

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

CASE NO. ~~09-1878~~ - 1958

Plaintiff-Appellant,

ON APPEAL FROM THE
MONTGOMERY COUNTY COURT
OF APPEALS, SECOND
APPELLATE DISTRICT

vs.

FRANK ROBERT HAMILTON, III

COURT OF APPEALS
CASE NO: 22895

Defendant-Appellee.

NOTICE OF CERTIFIED CONFLICT

MATHIAS H. HECK, JR.

PROSECUTING ATTORNEY

By KIRSTEN A. BRANDT (COUNSEL OF RECORD)

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COUNSEL FOR APPELLEE, FRANK ROBERT HAMILTON, III.

FILED
OCT 27 2009
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SUPREME COURT OF OHIO

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OCT 27 2009
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SUPREME COURT OF OHIO

NOTICE OF CERTIFIED CONFLICT

Appellant, the State of Ohio, through the Office of the Prosecuting Attorney for Montgomery County, hereby gives notice, pursuant to S. Ct. Prac. R. IV Sec. 1, of a certified conflict to the Supreme Court of Ohio of the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in *State of Ohio v. Frank Robert Hamilton, III.*, Case No. 22895 on October 16, 2009, in accordance with Article IV, Sec. 3(B)(4) of the Ohio Constitution.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

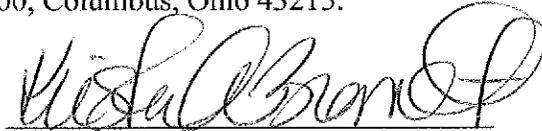
By 

KIRSTEN A. BRANDT
REG NO. 0070162
Assistant Prosecuting Attorney
APPELLATE DIVISION

COUNSEL FOR APPELLANT,
STATE OF OHIO

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Certified Conflict was sent by first class mail on or before this 20th day of October, 2009, to the following: Daniel J. O'Brien, 1210 Talbott Tower, 131 N. Ludlow Street, Dayton, Ohio 45402 and Timothy Young, Ohio Public Defender Commission, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.



KIRSTEN A. BRANDT
REG NO. 0070162
Assistant Prosecuting Attorney
APPELLATE DIVISION



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MONTGOMERY CO. OHIO
36

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22895
v.	:	T.C. NO. 2007 CR 3702
	:	
FRANK ROBERT HAMILTON, III	:	
	:	
Defendant-Appellant	:	
	:	

DECISION AND ENTRY

Rendered on the 16th day of October, 2009.

KIRSTEN A. BRANDT, Atty. Reg. No. 0070162, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

DANIEL J. O'BRIEN, Atty. Reg. No. 00031461, 1210 Talbott Tower, 131 N. Ludlow Street, Dayton, Ohio 45402
Attorney for Defendant-Appellant

PER CURIAM:

This matter is before the Court on the State of Ohio's Motion to Certify Conflict, filed September 14, 2009. In the motion, the State asks that we certify a conflict between our

decision in this case and a decision by the First District Court of Appeals in *State v. Rice*, Hamilton App. No. C-080444, 2009-Ohio-1080. Frank R. Hamilton filed a memorandum opposing the State's motion.

In our decision, we determined that the trial court erred in allowing the State to amend Hamilton's defective indictment for discharge of a firearm on or near prohibited premises by the addition of the requisite mens rea. We relied upon *State v. Colon*, 118 Ohio St.3d 26, 2009-Ohio-1624 ("*Colon I*"), which concluded that the defective indictment therein "failed to charge all the essential elements of the offense of robbery and resulted in a lack of notice to the defendant of the mens rea required to commit the offense. This defect clearly permeated the defendant's entire criminal proceeding. The defendant did not receive a constitutional indictment or trial, and therefore, the defective indictment * * * resulted in structural error." *Id.*, at ¶ 32.

We further determined that *Colon I* implicitly overruled *State v. O'Brien* (1987), 30 Ohio St.3d 122, upon which the State relied. *O'Brien* held that adding the term "recklessness" to an indictment for endangering children did not change the name or identity of the charged offense, nor the penalty nor the degree of the offense charged, and that the amendment was accordingly proper under Crim.R. 7(D). *Id.*, at 126.

In contrast to our decision, the First District determined, after *Colon I*, that "the *O'Brien* holding remains good law. Under *O'Brien*, an amendment is proper 'if the name or the identity of the crime is not changed, and the accused has not been misled or prejudiced by the omission of such element from the indictment.'" *Rice*, ¶ 13, quoting *O'Brien* at paragraph two of the syllabus.

Having found that a conflict exists, we certify the following question to the Supreme

Court of Ohio for review and determination:

May an indictment which does not contain all the elements of an offense be amended to include an omitted mens rea element that was not presented to the grand jury?

IT IS SO ORDERED.


MARY E. DONOVAN, Presiding Judge


JAMES A. BROGAN, Judge


MIKE FAIN, Judge

Copies mailed to:

- Kirsten A. Brandt
- Daniel J. O'Brien
- Hon. Connie S. Price



FILED
COURT OF APPEALS
2009 SEP -4 AM 8:41

GREGORY A. CRUSH
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36

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22895
v.	:	T.C. NO. 2007 CR 3702
FRANK ROBERT HAMILTON, III	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 4th day of September, 2009.

KIRSTEN A. BRANDT, Atty. Reg. No. 0070162, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

DANIEL J. O'BRIEN, Atty. Reg. No. 00031461, 1210 Talbott Tower, 131 N. Ludlow Street, Dayton, Ohio 45402
Attorney for Defendant-Appellant

DONOVAN, P.J.

This matter is before the Court on the Notice of Appeal of Frank Robert Hamilton, III, filed August 14, 2008. On December 12, 2007, the grand jurors of Montgomery County

returned an indictment charging Hamilton with discharge of a firearm on or near prohibited premises, in violation of R.C. 2923.162(A)(3)(C)(4), a felony of the first degree, along with a firearm specification. Hamilton pled not guilty.

On May 14, 2008, Hamilton filed a Motion to Dismiss Indictment, arguing that the indictment "fails to specify any requisite degree of culpability, an essential element of the offense alleged to have been committed by Defendant." The State filed a Motion to Amend Indictment and a memorandum contra Hamilton's motion to dismiss.

On June 4, 2008, the trial court issued a Decision and Entry Denying Motion to Dismiss and Granting Motion to Amend Indictment. The trial court determined, "Crim.R. 7 permits the amendment of an indictment before, during or after trial provided no change is made in the name or identity of the crime charged. * * *

"* * * After the amendment in Mr. Hamilton's case, the indictment on which the Defendant will proceed to trial will not omit the essential mens rea element, and the Defendant will have due notice of all the elements of the offense." The trial court further noted that Hamilton did not allege that he would be misled or prejudiced by the amendment.

On June 11, 2008, Hamilton filed a Motion to Reconsider Court's Decision Denying Motion to Dismiss Indictment, which the trial court denied.

On June 20, 2008, Hamilton pled no contest to discharge of a firearm on or near prohibited premises, in exchange for the State's agreement to drop the firearm specification and to agree to a sentence of community control. Hamilton was sentenced to a period of five years of community control sanctions.

Hamilton asserts one assignment of error as follows:

"THE TRIAL COURT ERRED AND DENIED DEFENDANT'S CONSTITUTIONAL RIGHT TO ANSWER ONLY TO AN INDICTMENT OF CRIME BY A DULY CONSTITUTED GRAND JURY, BY FAILING TO DISMISS THE DEFECTIVE INDICTMENT AND ALLOWING THE STATE TO AMEND THE FATALLY DEFECTIVE INDICTMENT."

According to Hamilton, "the amended indictment changed the 'identity' of the charge against Mr. Hamilton since the original indictment did not charge a crime at all." The State responds that "the addition of an essential element of the charge did not amend the substance of the indictment." The State relies upon *State v. O'Brien* (1987), 30 Ohio St.3d 122. On March 20, 2009, the State filed a Notice of Additional Authority, further directing our attention to *State v. Rice*, Hamilton App. No. C-080444, 2009-Ohio-1080 (referencing *O'Brien* in dicta).

In *O'Brien*, the defendant was indicted upon, inter alia, two counts of endangering children, and he moved to dismiss the two counts on the basis that each failed to include the element of recklessness. *O'Brien*, at 122-23. The trial court overruled the motion to dismiss, and a jury was impaneled. *Id.*, at 123. At the conclusion of the State's case-in-chief, the trial court dismissed one count of endangering children, and after the defense rested, the State moved to amend the remaining endangering children charge to include the mens rea of recklessness. *Id.* The trial court granted the State's motion, and the court of appeals reversed the decision of the trial court, determining that "the omission of the mental state element fatally flawed the indictment, and that allowing appellant to cure such an error permitted the jury to convict the accused on a charge essentially different from that upon which the grand jury indicted him." *Id.*

The Supreme Court of Ohio subsequently noted on appeal that Crim.R. 7 "controls the sufficiency of and amendments to criminal indictments." *Id.*, at 124. The rule provides in relevant part: "The indictment shall * * * contain a statement that the defendant has committed a public offense specified in the indictment. * * * The statement may be made in ordinary and concise language without technical averments 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." Crim.R. 7(B).

Further, the *O'Brien* Court considered Crim.R. 7(D), which provides in part: "The court may at any time before, during, or after a trial amend the indictment * * * in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged." *Id.*, at 125.

The *O'Brien* Court determined that the addition of the term "recklessness" to the indictment did not change the name or the identity of the crime of endangering children, nor did the addition change the penalty nor the degree of the offense charged, and the Court found that the amendment was proper pursuant to Crim.R. 7(D). *Id.*, at 126.

In the next step of its analysis, the *O'Brien* Court applied the remainder of Crim.R. 7(D) to *O'Brien's* indictment. *Id.* The rule further provides: "If any amendment is made to the substance of the indictment, * * * the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impaneled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been

misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by postponement thereof to a later day with the same or another jury."

The court noted that the addition of recklessness to the indictment amended its substance, but it noted that O'Brien did not move for the discharge of the jury after the indictment was amended. *O'Brien*, at 126. According to the Court, "[e]ven had appellee done so, we find that it would have been proper for the trial court to overrule the motion as the appellee would have been unable to show that he had been misled or prejudiced by the permitted amendment. Appellee had notice of both the offense and the applicable statute. Appellee's knowledge of the appropriate mental state standard is evidenced by his continuing efforts, before and during trial, to dismiss the indictment on the basis that such element was *not included* in the indictment." *Id.* The court found that O'Brien "was neither misled nor prejudiced by the amendment to the originally defective indictment." *Id.*

In conclusion, the *O'Brien* Court held, "[a]n indictment which does not contain all the essential elements of an offense, may be amended to include the omitted element, if the name or identity of the crime is not changed, and the accused has not been misled or prejudiced by the omission of such element from the indictment." *Id.*, at syllabus ¶ 2.

In contrast to the State, Hamilton relies upon *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"), and after thorough review thereof, we conclude that *Colon I* implicitly overruled *O'Brien*. In *Colon I*, in summary, the indictment for aggravated robbery omitted the required mens rea for the charge, Colon did not object to the indictment, there was no evidence that Colon had notice that the state was required to prove recklessness, and the State did not argue that Colon was reckless in inflicting physical harm on the

victim. *Id.*, at ¶¶ 29-30. Further, the trial court did not instruct the jury on the required mens rea of recklessness, and during closing argument, the State treated robbery as a strict liability offense. *Id.*, at ¶ 31.

The Supreme Court concluded, "the defective indictment in this case failed to charge all the essential elements of the offense of robbery and resulted in a lack of notice to the defendant of the mens rea required to commit the offense. This defect clearly permeated the defendant's entire criminal proceeding. The defendant did not receive a constitutional indictment or trial, and therefore, the defective indictment in this case resulted in structural error." *Id.*, at ¶ 32.

While Colon did not raise the issue of his defective indictment until after judgment, Hamilton objected to the indictment at the trial court level on the basis that it lacked a culpable mental state. In *Colon I*, the Supreme Court noted, "our case law follows the Ohio Constitution, which provides that '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 defective indictment is insufficient to charge an offense, and *cannot be cured 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. Harris* (1932), 125 Ohio St. 257, 264 * * * ." *Id.*, at ¶ 17 (emphasis added). See *State v. Childs* (2000), 88 Ohio St.3d 558 (An indictment must, first, contain the **elements** of the offense charged and fairly inform the defendant of the

charge against which he must defend.)

The Supreme Court further emphasized the critical function of the grand jury in fairly instituting criminal proceedings, noting that its holding in *Colon I* "protects defendants' right to a grand jury indictment. The grand jury is an important part of American citizens' constitutional rights. Our grand jury system is derived from its English counterpart, and the concept was brought to this country by early colonists and incorporated into the federal Constitution. (Internal citation omitted). 'The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. * * * Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges.

"In discussing the grand jury provision of the federal Constitution, which is very similar to the grand jury provision of the Ohio Constitution, the Supreme Court of the United States has stated that the grand jury is a 'constitutional fixture in its own right.' (Internal citations omitted). 'In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by 'a presentment or indictment of a Grand Jury.' The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions.'" (Citations omitted). *Colon I*, ¶ 39-40. (Emphasis added).

Hamilton's indictment provides in relevant part, "The Grand Jurors of the County of Montgomery, in the name, and by the authority of the State of Ohio, upon their oaths do

find that Frank Robert Hamilton, III, on or about September 8, 2007, in the County of Montgomery aforesaid, and State of Ohio, did discharge a firearm upon or over a public road or highway and said violation caused serious physical harm to a person; contrary to the form of the statute (in violation of Section 2923.162(A)(3)(C)(4) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio."

Pursuant to *Colon I*, the error in Hamilton's indictment cannot be cured by the court, and the trial court accordingly erred in allowing the State to amend the indictment. In other words, by its error, the trial court required Hamilton to answer for the crime charged other than on "presentment or indictment of a grand jury," in violation of Hamilton's constitutional rights.

Finally, we note our awareness that the precedential value of *Colon I* was subsequently limited to its unique facts by *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II*"). In *Colon II*, the court stressed that structural-error analysis of a defective indictment is only appropriate in rare cases where multiple errors follow the defective indictment, as in *Colon I*. *Id.*, at 205. The matter herein, however, is not one of structural error permeating a trial (Hamilton pled no contest), nor plain error (Hamilton objected to the indictment prior to judgment), and Hamilton's amended indictment is not saved by *Colon II*'s limitations of *Colon I*.

Hamilton's sole assignment of error is sustained, and the judgment of the trial court is reversed.

.....

BROGAN, J. and FAIN, J., concur.

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Kirsten A. Brandt
Daniel J. O'Brien
Hon. Connie S. Price



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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22895
v.	:	T.C. NO. 2007 CR 3702
FRANK ROBERT HAMILTON, III	:	<u>FINAL ENTRY</u>
Defendant-Appellant	:	

Pursuant to the opinion of this court rendered on the 4th day of September, 2009, the judgment of the trial court is reversed.

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

Mary E. Donovan

 MARY E. DONOVAN, Presiding Judge

James A. Brogan

 JAMES A. BROGAN, Judge

Mike Fain

 MIKE FAIN, Judge

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Hon. Connie S. Price
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41 N. Perry Street
Dayton, Ohio 45422

--- N.E.2d ---, 2009 WL 2855875 (Ohio App. 2 Dist.), 2009 -Ohio- 4602
 (Cite as: 2009 WL 2855875 (Ohio App. 2 Dist.))

Court of Appeals of Ohio,
 Second District, Montgomery County.
 The STATE of Ohio, Appellee,

v.

HAMILTON, Appellant.
 No. 22895.

No. 22895.

Decided Sept. 4, 2009.

Background: Defendant moved to dismiss indictment for discharge of a firearm on or near prohibited premises, and state moved to amend indictment to specify applicable mens rea. The Court of Common Pleas, No. 2007 CR 3702, denied defendant's motion to dismiss and granted state's motion to amend, after which defendant entered no contest plea. Defendant appealed.

Holding: The Court of Appeals, Montgomery County, Donovan, P.J., held that allowing state to amend indictment to specify essential mens rea element violated defendant's constitutional right to answer only to a presentment or indictment by a grand jury.
 Reversed.

West Headnotes

Indictment and Information 210 159(2)

210 Indictment and Information

210XI Amendment

210k158 Indictment

210k159 In General

210k159(2) k. Accusation in General.

Most Cited Cases

Allowing state to amend indictment to specify essential mens rea element for discharge of a firearm on or near prohibited premises violated defendant's constitutional right to answer only to a presentment or indictment by a grand jury. Const. Art. 1, § 10; R.C. § 2923.162(A)(3)(C)(4).

Mathias Heck, Montgomery County Prosecuting Attorney, and Kirsten A. Brandt, Assistant Prosec-

uting Attorney, for appellee.

Daniel J. O'Brien, for appellant.

Mathias Heck, Montgomery County Prosecuting Attorney, and Kirsten A. Brandt, Assistant Prosecuting Attorney, for appellee. Daniel J. O'Brien, for appellant.

DONOVAN, Presiding Judge.

*1 {¶ 1} This matter is before the court on the notice of appeal of Frank Robert Hamilton III, filed August 14, 2008. On December 12, 2007, the grand jurors of Montgomery County returned an indictment charging Hamilton with discharge of a firearm on or near prohibited premises, in violation of R.C. 2923.162(A)(3)(C)(4), a felony of the first degree, along with a firearm specification. Hamilton pleaded not guilty.

{¶ 2} On May 14, 2008, Hamilton filed a motion to dismiss the indictment, arguing that the indictment "fails to specify any requisite degree of culpability, an essential element of the offense alleged to have been committed by Defendant." The state filed a motion to amend the indictment and a memorandum contra Hamilton's motion to dismiss.

{¶ 3} On June 4, 2008, the trial court issued a decision and entry denying motion to dismiss and granting motion to amend the indictment. The trial court determined, "Crim.R. 7 permits the amendment of an indictment before, during or after trial provided no change is made in the name or identity of the crime charged. * * *

{¶ 4} "After the amendment in Mr. Hamilton's case, the indictment on which the Defendant will proceed to trial will not omit the essential mens rea element, and the Defendant will have due notice of all the elements of the offense." The trial court further noted that Hamilton did not allege that he would be misled or prejudiced by the amendment.

--- N.E.2d ---, 2009 WL 2855875 (Ohio App. 2 Dist.), 2009 -Ohio- 4602
(Cite as: 2009 WL 2855875 (Ohio App. 2 Dist.))

{¶ 5} On June 11, 2008, Hamilton filed a motion to reconsider the court's decision denying the motion to dismiss the indictment, which the trial court denied.

{¶ 6} On June 20, 2008, Hamilton pleaded no contest to discharge of a firearm on or near prohibited premises, in exchange for the state's agreement to drop the firearm specification and to agree to a sentence of community control. Hamilton was sentenced to a period of five years of community control sanctions.

{¶ 7} Hamilton asserts one assignment of error as follows:

{¶ 8} "The trial court erred and denied defendant's constitutional right to answer only to an indictment of crime by a duly constituted grand jury, by failing to dismiss the defective indictment and allowing the state to amend the fatally defective indictment."

{¶ 9} According to Hamilton, "the amended indictment changed the 'identity' of the charge against Mr. Hamilton since the original indictment did not charge a crime at all." The State responds that "the addition of an essential element of the charge did not amend the substance of the indictment." The State relies upon *State v. O'Brien* (1987), 30 Ohio St.3d 122, 508 N.E.2d 144. On March 20, 2009, the state filed a notice of additional authority, further directing our attention to *State v. Rice*, Hamilton App. No. C-080444, 2009-Ohio-1080 (referencing *O'Brien* in dicta).

{¶ 10} In *O'Brien*, the defendant was indicted upon, inter alia, two counts of endangering children, and he moved to dismiss the two counts on the basis that each failed to include the element of recklessness. *O'Brien*, 30 Ohio St.3d at 122-123, 508 N.E.2d 144. The trial court overruled the motion to dismiss, and a jury was impaneled. Id. at 123, 508 N.E.2d 144. At the conclusion of the state's case-in-chief, the trial court dismissed one count of endangering children, and after the defense rested, the state moved to amend the remaining endangering-child-

dren charge to include the mens rea of recklessness. Id. The trial court granted the state's motion, and the court of appeals reversed the decision of the trial court, determining that "the omission of the mental state element fatally flawed the indictment, and that allowing appellant to cure such an error permitted the jury to convict the accused on a charge essentially different from that upon which the grand jury indicted him." Id.

*2 {¶ 11} The Supreme Court of Ohio subsequently noted on appeal that Crim.R. 7 "controls the sufficiency of and amendments to criminal indictments." *O'Brien*, 30 Ohio St.3d at 124, 508 N.E.2d 144. The rule provides: "The indictment shall * * * contain a statement that the defendant has committed a public offense specified in the indictment. * * * The statement may be made in ordinary and concise language without technical averments 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." Crim.R. 7(B).

{¶ 12} Further, *O'Brien* considered Crim.R. 7(D), which provides: "The court may at any time before, during, or after a trial amend the indictment * * * in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged." *O'Brien*, 30 Ohio St.3d at 125, 508 N.E.2d 144.

{¶ 13} *O'Brien* determined that the addition of the term "recklessness" to the indictment did not change the name or the identity of the crime of endangering children, and the addition did not change the penalty or the degree of the offense charged, and the court found that the amendment was proper pursuant to Crim.R. 7(D). *O'Brien*, 30 Ohio St.3d at 126, 508 N.E.2d 144.

{¶ 14} In the next step of its analysis, *O'Brien* applied the remainder of Crim.R. 7(D) to *O'Brien's* in-

--- N.E.2d ---, 2009 WL 2855875 (Ohio App. 2 Dist.), 2009 -Ohio- 4602
(Cite as: 2009 WL 2855875 (Ohio App. 2 Dist.))

dictment. Id. The rule further provides: “If any amendment is made to the substance of the indictment, * * * the defendant is entitled to a discharge of the jury on the defendant’s motion, if a jury has been impaneled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant’s rights will be fully protected by proceeding with the trial, or by postponement thereof to a later day with the same or another jury.”

{¶ 15} The court noted that the addition of recklessness to the indictment amended its substance, but it noted that O’Brien did not move for the discharge of the jury after the indictment was amended. *O’Brien*, 30 Ohio St.3d at 126, 508 N.E.2d 144. ‘According to the court, “[e]ven had appellee done so, we find that it would have been proper for the trial court to overrule the motion as the appellee would have been unable to show that he had been misled or prejudiced by the permitted amendment. Appellee had notice of both the offense and the applicable statute. Appellee’s knowledge of the appropriate mental state standard is evidenced by his continuing efforts, before and during trial, to dismiss the indictment on the basis that such element was *not included* in the indictment.” Id. The court found that O’Brien “was neither misled nor prejudiced by the amendment to the originally defective indictment.” Id.

*3 {¶ 16} In conclusion, *O’Brien* held, “An indictment which does not contain all the essential elements of an offense, may be amended to include the omitted element, if the name or identity of the crime is not changed, and the accused has not been misled or prejudiced by the omission of such element from the indictment.” Id. at paragraph two of the syllabus.

{¶ 17} In contrast to the state, Hamilton relies upon *State v. Colon*, 118 Ohio St.3d 26, 885 N.E.2d 917, 2008-Ohio-1624 (“*Colon I*”), and after thorough review thereof, we conclude that *Colon I* implicitly

overruled *O’Brien*. In *Colon I*, in summary, the indictment for aggravated robbery omitted the required mens rea for the charge, Colon did not object to the indictment, there was no evidence that Colon had notice that the state was required to prove recklessness, and the state did not argue that Colon was reckless in inflicting physical harm on the victim. Id. at ¶ 29-30. Further, the trial court did not instruct the jury on the required mens rea of recklessness, and during closing argument, the state treated robbery as a strict-liability offense. Id. at ¶ 31.

{¶ 18} The Supreme Court concluded, “[T]he defective indictment in this case failed to charge all the essential elements of the offense of robbery and resulted in a lack of notice to the defendant of the mens rea required to commit the offense. This defect clearly permeated the defendant’s entire criminal proceeding. The defendant did not receive a constitutional indictment or trial, and therefore, the defective indictment in this case resulted in structural error.” Id. at ¶ 32.

{¶ 19} While Colon did not raise the issue of his defective indictment until after judgment, Hamilton objected to the indictment at the trial court level on the basis that it lacked a culpable mental state. In *Colon I*, the Supreme Court noted, “[O]ur case law follows the Ohio Constitution, which provides that ‘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 defective indictment is insufficient to charge an offense, and *cannot be cured 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. Harris* (1932), 125 Ohio St. 257, 264 * * *.” (Emphasis

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(Cite as: 2009 WL 2855875 (Ohio App. 2 Dist.))

added.) Id. at ¶ 17, 181 N.E. 104. See *State v. Childs* (2000), 88 Ohio St.3d 558, 728 N.E.2d 379 (An indictment must, first, contain the elements of the offense charged and fairly inform the defendant of the charge against which he must defend).

*4 {¶ 20} The Supreme Court further emphasized the critical function of the grand jury in fairly instituting criminal proceedings, noting that its holding in *Colon I* “protects defendants’ right to a grand jury indictment. The grand jury is an important part of American citizens’ constitutional rights. Our grand jury system is derived from its English counterpart, and the concept was brought to this country by early colonists and incorporated into the federal Constitution. (Internal citation omitted.) ‘The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. * * * Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges.

{¶ 21} “In discussing the grand jury provision of the federal Constitution, which is very similar to the grand jury provision of the Ohio Constitution, the Supreme Court of the United States has stated that the grand jury is a ‘constitutional fixture in its own right.’ (Internal citations omitted.) ‘In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by ‘a presentment or indictment of a Grand Jury.’ The grand jury’s historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions.’ ” (Emphasis added and citations omitted.) *Colon I*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, ¶ 39-40.

{¶ 22} Hamilton’s indictment provides: “The Grand Jurors of the County of Montgomery, in the name,

and by the authority of the State of Ohio, upon their oaths do find that Frank Robert Hamilton, III, on or about September 8, 2007, in the County of Montgomery aforesaid, and State of Ohio, did discharge a firearm upon or over a public road or highway and said violation caused serious physical harm to a person; contrary to the form of the statute (in violation of Section 2923.162(A)(3)(C)(4) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.”

{¶ 23} Pursuant to *Colon I*, the error in Hamilton’s indictment cannot be cured by the court, and the trial court accordingly erred in allowing the state to amend the indictment. In other words, by its error, the trial court required Hamilton to answer for the crime charged other than on “presentment or indictment of a grand jury,” in violation of Hamilton’s constitutional rights.

{¶ 24} Finally, we note our awareness that the precedential value of *Colon I* was subsequently limited to its unique facts by *State v. Colon*, 119 Ohio St.3d 204, 893 N.E.2d 169, 2008-Ohio-3749 (“*Colon II*”). In *Colon II*, the court stressed that structural-error analysis of a defective indictment is appropriate only in rare cases when multiple errors follow the defective indictment, as in *Colon I*. Id. at 205, 893 N.E.2d 169. The matter herein, however, is not one of structural error permeating a trial (Hamilton pleaded no contest), nor plain error (Hamilton objected to the indictment prior to judgment), and Hamilton’s amended indictment is not saved by *Colon II*’s limitations of *Colon I*.

*5 {¶ 25} Hamilton’s sole assignment of error is sustained, and the judgment of the trial court is reversed.

Judgment reversed.

BROGAN and FAIN, JJ., concur.

Ohio App. 2 Dist., 2009.

State v. Hamilton

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C
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
First District, Hamilton County,
STATE of Ohio, Plaintiff-Appellee,
v.
Reginald RICE, Defendant-Appellant.
No. C-080444.

Decided March 13, 2009.

West KeySummary
Indictment and Information 210 ⇨ 159(2)

210 Indictment and Information
210XI Amendment
210k158 Indictment
210k159 In General
210k159(2) k. Accusation in General.

Most Cited Cases

The prosecutor could amend the indictment to include the mens rea of recklessly to a robbery charge. The amendment did not change the penalty or degree of the charged offense, and the defendant did not argue that he was misled or prejudiced by the omission.

Criminal Appeal from Hamilton County Court of Common Pleas.

Joseph T. Deters, Hamilton County Prosecutor, and Judith Anton Lapp, Assistant Prosecutor, for Plaintiff-Appellee.

J. Rhett Baker, for Defendant-Appellant.

DINKELACKER, Judge.

*1 {¶ 1} In four assignments of error, defendant-appellant Reginald Rice claims that he was improperly convicted of robbery ^{FN1} and kidnapping. ^{FN2}

For the reasons set forth below, we disagree and affirm his convictions.

FN1. R.C. 2911.02(A)(2).

FN2. R.C. 2905.01(A)(2).

Evening Stroll Results in Robbery

{¶ 2} While walking home from a birthday party at midnight on January 18, 2008, Michael Cervay realized that two people were following him. He turned slightly and was able to discern that both were men, one was black and one was white. Cervay sensed that the men were getting closer, so he stepped aside to let them pass. The men grabbed his hood and pulled it over his head. They then grabbed his arms. They told him to keep his head down and hand over his wallet. Cervay was told repeatedly to comply, that the men had a gun, and that they would use it if he did not cooperate. Cervay gave the men his wallet because he believed they had a gun.

{¶ 3} The men were disappointed in the amount of cash Cervay had in his wallet, but saw that he had a credit card. They took him back to a business district, walking behind buildings so that they would avoid contact with a police car that was parked nearby. The men took Cervay to an ATM machine in front of a Kroger's store and forced him to withdraw \$300. The men then took Cervay down a walkway that was monitored by a security camera in a local store. The men roughly shoved Cervay and ran away. Cervay was unable to find the police car, so he called 911.

{¶ 4} An undercover officer who was working in the area had encountered Nicholas Donnerberg and Rice together just before the robbery. The officer said that it had appeared that Donnerberg was concealing something that could have been a firearm, so he stopped the men. The two were identified and searched, but the item the officer had seen was a

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whiskey bottle. Donnerberg and Rice were allowed to leave. When the officer heard the broadcast of the robbery and the description of the two suspects, he relayed the information about his prior encounter with Donnerberg and Rice. While Cervay was unable to identify the men from photo arrays, the video from the surveillance camera was processed, and Donnerberg and Rice were identified from it.

{¶ 5} Rice was subsequently questioned by police. He admitted that he was with Donnerberg that night, but claimed that he did not know his name. He said that Donnerberg had told him that Cervay owed him money. Rice claimed that Cervay had voluntarily walked with them to the ATM and withdrawn the cash. He said that he and Donnerberg had then “took off in a trot.”

The Trial

{¶ 6} Both Donnerberg and Rice were indicted for aggravated robbery, robbery, and kidnapping. The aggravated-robbery and kidnapping charges each carried two gun specifications. Both defendants waived their right to a jury trial, and a joint trial to the bench was conducted.

{¶ 7} During Cervay's testimony, counsel for Donnerberg informed the court that her relationship with Donnerberg had deteriorated to the point that she could no longer represent him. The trial court allowed counsel to withdraw and declared a mistrial in Donnerberg's case. Because Rice wanted to call Donnerberg as a witness in his case, the trial court offered a continuance to allow time for Donnerberg to obtain new appointed counsel. Rice declined the offer of a continuance, insisting that Donnerberg be held in the courtroom for the purpose of testifying. The trial court refused to do so and ordered deputies to return Donnerberg to the jail. During the presentation of his case hours later, Rice asked that Donnerberg be brought back. The trial court declined, indicating that it was unlikely that Donnerberg had obtained new counsel that quickly and that, even if new counsel had been appointed, it was

unlikely that counsel would have been able to effectively advise him in that brief period.

*2 {¶ 8} At the conclusion of the trial, the court concluded that there was not enough evidence to establish, beyond a reasonable doubt, that Rice or Donnerberg had or used a firearm to commit the charged offenses. Therefore, the trial court acquitted Rice on the aggravated-robbery count and all the gun specifications. The trial court found Rice guilty of robbery and kidnapping. He was sentenced accordingly.

The Indictment Was Properly Amended

{¶ 9} Rice first argues, citing *State v. Colon*,^{FN3} that the trial court improperly allowed the state to amend his indictment to add the mens rea element of recklessly to the robbery charge. In *Colon*, the court noted in dicta that it was not permissible to amend an indictment to add a mens rea element, saying that “[i]n *State v. 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. This court held that the prosecutor was not permitted to perfect the defective indictment by amendment, because ‘the grand jury and not the prosecutor, even with the approval of the court, must charge the defendant with each essential element of that crime.’”^{FN4}

FN3. 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, clarified by *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169.

FN4. *Id.* at ¶ 25, 893 N.E.2d 169, quoting *State v. Wozniak* (1961), 172 Ohio St. 517, 520, 178 N.E.2d 800.

{¶ 10} Prior to the *Colon* decision, but after *Wozniak*, the court had determined that an indictment *could* be amended to insert the mens rea element.^{FN5} In *State v. O'Brien*, the court held that “[a]n indictment, which does not contain all the essential elements of an offense, may be amended to

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include the omitted element, if the name or the identity of the crime is not changed, and the accused has not been misled or prejudiced by the omission of such element from the indictment.”^{FN6} The court concluded that the amendment was proper in its case because “[f]ailure to include the element of ‘recklessness’ in an indictment for endangering children in no way alters either the name, identity or severity of the offense charged.”^{FN7}

FN5. *State v. O'Brien* (1980), 30 Ohio St.3d 122, 508 N.E.2d 144.

FN6. *Id.* at paragraph two of the syllabus.

FN7. *Id.* at 127, 508 N.E.2d 144.

{¶ 11} The *Colon* decision cited *O'Brien*, but only for the proposition that the element “recklessly” is an essential element. It did not overrule, or even address, *O'Brien's* core holding regarding the amendment of indictments.

{¶ 12} Thus, the question is whether *O'Brien* remains good law after *Colon*. It does. In *State v. Davis*, released after the *Colon* decision, the court cited *O'Brien* with approval. The *Davis* decision quoted the rationale we have already noted and stated that “[t]his court [has] held that the indictment was properly amended to include the mens rea element.”^{FN8} Significantly, Chief Justice Moyer authored both the *Davis* and the *Colon* decisions.

FN8. *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, 903 N.E.2d 609.

{¶ 13} In light of the court's approval of *O'Brien* in *Davis*, we conclude that the *O'Brien* holding remains good law. Under *O'Brien*, an amendment is proper “if the name or the identity of the crime is not changed, and the accused has not been misled or prejudiced by the omission of such element from the indictment.”^{FN9} Since the amendment in this case did not change “the penalty or degree of the charged offense,” and since the record does not indicate, and Rice does not argue, that he was misled or prejudiced by the omission of the mens rea ele-

ment, the amendment was permissible under Crim.R. 7(D).

FN9. *O'Brien* at paragraph two of the syllabus.

*3 {¶ 14} Rice's first assignment of error is overruled.

The Kidnapping Conviction Was Proper

{¶ 15} In his second assignment of error, Rice claims that he could not have been convicted of kidnapping in this case because the trial court acquitted him on the aggravated-robbery charge. We disagree.

{¶ 16} In the fourth count of the indictment, the state claimed that Rice, “by force, threat, or deception, removed [Cervay] from the place where he was found or restrained him of his liberty for the purpose of facilitating the commission of a felony, to wit: AGGRAVATED ROBBERY * * *.” Rice argues that “since [he] was not found guilty of aggravated robbery, he could not thus be convicted of a kidnapping requiring an aggravated robbery or a purpose to commit an aggravated robbery.”

{¶ 17} But the kidnapping statute does not require that the perpetrator commit the predicate felony; it requires only that the victim be restrained or removed to facilitate its commission. The Ohio Supreme Court has defined “facilitate” as “[t]o free from difficulty or impediment.”^{FN10} Thus, a charge of kidnapping under R.C. 2905.01(A)(3) requires a showing that the defendant restrained or removed someone for the purpose of making it easier to commit another felony.

FN10. *State v. Hill*, 70 Ohio St.3d 25, 31, 1994-Ohio-12, 635 N.E.2d 1248.

{¶ 18} While we are not aware of another decision addressing this precise issue, the Ohio Supreme Court has addressed it in the context of another section of the rape statute. Considering the crime of

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kidnapping to facilitate nonconsensual sexual activity under R.C. 2905.01(A)(4), the court held that the offense "requires only that the restraint or removal occur for the purpose of non-consensual sexual activity-not that sexual activity actually take place."^{FN11}

FN11. *State v. Powell* (1990), 49 Ohio St.3d 255, 262, 552 N.E.2d 191, superseded by constitutional amendment on other grounds, as noted in *State v. Smith* (1997), 80 Ohio St.3d 89, 103, 684 N.E.2d 668; see, also, *State v. Wightman*, 12th Dist. No. CA2006-12-045, 2008-Ohio-95, at ¶ 33.

{¶ 19} Following this line of reasoning, we hold that the crime of kidnapping to facilitate the commission of a felony under R.C. 2905.01(A)(3) requires only that the restraint or removal occur for the purpose of the commission of the felony-not that the felony actually take place. For this reason, we reject Rice's argument that his acquittal on the aggravated-robbery charge necessarily required an acquittal on the kidnapping charge.

{¶ 20} Rice makes a passing argument that the kidnapping, as charged in the indictment, lacked a mens rea element. But the indictment set forth a mens rea element: the purpose to facilitate the commission of a felony.^{FN12}

FN12. See *State v. Carver*, 2nd Dist. No. 21328, 2008-Ohio-4631, ¶¶ 141-147.

{¶ 21} Rice's second assignment of error is overruled.

The Trial Court Properly Refused to Allow Codefendant Testimony

{¶ 22} Rice complains that he was denied his constitutional right to compulsory process because the trial court refused to allow him to call Donnerberg to testify. But, as the state notes, the trial court did not actually refuse. Donnerberg had succeeded in

obtaining the withdrawal of his original attorney during the trial and was awaiting the appointment of new counsel. The trial court offered to continue the case, so that new counsel could be obtained, but it indicated that it would not allow Donnerberg to testify without having the advice of counsel. Counsel for Rice elected not to agree to the continuance.

*4 {¶ 23} Rice cites a decision from the Tenth Appellate District, which he claims requires us to recognize the error.^{FN13} We disagree. In *State v. Ducey*, a witness made a statement to police that she, and not the defendant, had committed the offense.^{FN14} Because it believed the witness might offer the same incriminating testimony under oath, the trial court advised her of her rights against self-incrimination and to counsel.^{FN15} The witness chose to consult with an attorney before testifying further, so the trial court appointed counsel and recessed the trial.^{FN16} When trial resumed the following day, the witness did not appear.^{FN17} Despite the public defender's request, the trial court refused either to issue a warrant to enforce the subpoena or to grant a continuance so the defense could file contempt proceedings against the witness.^{FN18} Under those circumstances, the Tenth Appellate District concluded that it was improper to proceed with the trial.^{FN19}

FN13. *State v. Ducey*, 10th Dist. No. 03AP-944, 2004-Ohio-3833.

FN14. *Id.* at ¶ 9.

FN15. *Id.*

FN16. *Id.*

FN17. *Id.* at ¶ 10.

FN18. *Id.*

FN19. *Id.* at ¶ 14.

{¶ 24} This case is distinguishable from *Ducey* because the trial court in *Ducey* had refused to grant a continuance to secure the witness's testimony.

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^{FN20} The court in this case offered a continuance to give Donnerberg an opportunity to speak with counsel before he was subjected to any questioning. In this regard, we note that the *Ducey* court found no error in the trial court's decision to recess the proceedings to allow the witness to consult counsel, which is essentially what the trial court attempted to do in this case.

FN20. *Id* at ¶ 10.

{¶ 25} The trial court acted reasonably in striking a balance between the rights of Rice to present witnesses on his behalf and to compulsory process, and the rights of Donnerberg to counsel and to avoid self-incrimination. The offer of a continuance, as a compromise between these competing rights, was a proper one. Therefore, we overrule Rice's third assignment of error.

The Convictions Were Not Against the Manifest Weight of the Evidence

{¶ 26} In his final assignment of error, Rice claims that his convictions for robbery and kidnapping were against the manifest weight of the evidence. We disagree.

{¶ 27} The standard of review for a manifest-weight claim is well established. ^{FN21} The basis for Rice's claim is premised on the assumption that Cervay's testimony was not credible and that the trial court should have believed Rice's version of events. But Rice does not explain why this court should discount Cervay's version of events. The discretionary power to reverse should be invoked only in exceptional cases "where the evidence weighs heavily against the conviction." ^{FN22} Rice has given us no reason to conclude that his is one of those exceptional cases.

FN21. See *State v. Jones*, 1st Dist. No. C-070666, 2008-Ohio-5988, at ¶ 33, citing *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.

FN22. *State v. Damen*, 1st Dist. No. C-030814, 2004-Ohio-4363, at ¶ 10, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 28} Rice also argues that his involvement was "so minimal" that the trial court could not properly have concluded that he was involved in the robbery. But the record contains ample evidence to support the trial court's determination that Rice actively participated in the offense. Therefore, we overrule his fourth assignment of error.

Conclusion

*5 {¶ 29} In this case, the trial court correctly allowed the state to amend the indictment to add the mens rea element "recklessly" to the robbery charge, because it did not change the penalty or degree of the offense. Rice was properly convicted of kidnapping because the conviction did not require that the trial court also convict him of the underlying aggravated-robbery charge. The trial court appropriately refused to allow Rice's codefendant to take the stand, because it had offered to allow Rice to confront the codefendant once he had received counsel. Rice declined the offer. And Rice's convictions were not against the manifest weight of the evidence.

{¶ 30} Having considered all of Rice's assignments of error and rejected each of them, we affirm the judgment of the trial court.

Judgment affirmed.

HILDEBRANDT, P.J., and CUNNINGHAM, J., concur.

Please Note:

The court has recorded its own entry this date.

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