ORIGINAL

IN THE SUPRME COURT OF OHIO

09-1564

STATE OF OHIO,	:	
Appellees,	:	On Appeal from the Montgomery County Court of Appeals, Second Appellate District
Vs.	:	
JAI DEMETRIUS RICHARD.	:	
Appellant.	:	Court of Appeals Case No.
	:	

MEMORANDUM IN SUPPORT OF JURISDICTION

JAI DEMETRIUS RICHARD

Jai Demetrius Richard #
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Appellant Pro Se

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FILED
AUG 3 1 2009
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page

EXPLANATION OF WHY THIS CASE IS A CASE OF GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION 1

STATEMENT OF THE CASE AND FACTS 2

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW 2-6

Proposition of Law No. I: The appellant was denied his rights guaranteed by Article I, Section 10 and 16 of the Ohio Constitution, Fifth and Fourteenth Amendment of the United States Constitution, When the trail court convicted and sentenced the Appellant Via an indictment that lacked a vital and material element and thus, the Trial Court lacked jurisdiction and it abused it's discretion when it denied the motion to Void judgment which seeked to correct the error . . . . . .

Proposition of Law No. II: By failing to charge any level of mens rea for the serious physical injury element of Aggravated Robbery, under O.R.C. 2911.01 (A)(1), The indictment failed to properly charge Mr. Richard and failed to give him notice of the charges against him. This error violated Mr. Richards Constitutional Rights of indictment by a Grand Jury and the right to due process and the court abused it's discretion by asserting that he had to be on direct review when colon was announced to receive this basic constitutional protection. . . . . .

CONCLUSION 6

CERTIFICATE OF SERVICE 7

Affidavit Of Indigency 8

APPENDIX

Attached:

Opinion of the Montgomery County Court of Appeals (July 31, 2009) 8

EXPLANATION OF WHY THIS CASE IS A CASE OF GREAT GENERAL INTEREST AND INVOLVES A SUBSTANIAL CONSTITUTIONAL QUESTION

This cause presents two critical issues for the future of Appellant Jai Demetrius Richards United States and the State of Ohio's Constitutional Rights as follows: (1) The Appellant was denied his Constitutional rights as guaranteed by Article 1, Sections 10 and 16 of the Ohio Constitution, and Fifth and Fourteenth Amendment of the United States Constitution, when the trial court convicted and sentenced him via an indictment that lacked a vital and material element and thus, the court lacked jurisdiction and it abused it's discretion when it denied the motion to void judgment which seeked to correct the error, (2) By failing to charge any level of mens Rea for the serious physical injury element of Aggravated Robbery, Under O.R.C. 2911.01(A)(1), The indictment failed to properly charge Mr. Richard and failed to give him notice of the charges against him. This error violated the Defendants right to due process and the court abused it's discretion by asserting that he had to be on direct review when Colon was announced to receive this basic constitutional protection.

In this case, the court of appeals rendered its decision on the primary conclusion that Aggravated Robbery as charged in this case, is a strict liability offense, the trial court was incorrect in holding that Richard was not entitled to relief under Colon 1. As in any Case when a Material Element of any Crime is not included in the Indictment that Indictment is Void, Thus as in this Case the Indictment is Void for lack of a material element and this Case should be reversed and remanded back to the trial court or Dismissed for lack of that Element.

The decision of the court of appeals has denied Appellant Jai Demetrius Richard of his Untied States and the State of Ohio's Constitution Rights as follows because the Defendant was denied his Constitutional Rights as guaranteed by Article 1, sections 10 and 16 of the Ohio Constitution, And Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

The appellant Jai Demetruis Richard was indicted and subsequently convicted of Aggravated Robbery, Rape, Attempt To Commit Aggravated Murder and Felonious Assault in 1996. In July of 2008, the appellant filed a motion to arrest or void judgment which asserted that the Trial Court lacked jurisdiction to convict and sentence appellant Jai Demetruis Richard on t he Robbery charges because the indictment omitted a vital and essential mens rea element thereby, divesting the appellant of his rights guaranteed under the Ohio and United States Constitution.

On the eighth day of October, 2008, the Montgomery County Court of Common Pleas denied the Motion asserting that it was based on the Ohio Supreme Court decision in State V. Colon, 1077553, WL and Colon II, 2008-Ohio-3749, which asserted that if a defendant was not on direct review at the time of the decision then it did not apply to your case. Is is from that decision that the appellant now appeals.

In support of its position on theses issues, the appellant presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The appellant was denied his rights guaranteed by Article I, Section 10 and 16 of the Ohio Constitution, Fifth and fourteenth Amendments of The United States Constitution when the trial court convicted and sentenced him via an indictment that lacked a vital and material element and thus, the court lacked jurisdiction and it abused it's discretion when it denied the motion to void judgment which seeked to correct the error.

Article I, Section 10 of the Ohio Constitution asserts that "No person shall be held to answer for a capital, or other infamous, crime unless on 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 defective indictment is insufficient to charge an offense, and cannot be cure by the court, as such a procedure would not only violate the constitutional rights of the accused, but would allow the court to convict him on an indictment essentially different from that found by the Grand Jury." State V. Allen, 723 N.E.2d 674 at ¶ 4-5, Harris V. State, 267 N.E.2d 104, State V. Fairbanks, 2007 WL 2296482.

In the instant case the appellant was charged with was charged with Aggravated Robbery. The element of "Recklessness" is an essential element of that offense and charging instruments must include it. The State's failure to allege in the information or indictment, the requisite mental state or "mens rea" of recklessness rendered the charging instrument insufficient and invalid. Further, a judgment of conviction based on an indictment which does not charge an offense is void of lack of subject matter jurisdiction. State V. Crimpritz, 110 N.E.2d 416.

In Apprendi V. New York, (2000), 530 U.S. 466, the united State Supreme Court asserted that all essential element of an offense must be presented to the jury and prove beyond a reasonable double. If a State fails to apply the dictates of the high court's decision into it's Judicial system then that State would be guilty of an "Unreasonable Application" of clearly established Federal Law.

The appellant asserts that it is not possible for the essential element to be presented to a jury when they are omitted from the charging instrument nor instructed tot eh jury.

In State V. Marcus Davis, 2007 WL 3203040, the defendant was charged with two (2) counts of Felonious Assault and Aggravated Robbery. The 8th District Court of Appeals affirmed the appeal asserting that Davis had waived his defective indictment argument by not raising it below. However, on appeal to the Ohio Supreme Court, 2008 WL 3256267, the Court states that since the indictment did not contain the essential mens rea element for the offense charged and since this type of error cannot be waived, the judgment of the Court of Appeals is reversed and remanded thereby being consistent with the decision in State V. Colon, 118 Ohio St. 3d 26.

A similar position was taken by the First District Court of Appeals in State V. Lester, 2008 WL 2781033. Lester who was charged with Aggravated Robbery asserted that his indictment was fatally defective. However, the State asserted that he had waived such error be failing to raise it below. At ¶ 23 of the Lester Decision, the Court asserted that Lester was entitled to an indictment charging every essential element, but the indictment charging Laster with Aggravated Robbery omitted the mens rea element for the offense. "Colon is directly on point. The Ohio Supreme Court has told us that this type

of error is never harmless." Even though Lester did not raise the issue below, we still must reverse."

Since the indictment was fatally defective, it is apparent that the Montgomery County Court of Common Pleas lacked jurisdiction to rendered it's judgment of conviction and subsequent sentence. Further, a judgment rendered by a court lacking subject matter jurisdiction is void ab initio. Every judge has a duty to follow the constitution and to impose lawful sentence. Therefore, the denial of the Motion to Correct or Void Judgment constituted an abuse of discretion.

Proposition of Law No. II: By failing to charge any level of mens rea for the serious physical injury element of Aggravated Robbert, under O.R.C. 2911.01(A)(1), the indictment failed to properly charge Mr. Richard and failed to give him notice of the charges against him. This error violated Mr. Richard's constitutional rights of indictment by a Grand Jury and the right to due process when the Colon decision was decided in order to receive this basic constitutional protection.

The issue that this case presents to the court it does the recent Supreme Court Ruling in State V. Colon, 2008 WL 1077553 and Colon II a circumvent a criminal defendant's constitutionally guaranteed right to be formally charged by indictment and to challenge the jurisdiction of the court if this process if fatally flawed?

Basically, the ruling in Colon II asserted that if a defendant was not on direct review or within the 180 day time limit imposed by R.C. § 2953.21, Colon decision did not apply. The defendant asserts that if in fact the ruling in Colon does not apply then it should not have been used to deny this case since this case was not predicated solely on Colon. In fact a carefully reading of the Motion will reveal that the decision in Colon was not even mentioned. The motion was based on the Ohio and United States Constitution. It was asserting that the Trial Court did not have jurisdiction. The appellant assert that it's like a domino effect. The State had five steps and Basically it is using step five to knock down the other 4 steps.

Step 1: The Ohio Constitution guaranteed to every defendant the right to know the "Nature and cause of the accusation against them". Section 10, Article I. The primary purpose of a charging instrument in a criminal case is to inform the defendant of the nature of the offense with which he is

charged. State V. Lindway, (1936), 2 N.E.2d 490, Holt V. State, (1923), 140 N.E. 349, State V. Villagomez, (1994), 337 N.E.2d 167. In light of this purpose the law of Ohio has consistently held that an indictment or affidavit must set forth all the essential elements of the crime charged or it is invalid! The omitting of a material element of an offense, such as mens rea, is "so fundamental a defect or omission as to result in an affidavit (or indictment) which fails to allege an offense and which is not subject to amendment." see Culp, 288 N.E.2d 308 at ¶ 41.

Step 2: Without "a formal and sufficient accusation", Trial Courts has no jurisdiction to convict and sentence for a crime. 29 Ohio Jurisprudence 3d Criminal Law 2318, State V. Wohlever, 500 N.E.2d 318 at ¶ 2.

Step 3: Jurisdiction means "the court's statutory or constitutional power to adjudicate the case." because subject matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time. If a court acts without jurisdiction, then any proclamation by that court is void. Patton V. Diemer, (1988), 518 N.E.2d 941. Therefore, absent a proper indictment, the Trial Court lacks jurisdiction to enter a judgment and if a judgment is never-the-less rendered, it is a nullity and void ab initio.

Step 4: The defendant has a right to challenge the jurisdiction of The Court of Common Pleas, General Division, for the purpose of appellate review. Even when not raised by either party, the issue of subject matter jurisdiction may be raised sua sponte by the court at any stage of the proceedings, including for the first time on appeal. The issue of subject matter jurisdiction cannot be waived. It is only when the court lacked subject matter jurisdiction that the judgment is void. Pratts V. Hurley, 860 N.E.2d 992.

A parties failure to challenge a court's subject matter jurisdiction cannot be used in effect to bestow jurisdiction on a court where there is none. State V. Pruitt, 2002 WL 3286031. If the judgment of conviction is void, it is a nullity. It can attacked by motion, on appeal, or Collaterally, without time restrictions. In re Murphy, 461 N.E.2d 910 at ¶ 7. Each day that the sentence is attempted to be

enforced affords the defendant the right to challenge the jurisdiction aspects of it. Smith V. Ldh Communications of Ohio Inc. (1993), 1993 WL 34602.

Step 5: The decision in Colon II which basically asserts that if you were not on direct review or within the a1 80 day time limit imposed by R.C. § 2953.21, then the Colon decision does not apply to your case. The Trial Prosecutor is using the Colon to ask for a denial when it should not be used for the purpose to grant or deny. If it is applicable it's inapplicable period! Therefore it should not be used to knock down the other four steps.

CONCLUSION

In review, if a criminal defendant has a constitutionally guaranteed right to be charged by the presentment or indictment of a Grand Jury; and said indictment must include all essential elements or it fails to properly charge an offense; and is void and a nullity ab initio, thereby divesting the court of jurisdiction of the subject matter and therefore, cannot be waived and may be attached at any time. How can the Common Pleas Court assert that a defendant has to be on direct review at the time of the Colon or the court was not the sole predicate for relief and if it does not "trump" the Constitution, when there is no way that the court should use it for a denial of a review of a jurisdictional challenge.

The appellant asserts that the State must permit the collateral attack on a judgment of conviction where the judgment was based on a denial of a prisoner's rights under the United States Constitution. Case V. Nebraska, 381 U.S. 336.

Since the indictment was fatally defective and since the court lacked jurisdiction, this case should be reversed and remanded back to the trial court. See attach Copy of the Second Appellate District Court of Appeals Opinion

Respectfully Submitted,

Jai Richard

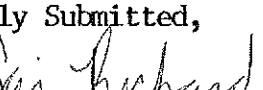
Jai Demitrius. Richard

Defendant, Pro Se

CERTIFICATE OF SERVICE

This is to Certify that a True and Correct Copy of the Foregoing Motion was sent to the Montgomery County Prosecuting Attorney at 301 W. Third St., Dayton,Ohio 45422 on this 25 day of August ,2009

Respectfully Submitted,



JAI DEMITRIUS RICHARD #318-195
L.O.C.I.
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Attachment not scanned

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23119
v.	:	T.C. NO. 95CR1245/ 95CR1244/95CR819
JAI RICHARD	:	
Defendant-Appellant	:	(Criminal appeal from Common Pleas Court)
	:	

. . . . . .

OPINION

Rendered on the 31st day of July, 2009.

. . . . . .

MELISSA M. FORD, Atty. Reg. No. 0084215, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

JAI RICHARD, #318-195, London Correctional Institute, P. O. Box 69, London, Ohio 43140
Defendant-Appellant

. . . . . .

FROELICH, J.

Jai Demetrius Richard appeals from a judgment of the Montgomery County Court of Common Pleas, which denied his "Motion to Void Judgment."

In 1995, Richard pled guilty to two counts of aggravated robbery, two counts of rape, and one count of attempted aggravated murder, and he was sentenced accordingly. On August 4, 2008, he filed a motion to void his aggravated robbery convictions on the basis that the indictment failed to include the culpable mental state of recklessness. The trial court overruled the motion, relying on *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"), and *State v. Colon*, 119 Ohio St.3d 2004, 2008-Ohio-3749 ("*Colon II*").

Richard appeals, pro se, raising two assignments of error, which we will address together. The assignments state:

I. "THE APPELLANT WAS DENIED HIS RIGHTS GUARANTEED BY ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION, FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT CONVICTED AND SENTENCED HIM VIA AN INDICTMENT THAT LACKED A VITAL AND MATERIAL ELEMENT AND THUS, THE COURT LACKED JURISDICTION AND IT ABUSED IT'S [SIC] DISCRETION WHEN IT DENIED THE MOTION TO VOID JUDGMENT WHICH SEEKED [SIC] TO CORRECT THE ERROR."

II. "BY FAILING TO CHARGE ANY LEVEL OF MENS REA FOR THE SERIOUS PHYSICAL INJURY ELEMENT OF AGGRAVATED ROBBERY, UNDER 2911.01(A)(1) THE INDICTMENT FAILED TO PROPERLY CHARGE MR. WINSTON [SIC] AND FAILED TO GIVE HIM NOTICE OF THE CHARGES AGAINST HIM. THIS ERROR VIOLATED MR. WINSTON'S [SIC] CONSTITUTIONAL RIGHTS OF INDICTMENT BY A GRAND JURY AND THE RIGHT TO DUE PROCESS AND THE COURT ABUSED IT'S [SIC] DISCRETION BY ASSERTING THAT HE HAD TO BE ON DIRECT REVIEW WHEN

COLON WAS ANNOUNCED TO RECEIVE THIS BASIC CONSTITUTIONAL PROTECTION."

Richard claims that he "was entitled to an indictment charging every essential element" of aggravated robbery and that the trial court lacked jurisdiction to convict him of aggravated robbery because the indictment failed to include the mens rea. Richard emphasizes that he did not rely exclusively on *Colon I* in his motion, but also relied on the Ohio and United States Constitutions in asserting that the trial court did not have jurisdiction. As such, he claims that he was entitled to relief even if *Colon I* did not apply to his case.

R.C. 2911.02, which defines robbery, provides:

"(A) No person, in attempting or committing a theft offense 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;

"(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;

"(3) Use or threaten the immediate use of force against another."

R.C. 2911.01, which defines aggravated robbery, contains similar provisions to those contained in R.C. 2911.02, but contemplates more serious conduct, such as the brandishing of the weapon in one's possession or the infliction of serious physical harm.

Colon I held that a robbery indictment for a violation of R.C. 2911.02(A)(2) is defective if it fails to state that the physical harm was *recklessly* inflicted, threatened, or attempted because, in omitting the mens rea, the indictment omits one of the essential elements of the crime. *Colon I* at ¶10. *Colon II* narrowly limited the holding in *Colon I* and

held that the holding in *Colon I* is prospective in nature.

The trial court held that Richard was not entitled to relief under *Colon I* because he had no appeal pending at the time that case was decided, and it applied prospectively only. For several reasons, we find no error in the trial court's denial of Richard's motion to void his conviction.

Richard was indicted for Aggravated Robbery in violation of R.C. 2911.01(A), which provides that "[n]o person, in attempting or committing a theft offense, ***, or in fleeing immediately after the attempt or offense, shall *** [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it[.]" In its brief, the State asserts that Richard's indictment was not defective because no mens rea was required to establish the deadly weapon element of aggravated robbery under which he was charged. We agree.

The Supreme Court of Ohio has held that "the General Assembly intended that a theft offense, committed while an offender was in possession or control of a deadly weapon, is robbery and no intent beyond that required for the theft offense must be proven." *State v. Wharf*, 86 Ohio St.3d 375, 377-378, 1999-Ohio-112; see, also, R.C. 2911.02(A)(1). In other words, the Court held that a robbery predicated on the possession or control of a deadly weapon is a strict liability offense. We have applied the Supreme Court's reasoning in *Wharf* to a case charged under R.C. 2911.01(A)(1), the statute under which Richard was charged. We explained:

"The thrust and philosophy of [the deadly weapon element of Aggravated Robbery] is to remove the potential for harm that exists while armed with a weapon. Merely having the weapon is the potentially dangerous factual condition warranting the more severe

penalty. As to the weapon, no mental condition or actual use is necessary or required under the statute." *State v. Williamson*, Montgomery App. No. 22878, 2008-Ohio-6246, at ¶17, citing *State v. Edwards* (1976), 50 Ohio App.2d 63, 66-67.

Based on the holdings in *Wharf* and *Williamson*, we conclude that the indictment charging Richard with aggravated robbery was not defective in failing to state the mens rea because it charged him with a strict liability offense for which no mens rea was required.

Although we base our decision primarily on our conclusion that aggravated robbery, as charged in this case, is a strict liability offense, the trial court was correct in holding that Richard was not entitled to relief under *Colon I*. *Colon I* applies prospectively only, *Colon II* at ¶3, and Richard's case was not pending when *Colon I* was decided. The trial court also correctly observed that Richard failed to object to the indictment, failed to show plain error by alleging any particular prejudice, and did not present any of the extenuating circumstances present in *Colon I*. Thus, the trial court properly concluded that Richard was not entitled to "void" his conviction on the authority of *Colon I* and *Colon II*.

Richard's first and second assignments of error are overruled.

The judgment of the trial court will be affirmed.

. . . . . .

FAIN, J. and HARSHA, J., concur.

(Hon. William H. Harsha, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Meliaa M. Ford
Jai Richard
Hon. Timothy N. O'Connell

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23119
v.	:	T.C. NO. 95CR1245/ 95CR1244/95CR819
JAI RICHARD	:	
		FINAL ENTRY
Defendant-Appellant	:	
	:	

. . . . . .

Pursuant to the opinion of this court rendered on the 31st day of July, 2009, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

MIKE FAIN, Judge

JEFFREY E. FROELICH, Judge

WILLIAM H. HARSHA, Judge
(Sitting by assignment of the Chief Justice of the Supreme Court of Ohio)

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