

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,
Plaintiff-Appellant

vs.

JAMES LESTER,
Defendant-Appellee

:
: No. 08-1725
: App. Case No. C-070383
:
:
:
:

MERIT BRIEF OF DEFENDANT-APPELLEE

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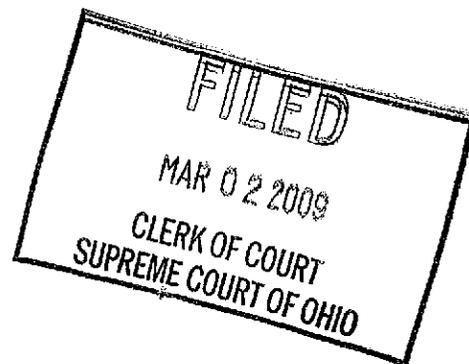


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STATEMENT OF THE CASE AND PROCEDURAL POSTURE

An incident occurred on October 24, 2006 in Hamilton County, Ohio which resulted in Appellee James Lester being indicted on the aggravated robbery and robbery charges. According to the alleged victim, Carlos Gray, he was approached by Mr. Lester while he was at the U.S. Bank in Queensgate; Mr. Gray stated that he had just withdrawn \$1,800. Mr. Gray testified that Mr. Lester stated he was trying to find someone on "Pea Green Street." He further testified that, despite having a great deal of cash on him, he allowed Mr. Lester into his vehicle. At some point, he testified that another man walked up to the vehicle and he let him get in as well. Instead of keeping the \$1,800 on his person, Mr. Gray stated that he left the money in his opened briefcase behind his seat. He then went on to tell a "convoluted" story of "making an example out of Mr. Lester" and him putting \$100 into a bag. This wholly unbelievable story ended with Mr. Lester allegedly taking the \$1,800 (although Mr. Gray did not see him do it) and pulling a knife on Mr. Gray. A knife was identified at trial by Mr. Gray, but no one testified that it was a knife recovered from Mr. Lester.

On April 12, 2006, Mr. Lester allegedly played a card game with Otha Bonner, after Mr. Bonner had driven him around. It appeared to be unclear whether Mr. Bonner lost the money in the card game or someone took the money because Mr. Bonner testified that no one made him do anything, he voluntarily got into the card game with Mr. Lester and another man, and he lost his money.

On October 24, 2006, Mr. Lester and another man allegedly played a card game with Sherman Lymen. Mr. Lymen voluntarily gave Mr. Lester an automobile ride, voluntarily let another man into his car, and voluntarily began playing the card game. At some point, Mr. Lymen gave his wallet to the other man, but Mr. Lester had nothing to do with that. Mr. Lymen

also testified that he withdrew \$3,000 out of the bank because the other man, not Mr. Lester, “coerced” him. Again, it appeared that Mr. Lyman simply lost his money in the card game.

Based on these incidents, Mr. Lester was indicted for aggravated robbery and robbery on November 1, 2006 in Case No. B-0609954; and he was indicted in Case No. B-0610741 for two counts of theft from an elderly person on November 22, 2006. The State of Ohio filed a Motion to Consolidate these cases on February 15, 2007. At some point, the trial court granted that Motion. On April 20, 2007, after the trial court denied motions for a continuance and new counsel, a jury trial began. On April 20, the jury returned verdicts of guilty to all charges. Mr. Lester was then sentenced to 7 years on the aggravated robbery charge; the robbery charge was merged for purposes of sentencing. This sentence was consecutive to the 3-year sentence in Case No. B-0610741. A Notice of Appeal was timely filed on May 29, 2007 with the First District Court of Appeals. The First District reversed the trial court's judgement for the aggravated robbery conviction on July 18, 2008. The State of Ohio then filed a Notice of Appeal to this Court on August 29, 2008. That appeal was accepted by this Court on January 2, 2009.

PROPOSITION OF LAW

There is a distinction, for the purpose of assigning a *mens rea* element, between the acts of possessing or controlling a deadly weapon during a theft, and brandishing, displaying, using or indicating possession of a deadly weapon during a theft.

On April 9, 2008, this Court held that an indictment that fails to charge a *mens rea* element of a crime is so defective that it resulted in structural error which need not be raised at trial; structural errors are “constitutional defects” which deprive a defendant of a constitutional right. As the defective indictment was a structural error 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,” the defendant’s conviction had to be reversed. State v. Colon (Ohio 2008), 118 Ohio St.3d 26, 885 N.E.2d 917, 2008-Ohio-1624 (*Colon I*); see also State v. Perry (Ohio 2004), 101 Ohio St.3d 118, 802 N.E.2d 643, 2004-Ohio-297. Support for this position was found in Art. I, Section 10 of the Ohio Constitution which states that “no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury.” It also stated that the defendant’s due process rights were violated because he had no notice of what *mens rea* the State was required to prove.

This Court then elaborated on *Colon I* in State v. Colon (Ohio 2008), 119 Ohio St.3d 204, 893 N.E.2d 169, 2008-Ohio-3479 (*Colon II*). First, this Court held that the rule announced in *Colon I* was prospective. Second, this Court went on to further explain *Colon I*, holding that the facts of *Colon I* were “unique” and that a structural-error analysis of a defective indictment would only be appropriate where “multiple errors” followed the defective indictment. These “multiple errors” included (1) the defendant’s lack of notice that the *mens rea* element of robbery was recklessness, (2) the state’s failure to prove the element of recklessness, (3) the trial court’s failure to instruct the jury on a *mens rea* of recklessness, and (4) in closing, the state’s treatment of robbery as a strict liability offense.

In the case at bar, Mr. Lester’s case is almost directly on point to the *Colon I* case; he was convicted of the charges of aggravated robbery and robbery. No where in the indictment for either of these charges is a culpable mental state mentioned. The indictment in this case, just as the indictment in the *Colon I* case states that Mr. Lester (1) “in committing or attempting to commit a theft offense . . . or in fleeing immediately thereafter, had a deadly weapon on or about

his person or under his control, and displayed, brandished, indicated possession or used the deadly weapon;" and (2) "in committing or attempting to commit a theft offense . . . or in fleeing immediately thereafter, inflicted or attempted to inflict or threatened to inflict physical harm . . ."

This indictment was defective and unconstitutional and resulted in a structural error that permeated the proceedings; there is "no evidence 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 [his] due process rights were violated." *Colon I* at 32. There were also multiple errors which followed the defective indictment: Mr. Lester was never put on notice that the *mens rea* for robbery and aggravated robbery was recklessness; the prosecutor, in opening statements, throughout the course of the trial, and during closing statements, never once spoke of recklessness, instead treating robbery and aggravated robbery as strict liability offenses; and in instructions to the jury, the trial court did not inform the jury that Mr. Lester had to recklessly display, brandish, or indicate possession of a deadly weapon nor that Mr. Lester had to recklessly inflict or attempt to inflict physical harm. Therefore, Mr. Lester was prejudiced by this structural error, as these multiple errors "permeate[d] the trial from beginning to end."

The State of Ohio contends that this Court's decision in State v. Wharf (Ohio 1999), 86 Ohio St.3d 375, 715 N.E.2d 172, 1999-Ohio-112 supports a reversal of the First District's decision; this contention is erroneous. This Court in the *Colon I* decision clearly states that "[w]hen a section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense." *Colon I* at 28. Even Justice Lanzinger in her dissent recognizes that the majority, for the first time, was holding that "the state is required to prove that the defendant *recklessly* inflicted . . . physical harm." *Colon I*

at 40. She acknowledged that the sweep of *Colon I* in essence, had trumped the earlier, more limited holding in *Wharf*.

Similarly, nowhere in R.C. Section 2911.01(A)(1), the aggravated robbery section under which Mr. Lester was convicted, is a culpable mental state indicated nor is there indication of a purpose to impose strict liability. The State's contention that as "the act of possessing a weapon . . . is a strict liability offense, the act of displaying or indicating its presence should be likewise" is erroneous. Even the *Wharf* case suggests a distinction between the *mens rea* required for mere possession of a weapon (strict liability) and the *mens rea* required for actual use or intent to use a weapon (recklessness) which is required in the aggravated robbery statute, R.C. Section 2911.01(A)(1): "[B]y employing language making mere possession or control of a deadly weapon, as opposed to actual use or intent to use, a violation, it is clear to us that the General Assembly intended that R.C. 2911.02(A)(1) be a strict liability offense." (Emphasis added). State v. Jones (December 30, 2008), 7th District, Mahoning County No. 07-MA-200, 2008-Ohio-6971, quoting, *Wharf* at 378. The *Jones* Court found support for its holding that the *mens rea* required for R.C. Section 2911.01(A)(1) was recklessness in this Court's recent case, State v. Davis (Ohio 2008), 119 Ohio St.3d 113, 892 N.E.2d 446, 2008-Ohio-3879. In *Davis*, this Court, "without opinion, simply reversed the court of appeals' holding on the authority of *Colon I*" and held that the indictment on an aggravated robbery count in violation of R.C. Section 2911.01(A)(1) was defective for failing to state a *mens rea*, as is Mr. Lester's indictment under the same statute section. *Jones* at para. 51.

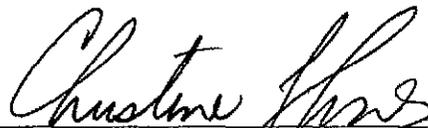
Therefore, as the indictment failed to state the *mens rea* of "recklessness," it is structurally defective under this Court's decision in both *Colon I* and *Colon II*. The First District

Court of Appeals' decision in this case was properly decided.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Court affirm the First District Court of Appeals' decision, reversing his convictions for aggravated robbery and robbery.

Respectfully submitted,



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CERTIFICATE OF SERVICE

In hereby certify that a copy of the foregoing brief was personally served upon Judith Anton Lapp, Assistant Hamilton County Prosecuting Attorney, this 26th day of February, 2009.



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