore, he has waived this argument on appeal. *State v. Davis*, Ashland App. No. 03COA016, 2004 Ohio 2255, P48

State v. Colon, Cuyahoga App. No. 87499, 2006 Ohio 5335, ¶¶ 19-20. Moreover, the parties addressed Crim. R. 7(D) and *O'Brien* in their briefs before this Court. (Appellant's Br. at 10; Appellee's Br. at 3, 4, 6; Amicus Curiae Ohio Association of Criminal Defense Lawyers Br. at 4, 5, 7-10). Justice Stratton's dissent in *Colon* highlighted the very issue that is the primary basis for the motion for reconsideration. 2008-Ohio-1624, ¶ 76 ("Indeed, had the error been discovered, it would have been properly subject to amendment. Crim. R. 7(D); *State v. O'Brien* (1987), 30 Ohio St.3d 122, 30 OBR 436, 508 N.E.2d 144, paragraph two of the syllabus.) Thus,

the State's contention that Crim. R. 7(D) and *O'Brien* were not adequately considered lacks merit.

Ultimately, *O'Brien* is a very different case as the error in that case did not pervade the entire proceeding. Unlike in *Colon's* case, the defect in the indictment in *O'Brien* did not, among other things, result in insufficient notice of the elements of offense or incomplete jury instructions.

Moreover, notwithstanding the State's colorful hyperbole about the *Colon* decision "drastically chang[ing] well-settled Ohio law," (Appellee's Mot. to Recon. at 2), *Colon* is a logical extension of this Court's decision in *State v. Childs* (2000), 88 Ohio St. 3d 194 and does not break any new ground regarding the amendment of an indictment. Like *Childs*, this case involved the omission of an element from the indictment which was never addressed at any time during the trial court proceedings. Although *Childs* did not use the term "structural error," it treated the omission of an element from the indictment as a structural error which did not have to be raised prior to trial. In *Childs*, the defendant was indicted with, among other things, conspiracy to commit aggravated drug trafficking. 88 Ohio St. 3d at 197. Although the indictment did allege the commission of a "substantial, overt act," it did not "specifically detail any overt act done in furtherance of the conspiracy." *Id.* The defendant did not challenge the sufficiency of the indictment *prior to* or *during* his jury trial and was ultimately convicted of the charge. *Id.* at 194-97. On appeal, the defendant argued that the indictment was fatally defective because it failed to allege "at least one specific, substantial, overt act in furtherance of the conspiracy." *Id.* at 197. This Court agreed that the absence of a specific, overt act alleged in the

indictment rendered it fatally defective and affirmed the reversal of the defendant's conviction.² *Id.* at 199. The defendant's conviction was reversed despite his failure to challenge the defect in a pre-trial motion and notwithstanding a bill of particulars which set forth the specific conduct constituting the charge. *Id.* at 198 (dismissing the State's reliance on the bill of particulars because it "is not signed by the grand jury foreman, and there is no evidence that the material contained in the bill of particulars was ever presented to the grand jury.")

Both the State and Amicus OPAA also argue that the *Colon* decision constitutes "unsound judicial policy" because it "encourages shrewd criminal defense lawyers to withhold objection to a defective indictment and plant a *mens rea* time bomb set to detonate in the appellate court." (Appellee's Mot. to Recon. at 2; accord Amicus OPAA Br. at 6). Although the State has refined its rhetoric, it made this identical policy argument at oral argument and in its merit brief, emphasizing in the brief that "potential defects should not to be [sic] stored away to be used as a trap on appeal." (Appellee's Br. at 15-16). This Court explicitly found such arguments unpersuasive:

It is not an unreasonable burden to require counsel for the state to ensure that the defendant receives the benefit of his fundamental constitutional protections. . . .

A defendant has a constitutional right to grand jury indictment and to notice of all the essential elements of an offense with which he is charged. The state must meet its duty to properly indict a defendant, and we will not excuse the state's error at the cost of a defendant's longstanding right to a proper indictment.

2008-Ohio-1624, ¶¶ 43-44.

² Although *Childs* was a 6-1 decision, this Court was unanimous in its conclusion that the omission of an essential element from an indictment could be raised for the first time after trial. The sole dissenting justice explicitly recognized that an indictment, which omits an essential element, "fails to charge an offense" and can be challenged for the first time after trial. *Id.* at 200. She merely disagreed with the majority's conclusion that the indictment in this case omitted an essential element of conspiracy. *Id.*

The State's continued pleas to this Court to excuse its duty to properly indict a criminal defendant reflect its complete disregard of the right to a proper grand jury indictment. More than ten months ago, the State conceded that Colon's robbery indictment was defective because it failed to include the mens rea of recklessness with respect to the infliction of physical harm.³ (Appellee's Br. at 5-6). It has not, however, taken any steps to correct this flaw. The State continues to secure improper robbery indictments which omit the essential mens rea element of the offense. *See e.g. State v. Donald Davis*, Cuyahoga Common Pleas Case No. 508996 (indictment returned on April 4, 2008); *State v. Floyd Thompson*, Cuyahoga Common Pleas Case No. 508673 (indictment returned on March 28, 2008). The State's claim that "[o]f course [it] seeks to properly indict cases" rings hollow in light of its continued nonfeasance about a known defect in its robbery indictments. If *Colon* is a "mens rea time bomb," it is one created and maintained by the State.

Amicus OPAA takes the State's unfounded "the sky is falling" argument to an equally absurd extreme. It contends, without giving a single specific example, that *Colon* will necessarily mean that "the State will now be unable to prosecute countless cases – including potentially capital cases – for which it is too late to re-indict for speedy trial purposes." (Amicus OPAA Br. at 5). Even if Amicus OPAA is right in its assumption that county prosecutors have

³ Amicus Curiae Clark County suggests that reconsideration is required by this Court "to independently analyze R.C. § 2911.02(A)(2) to determine the applicable mens rea." (Amicus Clark County Br. at 5). In this regard, Amicus Clark County contends that this Court simply accepted the parties' "agreement" of the law, rather than reaching its own independent conclusion. (Amicus Clark County Br. at 5). It hardly seems necessary to point out that this Court does not conduct its jurisprudence by stipulation and would not unnecessarily resolve a constitutional question. This Court's recognition that the parties did not dispute a particular legal issue does not mean that it failed to reach its own conclusion. On the contrary, at least six members of this Court reached an independent conclusion that Colon's robbery indictment was constitutionally defective. *Colon*, 2008-Ohio-1624, ¶¶ 10-15, 46 and 50.

omitted essential elements of the offense in hundreds of indictments, its speedy trial concerns are unfounded. In *State v. Adams*, this Court held that the waiver of a right to speedy trial to an initial charge “is not applicable to *additional charges* arising from the same set of circumstances brought subsequent to the execution of the waiver.” (1989), 43 Ohio St. 3d 67, syllabus (emphasis added). In essence, *Adams* provides that a speedy trial waiver cannot be applied to an entirely different crime which the defendant had absolutely no awareness could be brought at some point in the future.⁴ *Adams* does not purport to apply situations where the defendant was generally aware of the charge but did not have notice of all the essential elements of the offense. See e.g. *State v. Davis*, Clark App. No. 2002-CA-43, 2003 Ohio 4839, ¶ 32 (concluding that knowledge of the greater offense is sufficient for a waiver to be applied to any lesser-included offense charged in a subsequent indictment). Thus, *Colon* is not going to mean that “[h]undreds of cases will . . . become non-prosecutable.” (Amicus OPAA at 6).

Further, the State also contends, quite inexplicably, that this Court failed to address Crim. R. 12(C)(2) (and its statutory counterpart, R.C. 2941.29) and to explain why *Colon*’s defect could, consistent with these provisions, be raised for the first time on appeal. (Appellee’s Mot. to Recon. at 8). On the contrary, this Court *explicitly* addressed this argument:

The state agrees that the indictment charging the defendant is defective, but argues that the Ohio Rules of Criminal Procedure require that any objection based on defects in the indictment must be raised before trial. Crim. R. 12(C) provides:

‘Prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue. The following must be raised before trial:

⁴ Amicus OPAA’s speedy trial concerns are even less compelling in light of this Court’s recent decision in *Blackburn* in which it held that periods of tolling associated with an initial charge *do* apply to new charges based on the same underlying facts and circumstances. 2008-Ohio-1823, syllabus.

(2) Defenses and objections based on defects in the indictment, information, or complaint (other than failure to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceeding).’

As stated in the Crim.R. 12(C)(2), there are two specific exceptions to the general rule. Defects in an indictment that fail either ‘to show jurisdiction in the court’ or ‘to charge an offense’ do not need to be raised prior to trial and can be raised any time during the pendency of the proceeding. An indictment that omits the mens rea element of recklessness fails to charge the offense of robbery, and is therefore an exception to the general rule stated in Crim.R. 12(C).

2008-Ohio-1624, ¶¶ 33-37.

The State also contends that *Colon* “essentially abrogates” this Court’s recent decision in *State v. Wamsley* (2008), __ Ohio St. 3d __, 2008-Ohio-1195. (Appellee’s Mot. to Recon. at 5-7). This argument is unfounded. In *Colon*, this Court held that the omission of an essential element from an indictment was a structural error. 2008-Ohio-1624, ¶¶ 23-32. In *Wamsley*, this Court held that the failure to charge a jury on an element of an offense was not a structural error. 2008-Ohio-1195, ¶¶ 15-24. There is nothing inconsistent about these decisions as the error in *Wamsley* did not pervade the proceeding. *Colon* involved different constitutional violations—right to a grand jury indictment and due process right to notice—which infected every portion of this case from the original indictment to the closing arguments and jury instructions. *Colon* does not in any way affect the viability of *Wamsley*.

In a final effort to reargue the case, the State string cites several cases which it had relied on its original merit brief and which it believes support its position.⁵ (Appellee’s Mot. to Recon. at 9; Appellee’s Merit Br. at 8-9). For the reasons set forth in *Colon*’s reply brief, these cases are

⁵ *State v. Carter* (2000), 89 Ohio St. 3d 593; *State v. Biros* (1997), 78 Ohio St. 3d 426; *State v. Joseph* (1995), 73 Ohio St. 3d 450; *State v. Mills* (1992), 62 Ohio St.3d 357.

distinguishable and do not support the State's arguments.⁶ (Appellant's Reply Br. at 8 and 11-12). Given the detailed briefing by the parties about these cases, this Court has obviously already considered them.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Mr. Vincent Colon respectfully asks this Court to deny the State's motion for reconsideration.

Respectfully Submitted,


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Counsel for Appellant

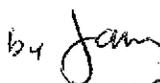
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⁶ The State's continued reliance on *Joseph* is particularly perplexing given that the Sixth Circuit Court of Appeals held that the indictment flaw in *Joseph* constituted reversible constitutional error and granted a habeas petition on that basis. *Joseph v. Coyle* (6th Cir. 2006), 469 F.3d 441, 445 and 463-64.

CERTIFICATE OF SERVICE

A copy of the foregoing Appellant's Memorandum in Opposition to Appellee's Motion for Reconsideration was hand-delivered upon WILLIAM D. MASON, ESQ., Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 and sent by ordinary mail to Amicus Curiae Ohio Prosecuting Attorneys Association, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio, 45202 and Amicus Curiae Clark County Prosecutor, Stephen A. Schumaker, 50 E. Columbia Street, 4th Floor, Springfield, Ohio, 45501, on this 28 day of April, 2008.


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