

IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

09-1407

DAVID K. WILLIAMS

: TR. CA. NO 06CR-11-8293 -
06CR-08-5766

Plaintiff-Petitioner

:

vs

: CASE NO. 09AP-105
09AP-106

TIMOTHY BRUNSMAN

:

Defendant-Respondent

: HEARING REQUESTED

ORIGINAL

PETITION FOR WRIT OF HABEAS CORPUS
SWORN TO UNDER AUTHORITY OF 28 USC §1746

Now comes DAVID K. WILLIAMS (herein Petitioner) seeking to Petition the Court for a Writ of Habeas Corpus, Petitioner respectfully alleges:

1. Petitioner is restrained of his liberty at the Lebanon Corr Inst. in Warren County, Ohio and the person by whom the Petitioner is restrained is the above named Defendant;

2. The Petitioner has not been committed nor detained by virtue of any proper final judgement, or final order, issued by a court with "Competent Jurisdiction" over the Petitioner;

3. That the cause or pretense of such imprisonment, according to the best of Petitioner's knowledge or belief, is a commitment issued by the FRANKLIN COUNTY COURT OF COMMON PLEAS, Based upon indictments charging a total of 8 counts of AGGRAVATED ROBBERY w/Spec. A copy of which has been attached hereto and marked "EXHIBIT A".

Wherefore, Petitioner prays a Writ of Habeas Corpus be issued. directing the Defendant to bring Petitioner before this Court. whereupon the Court may inquire into the legality of the Petitioner's detainment.

On this 24th day of April, 2009.

RECEIVED
AUG 03 2009
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
AUG 03 2009
CLERK OF COURT
SUPREME COURT OF OHIO

cc file

(cover page)

IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

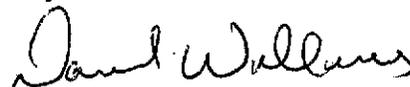
STATE OF OHIO, : TR. CA. NO 06GR-11-8293
Plaintiff-Petitioner :
vs : CASE NO 09AP-105
DAVID K. WILLIAMS, :
Defendant-Movant : MOTION TO WITHDRAW GUILTY PLEAS
: PURSUANT TO OHIO CRIMINAL RULE 32.1

Comes now Defendant-Movant **David K. Williams** pro se and pursuant to Rule 32.1, Ohio Rules of Criminal Procedure, moves this Court for an Order, allowing him to withdraw his guilty plea to eight(8) counts of Aggravated Robbery per ORC§2911.01 [A](1) for the reasons that an injustice has occurred because such pleas were entered without the effective assistance of counsel, where such counsel induced such pleas pursuant an indictment that charged only general Aggravated Robbery because no mens rea element was charged therefore not charged the offenses. Cf. State v. Cimpritz(1953) 158 Ohio St 490, Article I, Section 10, Ohio Constitution, Sixth and Fourteenth Amendments, United States Constitution.

For these reasons Defendant requests that an evidentiary hearing be ordered at which he be allowed to attend with the assistance of court-appointed counsel, pursuant to Chapter 120.16, Ohio Public Defender's Act.

It is so prayed for.

Respectfully submitted,



David K. Williams #549-252
Lebanon Correctional Institution
P.O Box 56
Lebanon, Ohio 45036

FIRST GROUND FOR RELIEF

Defendant's guilty pleas to generic Aggravated Robbery is void under Ohio Crim Rule 11[c](2)(a) and the Due Process Clause of the Ohio and United States Constitutions.

Ohio Crim Rule 11[c](2)(a) mandates that this Court shall not accept a plea of guilty or no contest based upon misinformation as to the elements of the offenses, *Id.* Such procedure is constitutionally invalid. *Smith v O'Grady*, 312 U.S. 329, 334, 61 S. Ct 572, 574 [1941]; *Henderson v Morgan*, 426 U.S. 637, 644-645, 96 S.Ct 2253, 2257-2258[1976].

Defendant's conviction and punishment for the acts that the law of Ohio does not make criminal, cf. ORC§2911.01[A](1), constitutes a circumstance "inherently resulting in a complete miscarriage of justice and presents exceptional circumstances that justify collateral relief***" *Davis v U.S.*, 417 U.S. 333,346-347, 94 S. Ct 2298, 2305 [1974]

Conversely then, where this Common Pleas Court, defense counsel and Asst Prosecuting Attorney advised and misinformed Defendant as to the essential elements of the Aggravated Robbery charges preventing him from receiving "real notice" of the crimes with no understanding of the nature of the offenses as required under Ohio Crim Rule 11[2](a) and the sixth and fourteenth amendments to the United States Constitution, as well as Article I, Sections 10 and 16, Ohio Constitution, a complete miscarriage of justice resulted here divesting the Court of subject matter jurisdiction to convict or sentence Defendant accordingly. Compare: Article IV, Section 3[B], Ohio Constitution [Common Pleas Court justicible jurisdiction shall be provided by law].

As a result, this miscarriage of justice mandates that an evidentiary hearing be ordered in this matter at which Defendant be allowed to attend with the assistance of counsel under Chapter 120[A][D], Ohio Revised Code, the so-called Public Defender's Act.

CONCLUSION

Wherefore accepting Defendant's allegations as true and drawing all reasonable inferences therefrom as the Court is required to do, Cf. *Peterson v Teodosio*, [1973], 34 Ohio St. @d 161, Defendant has stated grounds which relief may be granted.

It is so prayed for.

MEMORANDUM IN SUPPORT

The Defendant's indictment(s) did not specify the mental element of AGGRAVATED ROBBERY and/or ROBBERY--that the Defendant acted "Recklessly". Exhibit A. Under R.C. §2911.02(A)(1), a defendant only commits AGGRAVATED ROBBERY and/or ROBBERY if the defendant acts knowingly, recklessly or negligently, depending on the charges. See R.C. §2901.22("Culpable Mental State"). Further, pursuant to R.C. 2901.21("Requirements for Criminal Liability"), the indictment had to allege that the defendant acted to "Inflict, or attempt, or threaten to inflict physical harm on another" or that he recklessly had a "Deadly Weapon or Dangerous Ordinance on or about [his] person or under [his] control." R.C. §2911.11(A)(1) & (A)(2).

Applying the COLON standard sub judice, 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 essential elements of the offense charged, as the indictment omitted the mens rea element for the crime of AGGRAVATED ROBBERY and/or ROBBERY. Due to the lack of the intent element, 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 AGGRAVATED ROBBERY and/or ROBBERY, thus the defendant's Due Process rights were violated.

Moreover, the State did not argue that the defendant's conduct in inflicting physical harm on the victim(s) constituted reckless conduct. In addition, when the Prosecution reviewed the elements of AGGRAVATED ROBBERY and/or ROBBERY necessary to find the defendant guilty, the Court failed to find the required mens rea elements for the offense. There is no evidence in the record that the Court even considered whether the defendant was reckless in inflicting, attempting to inflict, or threaten to inflict physical harm, as is required by Ohio Law to convict under R.C. §2911.01(A)(1) & (A)(2).

Criminal Rule 7(D), first adopted in 1973, affected the rule with respect to the amendment of indictments. Criminal Rule 7(D) states, "The Court may at any time before or after a trial amend an indictment, information, or complaint, or bill of particulars, in respect to any defect, imperfection, an omission in form or substance, or of any variance with the evidence, provided that no change is made in the name or identity of the crime charged." Despite the language in Criminal Rule 7(D) permitting amendment, the 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 enable him to plead an acquittal or conviction in bar of future prosecution for the same offense." **STATE v. CHILDS(2000)**, 88 Ohio St. 3d 558, @563, 728 N.E.2d 378, quoting **HANDLING v. UNITED STATES(1974)**, 418 U.S. 67, @117-18, 94 S. Ct, 2887, 41 L.Ed 2d 590.

Ohio Supreme Court case law follows the Ohio Constitution, which provides, no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury." **Section 10, Article I, Ohio Constitution**. The material and essential facts constituting an offense are found by the presentment of the Grand Jury, and if one of the vital and material elements identifying and characterizing the crime has been omitted from the indictment. such a defective indictment is insufficient to charge an offense, cannot be cured by the Court, as such a procedure would not only violate the constitutional rights of the accused, but would also allow the Court to convict him on an indictment essentially different from that found by the Grand Jury. "**STATE v. HARRIS(1932)**, 125 Ohio St. 257 @ 264, 181 N.E. 104.

The Ohio Rules of Criminal Protection reflect the principle that an indictment that fails to include all the elements of an offense is a defective indictment. Criminal Rule 7(B) provide that an indictment must include a statement that "the Defendant has committed a public offense specified in the indictment. *** The statement may be made in ordinary concise language without technical averment or allegations not essential to be proved. The statement may be in the words of the applicable section of the statute, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged."

Structural Errors are "Constitutional defects that" defy analysis by "Harmless error" standards because they "affect[] the framework from within which the trial proceeds, rather than simply [being] an error in the trial process itself." (brackets added in **FISHER**) **STATE v. PERRY**, 101 S. Ct 3d 128, 2004: Ohio 297, 802 N.E. 2d 643 @ 117, quoting **STATE v. FISHER**, 99 Ohio St 3d 127, 2003 Ohio 2761, 789 N.E. 2d 222 @ 19, quoting **ARIZONA v. GUL-MINANIE(1991)**, 499 U.S. 279, @ 209-10, 111 S.Ct 1246, 113 L.Ed 302, " Such errors permeate '[t]he entire conduct of the trial from beginning to end' so that the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." Id., quoting **ARIZONA** @309-10, quoting **ROSE v. CLARK(1986)**, 470 U.S. 570, @577-98, 106 S. Ct 3101, 92 L.Ed 2d 460."[A] structural error mandates a finding of per se prejudice."(emphasis added).

The Defendant in this case did not receive a constitutional indictment and therefore the defective indictment in this case resulted in structural error. Defendant's indictment does not allege all of the elements, and therefore fails to allege a crime. **STATE v. COLON**, ---Ohio St 3d---,2003-Ohio-1624, @118-45, 2008 W 1077553(2008). The error violated Defendant's right to Due Process and the right to only be convicted pursuant to indictment.Id.

Pursuant to **Section 10, Article I, Ohio Constitution**; Criminal Rule 7(D). The error is structural and is not waived by a failure to object. Id, at syllabus. Generally, questions which could have been, should have been, or were decided on direct appeal are res judicata under Ohio Law and may not be subject to collateral attack by way of post conviction or other litigation. See: **STATE v. PERRY(1967)**, 10 Ohio St. 2d 175. Lack of jurisdiction is, the one exception to this rule. Claims for want of subject jurisdiction can be raised at any time, and are normally revised as a due process violation.

Jurisdiction may not be conferred by agreement, nor could jurisdiction be vicariously waived by counsel on the defendant's behalf. It has been held that where an essential element of the charged offense is missing from an indictment, the Court lacks jurisdiction of the subject matter and the indictment may be attached either collaterally or on direct appeal. See: **STATE v. CIMPRTIZ(1953)**, 158 Ohio St. 490. Courts are required to address the Federal Constitutional issue and brings the trial court's jurisdiction into question and whether the Petitioner is entitled to Habeas relief. See: **HAMMOND v. DALLMAN(1992)** 63 Ohio St. 3d 666.

In **STATE v COLON**(2008), 2008 WL 1077553. 2008 Ohio 1624, the court held; "A defendant can challenge for the first time, on appeal, or through collateral attack an indictment that omits an essential element of the crime, thus protecting the defendant's right to a Grand Jury indictment. In discussing the Grand Jury provisions of the Federal Constitution, which are very similar to the Grand Jury provisions of the Ohio Constitution, the United States Supreme Court has stated that the Grand Jury is a constitutional fixture in its own right." **United States v Williams**(1992), 504 U.S. 36 @ 47, 112 S Ct 1735, 118 L. Ed. 352. quoting **United States v Chamen**(C.A. 9.1977), 549 F.2d 1306, @1312.

The Founders thought the Grand Jury so essential to basic liberties that they provided in the Fifth Amendment, that a prosecution for serious crimes can only be instituted by a "presentation of indictment by a Grand Jury," quoting **Nixon v Strica**, 487 F.2d 700, @712 fn54. The Grand Jury is an important part of 'American Citizens'." Constitutional rights, the purpose of which is to provide a fair method for instituting criminal proceedings.

According to Criminal Rule 12(c)(2), there are two specific exceptions to the rule. defects in the indictment that fail to either show "jurisdiction of the court" or, "to charge an offense does not need to be raised prior to trial and can be raised at any time during the pendency of the proceedings. The conclusion that an indictment that omits an essential element fails to charge an offense is supported by case law. In **State v Wozniak**, 172 Ohio St. 517(1961) paragraph 1 of the syllabus, the court there held that the intent element of the offense in an essential element of the crime and an indictment that does not charge a defendant with intent does not charge a defendant with a crime.

As was explained in **Wozniak**: "[t]o require defendants to answer for the crime sought to be charged in the indictment after amendment of the indictment by addition thereto of a missing charge or essential element of that crime would be to require defendant's answer for a crime other than on presentment or indictment of a Grand Jury." in **Wozniak** the indictment did not include the element of intent specified in former R.C. §2907.10, now R.C. §2911.13, Breaking and Entering. Id. @519, 178 N.E. 2d 800. The Supreme Court has held that the prosecutor was not permitted to perfect the defective

indictment by amendment, because the "Grand Jury, not the prosecutor, even with the approval of the court, must charge the defendant with each essential element of that crime." Id. @520, 178 N.E. 2d 800.

*The Petitioner could have objected to the indictment prior to trial, he didn't. Crim R. 12(c)(1) provides that objections based on defects in an indictment must be raised by pretrial motion. The plain implication of that requirement is that failure to object waives any error the defect involves. In this case the defect is not subject to waiver because it is jurisdictional in nature. That defect rendered the indictment insufficient to confer jurisdiction on the court to try and convict Mr. Williams on the charge of *Aggravated Robbery*.

The defect is fatal, notwithstanding any waiver, because waiver cannot operate to create subject matter jurisdiction the court lacks. A Common Pleas Court's subject-matter jurisdiction can only be created by statutory enactment. Article IV, Section 4(B), Ohio Constitution. *Mattone v Argentina(1931)*, 123 Ohio St 393, 175 N.E. 603. "Where a Court has no jurisdiction over the subject matter of an action or appeal, a challenge to jurisdiction on such grounds may effectively be made for the first time on appeal to a reviewing court or by a collateral proceeding." *Jenkins v Keller(1966)*, 6 Ohio St 2d 122, 216 N.E. 2d 379, Paragraph 5 of the syllabus.

In *State v Cimpritz(1953)*, 158 Ohio St 490, 110 N.E. 2d 416 the Defendant was convicted of Attempted Burglary. The section of the General Code at that time defining that offense included as an element, that the act of Breaking and Entering was committed "malicious and forcibly." The indictment charges only that the Defendant's acts were committed "unlawfully." The omission was a defect, for which the defendant moved to quash the indictment, the motion was denied, and he was subsequently convicted. On appeal, the Supreme Court found that the defect was fatal because, as a result, the indictment failed to charge an offense at all. The Court further held:

A judgement of conviction based on indictment which does not charge an offense is void for "lack of jurisdiction of the subject matter" and may be successfully attacked

either on direct appeal to a reviewing court or by a collateral proceeding." Id., syllabus by the Court Paragraph 6.

Unlike the Defendant in **Gimpritz**, Mr. **Williams** failed to bring the defect in the indictment to the Court's attention by way of motion or objection. That failure does not waive the jurisdictional defect. **Jenkins v Keller**, Supra. even had he objected, the Court could not have cured the defect by amending the indictment to include the "Reckless" element. That would have changed the identity of the offense with which Mr.

was charged. Grim R 7(D) prohibits an amendment to that effect. To properly charge Aggravated Robbery/Robbery. reindictment was required. There was no re-indictment. Thus Petitioner's conviction should be set aside, and reindictment be barred, as Petitioner has once been in jeopardy of conviction.

Lastly, Mr. **Williams** prays this Court to recognize he is a pro se litigant, and as such his pleading should be held to a less stringent standard than a pleading drafted by a lawyer; If the Court can read the pleading to state a valid claim on which the litigant can prevail, it should be so despite his failure to cite proper legal authority, confusion of legal theory, poor syntax and sentence construction, or litigants unfamiliarity with the pleading requirements. See: **Boag v McDougal**, 434 U.S. 364, 70 L.Ed 2d 531, 102 S. Ct 70(1982); **McCormick v City of Chicago**, 230 F.3d 319(7th Cir. 2000).

Conclusion

For all the foregoing reasons the Petitioner prays this Court grant him the relief he seeks, and whatever other relief this Court deems to be just and appropriate.

Respectfully submitted,



Lebanon Correctional Institution
P.O. Box 56
Lebanon, Oh 45036