IN THE SUPREME COURT OF OHIO
2008

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

MARCUS DAVIS,

Defendant-Appellant

Case No. 07-2424

On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District

Court of Appeals Case No. 88895

MEMORANDUM OF AMICUS CURIAE FRANKLIN COUNTY PROSECUTOR RON O'BRIEN IN SUPPORT OF PLAINTIFF-APPELLEE STATE OF OHIO'S MOTION FOR RECONSIDERATION

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In *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"), the defendant stood convicted on a robbery charge under R.C. 2911.02(A)(2), alleging that, in attempting or committing a theft offense or fleeing therefrom, defendant attempted, threatened, or actually inflicted physical harm on the victim. This Court reversed the conviction, concluding that, by operation of the recklessness-importation provision in R.C. 2901.21(B), recklessness was an element of robbery under R.C. 2911.02(A)(2). This Court concluded that the omission of recklessness from the indictment was "structural error" requiring reversal because, inter alia, the jury instructions did not advise the jury that recklessness was an element.

Upon motion for reconsideration by the prosecution, this Court in *State v. Colon*, ___ Ohio St.3d ___, 2008-Ohio-3749 ("*Colon II*"), clarified that *Colon I* was prospective to pending cases only and that "[a]pplying structural-error analysis to a defective indictment is appropriate only in rare cases, such as *Colon I*, in which multiple errors at the trial follow the defective indictment." Id. at ¶ 8.

Seven days after *Colon II*, this Court acted in the present case on April 7, 2008. In *State v. Davis*, ___ Ohio St.3d ___, 2008-Ohio-3879, this Court accepted defendant Davis' appeal based on his first and second propositions of law and summarily reversed the Eighth District's holding on his fourth assignment of error based on *Colon I*. This Court remanded the case "to the trial court for further proceedings consistent with *State v. Colon*."

Amicus curiae Franklin County Prosecutor Ron O'Brien respectfully submits that

the acceptance of review and summary reversal of the present case was improvident for at least three reasons. First, defendant Davis' memorandum supporting jurisdiction contained several misstatements indicating that defendant was convicted of robbery involving the infliction of harm under R.C. 2911.02(A)(2), as had the defendant in *Colon I*. In fact, a review of Davis' indictment (which was unavailable to this Court) shows that Davis was convicted of *aggravated robbery* under R.C. 2911.01(A)(1) for possessing a deadly weapon and using it during the actual or attempted theft offense.

Second, the crime of aggravated robbery involving a deadly weapon does not include recklessness, as strongly suggested by this Court's refusal to import recklessness into the crime of robbery involving a deadly weapon in *State v. Wharf* (1999), 86 Ohio St.3d 375. An analysis of the recklessness-importation provision in R.C. 2901.21(B), using this Court's standard set forth in *State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121, confirms that recklessness should not be imported into the crime of aggravated robbery involving a deadly weapon.

Third, to the extent defendant complains that the indictment failed to include the mens rea pertinent to the predicate theft offense, a long line of authority from this Court recognizes that an indictment charging a compound offense need not state the elements of the underlying predicate offense.

Amicus Franklin County Prosecutor Ron O'Brien has grave concerns that the summary reversal in the present case will be misread by the bench and bar to be a ruling that *Colon I* requires recklessness as to aggravated robbery involving a deadly weapon. Given the misstatements about "robbery" in the defense memorandum, this Court's summary reversal cannot properly be read that way. In addition, since *Colon I* does not

dictate such a result, and since much of this Court's case law points away from such a result, a summary reversal would be an improvident means of rendering such a ruling. A ruling on this question should only follow full briefing and argument.

Because the Franklin County grand jury indicts many aggravated robbery offenses involving a deadly weapon each year, the issue of whether recklessness is an element of that crime is an important one to amicus and to the bench and bar. As a result, amicus submits this memorandum in support of plaintiff-appellee State of Ohio's motion for reconsideration.

I. Significant Misstatements

While defendant's memorandum supporting jurisdiction stated in the "Statement of the Case" that defendant was charged with aggravated robbery, (see Memo Supp. Juris., at 2), the balance of the memorandum repeatedly contended that defendant stood convicted of robbery under R.C. 2911.02(A)(2).

In the explanation of why the Court should accept the case on page 1, defendant equated his indictment to the robbery indictment in *Colon I.*

In the first proposition of law at page 8, he contended that "[t]he two judicially interpreted mens rea elements of *robbery* are essential elements * * *." (Emphasis added) Also on page 8, defendant contended that "his indictment was fatally defective as it omitted two essential elements of robbery * * *." Also on page 8, defendant captioned part A of his argument as "**Essential Elements of Robbery (R.C. 2911.02(A)(2))**", (emphasis sic), and he contended that he "was charged with robbery in violation of R.C. 2911.02(A)(2)." He further argued on page 8 that recklessness applied to the act of attempting, threatening, or inflicting physical harm for that crime.

More mistaken references to "robbery" followed on pages 9 through 12. Defendant referred to "Mr. Davis's robbery indictment" and referenced as an element the need to prove that defendant attempted, threatened, or inflicted physical harm. Other references to this kind of "robbery" followed. Memo Supp. Juris., at 10 ("the physical harm portion of the robbery statute"; "elements of the offense of robbery"); id. at 11 ("alleged infliction of harm"; "conviction for robbery"); id. at 11-12 ("alleged robbery").

These misstatements very likely affected this Court's decision. Although defendant made one reference to "aggravated robbery" in the memo, and although the Eighth District's opinion referred to "aggravated robbery," this Court without qualification or limitation accepted defendant's first proposition of law, which was based on the claim that elements of *robbery* were at issue. This Court presumably would not have accepted the incorrect first proposition of law, and would not have summarily reversed on that basis, if it had understood that defendant was really convicted of aggravated robbery.

Another problem is that, even if this Court concluded that aggravated robbery was involved instead of robbery, this Court had no way of knowing what kind of aggravated robbery was involved. The defense memorandum and accompanying appellate opinion made it clear that the victim had been shot with a firearm, but none of the materials indicated whether defendant was charged with the deadly-weapon kind of aggravated robbery under R.C. 2911.01(A)(1), the infliction-of-serious-physical-harm kind of aggravated robbery under R.C. 2911.01(A)(3), or whether both of these kinds of aggravated robbery were alleged. The particular subsection involved could make a difference under this Court's case law. Compare *Wharf* (robbery with deadly weapon; no

recklessness) with *Colon I* (robbery with physical harm; recklessness required).

In the final analysis, this Court was either misled by defendant's misstatements regarding "robbery" under "R.C. 2911.02(A)(2)," or the Court was deciding the case in the dark regarding what kind of aggravated robbery was charged. Either way, it was improvident to accept the appeal and summarily reverse based on a flawed proposition of law and memo referring to "robbery" without knowing the deadly-weapon nature of the aggravated robbery charge actually involved. Amicus respectfully submits that the proper course now would be to grant reconsideration and either to decline the appeal or to allow the appeal on the same propositions of law and allow full briefing and argument.[1]

II. Recklessness Is Not Imported Into Aggravated Robbery Under R.C. 2911.01(A)(1)

Defendant is entitled to no relief under *Colon I*. This Court in *Colon I* confined its holding to robbery under R.C. 2911.02(A)(2), stating that "R.C. 2911.02(A)(2) does not specify a particular degree of culpability for the act of 'inflict[ing], attempt[ing] to inflict, or threaten[ing] to inflict physical harm,' nor does the statute plainly indicate that strict liability is the mental standard." *Colon I*, at ¶ 14. As a result, this Court found that the indictment charging the defendant with (A)(2) robbery was defective, and that the defect "resulted in structural error." Id. at ¶ 19.

In the present case, however, Count One charged defendant with *aggravated*

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[1] Defendant also misstated things in repeatedly referring to a "jury" and/or to flawed "jury instructions," as if the case were tried to a jury. See Memo Supp. Juris., at 1, 2, 8, 9, 10, 11. The case was tried to the bench, and so there would be no flawed jury instructions as in *Colon I*. The lack of flawed instructions, and the presumption that the trial judge knew the law, would mean that *Colon I* would not support summary reversal. Nor can any plain error be found, since, even if "reckless" were pertinent, defendant acted more than recklessly by giving the gun to his accomplice for use in the aggravated robbery.

robbery under R.C. 2911.01(A)(1), which states: "No person, 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, shall do any of the following: (1) Have a deadly weapon on or about the offender's person or under the offender's control and ether display the weapon, brandish it, indicate that the offender possesses it, or use it[.]"

Given that Count One did not charge defendant with robbery under R.C. 2911.02(A)(2), this fact alone renders *Colon I* inapplicable to that count, since the deadly-weapon element in R.C. 2911.01(A)(1) does not require proof of a particular mens rea. C.f., *Wharf*, 86 Ohio St.3d at 379 ("as long as the accused merely possesses a deadly weapon or dangerous ordnance during the commission of a theft[,]' the accused could be convicted of aggravated robbery * * *" under former statute), citing *State v. Merriweather* (1980), 64 Ohio St.2d 57 (addressing former version of aggravated robbery statute); see, also, *Wharf*, 86 Ohio St.3d at 379 (noting that physical-harm element under former aggravated-robbery statute and the deadly-weapon element of R.C. 2911.02(A)(1) "are not analogous provisions"). In short, *Colon I*'s holding cannot be applied to defendant's conviction under Count One because *Colon I* interpreted a fundamentally different offense than the one defendant was charged with and convicted of.

Although *Wharf* addressed robbery under R.C. 2911.02(A)(1), even after *Colon I*, Ohio appellate courts have relied on *Wharf* in finding that the deadly-weapon form of aggravated robbery does not require proof of recklessness. *State v. Ferguson*, 10th Dist. No. 07AP-640, 2008-Ohio-3827, ¶¶ 42-46; *State v. Saucedo*, 8th Dist. No. 90327, 2008-Ohio-3544, ¶ 13, n. 1; *State v. Price*, 8th Dist. No. 90308, 2008-Ohio-3454, ¶ 3; but, see, *State v. Lester*, 1st Dist. No. C-070383, 2008-Ohio-3750, ¶ 23.

Indeed, the Ohio Jury Instructions Committee, citing *Wharf*, chose not to add any "recklessness" language into the instructions for the deadly-weapon form of aggravated robbery under R.C. 2911.01(A)(1). *Ferguson*, at ¶¶ 47-50. While not binding legal authority, the Ohio Jury Instructions are helpful authority on the matter. *Ferguson*, at ¶ 47.

Additionally, this Court has held that recklessness cannot be imported into a section of the Revised Code if that "section" already includes a mens rea in any of its provisions. *State v. Maxwell* (2002) 95 Ohio St.3d 254, 257 ("in determining whether R.C. 2901.21(B) can operate to supply the mental element of recklessness * * *, we need to determine whether the entire *section* includes a mental element, not just whether *division* (A)(6) includes such an element.") The *Maxwell* Court, relying on *State v. Wac* (1981), 68 Ohio St.2d 84, stated that, in order to import the element of recklessness pursuant to R.C. 2901.21(B), "a court must be able to answer in the negative the following two questions * * * (1) does the section defining an offense specify any degree of culpability, and (2) does the section plainly indicate a purpose to impose strict criminal liability?" *Maxwell*, 95 Ohio St.3d at 257.

It must be emphasized that R.C. 2901.21(B) does not import recklessness into every criminal-statute subsection that is silent as to mens rea. That statute provides, as follows:

> (B) When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.

Thus, there are at least three criteria that must be present before recklessness will be imported into a criminal statute under this provision. First, the particular "section" of the Revised Code must not specify any degree of culpability. *Maxwell*, at ¶ 21. Second, the particular "section" must not plainly indicate a purpose to impose strict liability. Id. Third, the result of importing recklessness must be that "recklessness is sufficient culpability to commit the offense." R.C. 2901.21(B).

Here, the aggravated robbery "section" contains a "knowing" degree of culpability in the offense defined in paragraph (B) of that statute. R.C. 2911.01(B) ("*knowingly* remove or attempt to remove a deadly weapon from the person of a law enforcement officer"; "*knowingly* deprive or attempt to deprive a law enforcement officer of a deadly weapon"). Since the "section" is not completely silent on mens rea, R.C. 2901.21(B) does not operate to import a mental state of recklessness into any part of the "section." Therefore, defendant's argument under *Colon I* fails since R.C. 2901.21(B) does not import recklessness into R.C. 2911.01. Amicus notes that *Maxwell* and *Wac* remain good authority, as this Court recently cited *Maxwell* and *Wac* with approval on this point. *State v. Fairbanks*, 117 Ohio St.3d 543, 2008-Ohio-1470, ¶¶ 11, 13-14.

Furthermore, the aggravated robbery statute requires that the offender committed or attempted to commit a theft offense, thereby already importing the mens rea requirements for theft or other theft offenses into the crime. For example, the crime of theft has "purpose" and "knowingly" mens rea requirements. The recklessness-importation provision in R.C. 2901.21(B) is only meant to import recklessness into statutory crimes that otherwise would amount to strict liability. The result of importing recklessness under R.C. 2901.21(B) is that "recklessness is sufficient culpability to

commit the offense." But recklessness plainly is not sufficient culpability for aggravated robbery, as aggravated robbery would require proof of purpose and knowledge in relation to the commission or attempted commission of the theft offense. The aggravated robbery offense is simply not a strict liability offense, and the importation of recklessness into the crime would not save it from becoming a strict liability offense. Under that circumstance, the recklessness-importation provision has no application. And, of course, per the *Wharf* case, recklessness could have no application to the deadly-weapon form of aggravated robbery anyway.

To be sure, the same predicates of theft or attempted theft are stated in robbery under R.C. 2911.02(A)(2), and therefore some might contend that *Colon I* controls in requiring recklessness even when predicates include their own mens rea requirements. But the prosecution had conceded that recklessness applied in *Colon I*, and *Colon I* did not address the involvement of the predicates of theft and attempted theft and did not address the precise question being raised here, i.e., whether the necessary involvement of degrees of culpability in the predicates is sufficient to avoid importation of recklessness. *Colon I* therefore does not settle those matters, as "[a] reported decision, although in a case where the question might have been raised, is entitled to no consideration whatever as settling, by judicial determination, a question not passed upon at the time of the adjudication." *B.F. Goodrich v. Peck* (1954), 161 Ohio St. 202, paragraph four of the syllabus. Although some might think that *Colon I* implicitly decided this point, there are no "implicit" precedents. *State v. Payne*, 114 Ohio St.3d 502, 2007 Ohio 4642, ¶ 12 ("we are not bound by any perceived implications that may have been inferred from" earlier decision).

Even if the charge of aggravated robbery under R.C. 2911.01(A)(1) was required to allege recklessness, the error would not be "structural" in this case. In *Colon II*, this Court clarified *Colon I*, stating that it "assume[d] that the facts that led to our opinion in *Colon I* are unique." *Colon II*, at ¶ 6. This Court further noted that applying structural-error analysis to a defective indictment is appropriate only in "rare cases, such as *Colon I*, in which multiple errors at the trial follow the defective indictment." Id. at ¶ 8. "Seldom will a defective indictment have this effect, and therefore, in most defective indictment cases, the court may analyze the error pursuant to Crim.R. 52(B) plain-error analysis." Id. Accordingly, this Court confined the syllabus of *Colon I* to the narrow facts of that case. Id.

The present case is not one of the "rare cases" that would justify structural-error analysis. In *Colon I*, this Court emphasized that the trial court did not instruct the jury that recklessness was an element of the robbery charge. *Colon I*, at ¶ 31. But the present case was a bench trial. "Unlike a jury, which must be instructed on the applicable law, a trial court judge is presumed to know the applicable law and apply it accordingly." *State v. Turner*, 11th Dist. No. 2004-A-0005, 2004-Ohio-5632, ¶ 15, citing *State v. Eley* (1996), 77 Ohio St.3d 174, 180-81.

Moreover, the evidence showed that defendant gave Johnson the gun for the express purpose of robbing someone. Defendant and Johnson "were plotting to rob somebody" and defendant "gave [Johnson] a gun and they went to rob somebody." 8th Dist. Op., at ¶ 6.

III. The Elements of the Predicate Offense Need Not Be Alleged in an Indictment for the Compound Offense

Defendant's argument that the indictment was defective for not alleging that he knowingly committed or attempted to commit the theft offense is equally without merit. This Court has recognized that the elements of a predicate offense need not be stated in an indictment for the compound offense. In *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, the charged offense was ethnic intimidation, and the indictment for that offense referred to the predicate offense of aggravated menacing by way of stating that the defendant "did violate Section 2903.21 of the Revised Code." The *Buehner* Court upheld the adequacy of the charge, even though the elements of aggravated menacing were not stated in the indictment.

As stated in *Buehner*:

> **{¶10}** Further, we have previously rejected the argument that an indictment is defective for the state's failure to identify the elements of the underlying offense of the charged crime. *State v. Murphy* (1992), 65 Ohio St.3d 554, 583. This court has held that where the indictment sufficiently tracks the wording of the statute of the charged offense, the omission of an underlying offense in the indictment can be remedied by identifying the underlying offense in the bill of particulars. *State v. Skatzes*, 104 Ohio St.3d 195, 2004 Ohio 6391, ¶ 30. Moreover, we expressly held that "there is no requirement that the indictment demonstrate the basis for the grand jury's findings. The bill of particulars serves this function." Id.
>
> **{¶11}** Therefore, an indictment that tracks the language of the charged offense and identifies a predicate offense by reference to the statute number need not also include each element of the predicate offense in the indictment. The state's failure to list the elements of a predicate offense in the indictment in no way prevents the accused from receiving adequate notice of the charges against him.

> **{¶12}** Here, the indictment followed the language of the charged offense, ethnic intimidation in violation of R.C. 2927.12. An element of the offense of ethnic intimidation is that the accused violated one of the predicate offenses identified in the ethnic-intimidation statute by reference to the statute numbers. See R.C. 2927.12(A). In this case, the indictment specifically identified one of the predicate offenses listed in the ethnic-intimidation statute—R.C. 2903.21. As the dissenting member of the appellate panel stated, it is the predicate offense itself and not the elements of the predicate offense that is an essential element of the charged offense. Therefore, the indictment in this case was sufficient to provide the appellee with adequate notice of the charge against him. (Parallel citations omitted)

Beyond *Buehner*, *Murphy*, and *Skatzes*, other cases have similarly recognized that a charge need not state the elements of the underlying predicate offense and/or that the charge need not specify the predicate offense at all. *State v. Landrum* (1990), 53 Ohio St.3d 107, 119; *State v. Roe* (1989), 41 Ohio St.3d 18, 24; *State v. Schaeffer* (1917), 96 Ohio St. 215 (manslaughter charge need not specify predicate offense).

In the present case, the aggravated-robbery charge specified that defendant had committed or attempted to commit a theft offense. "[I]t is the predicate offense itself and not the elements of the predicate offense that is an essential element of the charged offense." *Buehner*, at ¶ 12. Thus, the charge sufficiently stated the essential element, i.e., "theft offense." The charge was not required to specify the elements of the theft offense.

Colon I does not lead to a contrary conclusion, as it was not addressing whether the elements of a predicate offense must be stated in a charge of a compound offense. *Colon* did not overrule *Buehner* or the other cases cited above addressing the predicate-offense issue.

Precedent should not be overruled if an undue hardship would flow for parties

who had relied on the precedent. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, paragraph one of the syllabus. Such interests would weigh heavily against overruling *Buehner*, given that prosecutors have relied on *Buehner* and like-minded cases in obtaining indictments. To overrule *Buehner*, especially after no objection was raised in the trial court, would be a draconian result.

Finally, even if the indictment was required to allege the elements of the theft offense, the error would not be structural. As explained above, any such defect in the indictment had no effect on the trial court's verdict. Again, the trial court—as the fact-finder in this case—is presumed to know the law and to properly apply it.

For the foregoing reasons, amicus respectfully submits that this Court reconsider its summary reversal in this case and decline jurisdiction. In the alternative, amicus requests that this Court grant the appeal on the first and second propositions of law and allow full briefing and argument.

Respectfully submitted,

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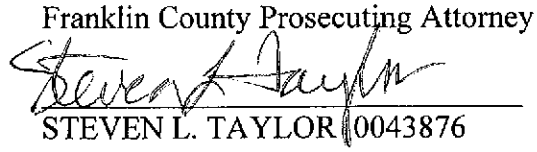

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