

NOS. 2007-2424

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 88895

STATE OF OHIO

Plaintiff-Appellee

-vs-

MARCUS DAVIS

Defendant-Appellant

MOTION FOR RECONSIDERATION S. Ct. Prac. R. XI

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I. Summary of Argument

On the basis of *State v. Colon*,¹ this Court summarily reversed Davis's conviction for aggravated robbery and felonious assault. This decision should be reconsidered for four reasons:

- Davis's memorandum in support of jurisdiction provided analysis of a statute at issue in *Colon* but not the statute that Davis was indicted and convicted of;
- because this case tried to the bench this case did not involve defective jury instructions inextricably linked to a flawed indictment;
- under *Colon II*, summary reversal would be inappropriate because this Court needs to review the transcripts to determine if a defective indictment caused *multiple errors throughout the trial* and;
- a felonious assault conviction that was not challenged was improperly overturned.

The summary reversal should be reconsidered and the Eighth District's decision should be affirmed.

II. Procedural History

Davis was indicted for aggravated robbery, R.C. 2911.01(A)(1), and felonious assault, R.C. 2903.11. One and three year firearm specifications were included in each count. Davis was convicted of all charges.

¹ 118 Ohio St.3d 26, 2008-Ohio-1624.

On appeal, he challenged the indictment for aggravated robbery. The Eighth District rejected the argument because it was not raised in the trial court.

Davis filed a memorandum in support of jurisdiction. The majority of his argument is dedicated to the purported defect in aggravated robbery indictment. He argued that R.C. 2911.02(A)(2) requires an additional mens rea of reckless. He also argued that this additional mens rea was not presented to the jury.

III. Law and Argument

A. Jurisdiction

A party is permitted to seek reconsideration of an “action that actually disposes of a case.”² The State may seek reconsideration of a summary reversal.

The test generally applied in reviewing a motion for reconsideration “is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for the court’s consideration that was either not considered at all or was not fully

² Staff and Committee Comments (1994).

considered by the court when it should have been.”³ This criterion is present.

B. Davis’s memorandum in support of jurisdiction provided analysis of R.C. 2911.02(A)(2)—not R.C. 2911.01(A)(1) the statute of which he was convicted. This Court should reconsider its opinion.

The State will highlight the parties involved with the Davis and Colon memorandums in support, not to embarrass, but to show where a possible mistake was made. In the Eighth District and in the Ohio Supreme Court, different members of the Cuyahoga County Public Defender’s Office argued both Davis and Colon. The State believes that the memo in support in *Davis* inadvertently used the statute and jury instructions at issue *Colon*. The memo in support of jurisdiction filed in *State v. Davis* is similar to the memo in support of jurisdiction filed in *State v. Colon*. This is critical when this Court considered Davis.

In Davis’s memorandum in support, on page 8, he provided analysis for the essential elements of robbery under R.C. 2911.02(A)(2)—not aggravated robbery under R.C. 2911.01(A)(1). The robbery statute quoted by Davis was the robbery statute at issue in *Colon*.

³ *State v. Wong* (1994), 97 Ohio App.3d 244, 246.

This Court did not have Davis's indictment.⁴ Thus, the Court probably believed that this situation was identical to Colon—it is not.

No Ohio courts have specifically held that R.C. 2911.01(A)(1) contains an additional mens rea. In fact, the Eighth, Tenth, and Eleventh Districts have rejected the claim that R.C. 2911.01(A)(1) contains a judicially interpreted mens rea.⁵ These decisions are based on 1) persuasive language from this Court in *State v. Wharf* and 2) the amendments to the Ohio Jury Instructions.

The First District, without explanation, reached a different conclusion.⁶

Whether R.C. 2911.01(A)(1) contains a judicially interpreted mens rea has not been subjected to the adversarial process in this Court. For that reason, summary reversal was not appropriate in this case.

C. Davis indicated that his jury was improperly instructed on the essential elements. Davis's case was tried to the bench. And a trial court is presumed to follow the law.

⁴ Ex. A.

⁵ *State v. Price*, Cuyahoga App. No. 90308, 2008-Ohio-3454 ¶ 3; *State v. Saucedo*, Cuyahoga App. No. 90327, 2008-Ohio-3544 at fn 1; *State v. Ferguson*, Franklin App. No. 07AP-640, 2008-Ohio-3827, at ¶s 42-50; *State v. Harber*, Lake App. No. 2007-L-144, 2008-Ohio-3991.

⁶ *State v. Lester*, Hamilton App. No. C-070383, 2008-Ohio-3570.

Like the memorandum in support filed in *Colon*, Davis argued that his jury instructions omitted the judicially interpreted mens rea. This is problematic because Davis's case was tried to the court. There were no defective jury instructions.

Assuming the indictment is defective, trying the case to the bench would correct any *Colon* defect in an indictment.

- D. After *Colon II*, this Court should review the record to determine whether the appeal is the rare case in which multiple errors at the trial follow the defective indictment.**

This Court issued *Colon II* approximately one week before summarily reversing this case. But this Court held that *Colon I* only applies to rare cases “in [which] the indictment led to errors that ‘permeate[d] the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence.’”⁷

The only way to determine whether multiple errors in a trial are inextricably linked to a flawed indictment is by reviewing the entire record. The summary reversal should be reconsidered and, at a

⁷ *State v. Colon*, ___ Ohio St.3d ___, 2008-Ohio-3749, at ¶ 8 (citing *Colon*, 2008-Ohio-1624 at ¶ 23 citing in turn *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, at ¶ 17).

minimum, the entire record should be reviewed to determine whether Davis qualifies as the rare case referred to in *Colon II*.

E. Davis was convicted of two counts of felonious assault with a three-year firearm specification. Davis's felonious assault convictions were not challenged under the propositions accepted by this Court. Thus, these convictions must stand.

In the summary reversal, Davis's first and second propositions were accepted. In these propositions, Davis only challenges his aggravated robbery convictions—not his felonious assault convictions. Davis does not challenge his felonious assault convictions in any proposition.

Assuming this Court rejects the first three reasons for reconsideration, the summary reversal should explicitly indicate that Davis's felonious assault convictions were not challenged and remain. The reversal should only relate to the aggravated robbery conviction.

IV. Conclusion

The *Wong* criterion for reconsideration is present in this case for four reasons:

- Davis's did not provide analysis of the statute for which he was actually convicted;
- Davis's case was tried to the bench so jury instructions were not an issue;

- under *Colon II* a through review of a record must occur to determine if a conviction is subject to plain error and;
- Davis did not challenge his felonious assault convictions so a reversal does not implicate these convictions and sentence.

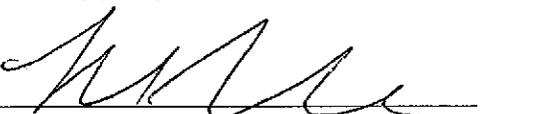
This case warrants reconsideration. The Eighth District's decision should be affirmed. In the alternative, this Court should accept Propositions of Law I and II and subject the claims to the adversarial process and full appellate review.

Respectfully submitted,
WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR


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CERTIFICATE OF SERVICE

A true copy of the foregoing Answer Brief has been delivered via U.S. Mail, postage prepaid, this 18th day of August 2008 to Paul Kuzmins 310 Lakeside Ave. Suite 200 Cleveland Ohio 44113-1021.


Thorin O. Freeman (0079999)
Assistant Prosecuting Attorney

THE STATE OF OHIO

VS.

MARCUS DAVIS

A TRUE BILL INDICTMENT FOR

AGGRAVATED ROBBERY R.C. 2911.01 w/cts

DATE OF OFFENSE	THE TERM OF	CASE NO.	COUNT
October 23, 2005	SEPTEMBER OF 2005	CR 472530	1

The State of Ohio,
CUYAHOGA COUNTY

SS.

CR05472530-A

36397556



The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, **IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO**, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully

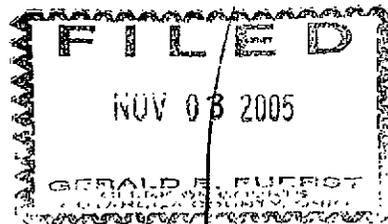
did, in attempting or committing a theft offense, as defined in Section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense upon Mandy Soto, have a deadly weapon to-wit: gun, on or about his person or under his control and either displayed the weapon, brandished it, indicated that he possessed it, or used it

FIREARM SPECIFICATION - 1 YEAR (2941.141)

The Grand Jurors further find and specify that the offender had a firearm on or about his person or under his control while committing the offense.

FIREARM SPECIFICATION - 3 YEARS (2941.145)

The Grand Jurors further find and specify that the offender had a firearm on or about his person or under his control while committing the offense and displayed the firearm, brandished the firearm, indicated that he possessed the firearm, or used it to facilitate the offense.



contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

[Signature]
Foreman of the Grand Jury

[Signature]
Prosecuting Attorney

THE STATE OF OHIO
VS.

MARCUS DAVIS

A TRUE BILL INDICTMENT FOR

FELONIOUS ASSAULT R.C. 2903.11

DATE OF OFFENSE	THE TERM OF	CASE NO.	COUNT
October 23, 2005	SEPTEMBER OF 2005	CR 472530	2

The State of Ohio, }
CUYAHOGA COUNTY } SS.

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, **IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO**, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully

did knowingly cause serious physical harm to Mandy Soto

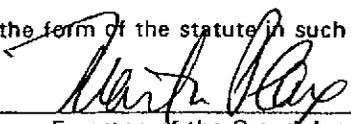
FIREARM SPECIFICATION - 1 YEAR (2941.141)

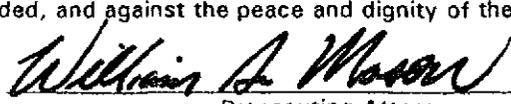
The Grand Jurors further find and specify that the offender had a firearm on or about his person or under his control while committing the offense.

FIREARM SPECIFICATION - 3 YEARS (2941.145)

The Grand Jurors further find and specify that the offender had a firearm on or about his person or under his control while committing the offense and displayed the firearm, brandished the firearm, indicated that he possessed the firearm, or used it to facilitate the offense.

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.


 Foreman of the Grand Jury


 Prosecuting Attorney

THE STATE OF OHIO

VS.

MARCUS DAVIS

A TRUE BILL INDICTMENT FOR

FELONIOUS ASSAULT R.C. 2903.11

DATE OF OFFENSE

October 23, 2005

THE TERM OF

SEPTEMBER OF 2005

CASE NO.

CR 472530

COUNT

3

The State of Ohio, }
CUYAHOGA COUNTY }

SS.

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, **IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO**, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully

and knowingly did cause or attempt to cause physical harm to Mandy Soto by means of a deadly weapon or dangerous ordnance, to-wit: gun, as defined in Section 2923.11 of the Revised Code

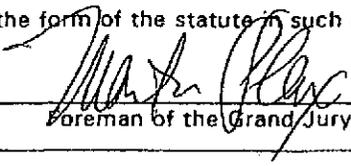
FIREARM SPECIFICATION - 1 YEAR (2941.141)

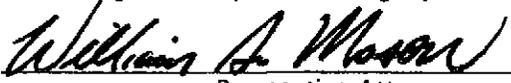
The Grand Jurors further find and specify that the offender had a firearm on or about his person or under his control while committing the offense.

FIREARM SPECIFICATION - 3 YEARS (2941.145)

The Grand Jurors further find and specify that the offender had a firearm on or about his person or under his control while committing the offense and displayed the firearm, brandished the firearm, indicated that he possessed the firearm, or used it to facilitate the offense.

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.


 Foreman of the Grand Jury


 Prosecuting Attorney