

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, )  
 )  
 Plaintiff-Appellee, )  
 )  
 -vs- )  
 )  
 GREGORY HORNER, )  
 )  
 Defendant-Appellant. )

Case No. 2009-0311  
C.A. Case No. CL07-1224  
C.P. Case No. CR06-3208

APPEAL FROM THE LUCAS  
COUNTY COURT OF APPEALS,  
SIXTH APPELLATE DISTRICT

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MERIT BRIEF OF DEFENDANT-APPELLANT, GREGORY HORNER

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*On Behalf of Plaintiff-Appellee*

*On Behalf of Defendant-Appellant*

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## STATEMENT OF THE FACTS

This is an appeal on a certified conflict between decisions of different courts of appeals as to whether the culpable mental state of recklessness is an essential element of the Aggravated Robbery under R.C. 2911.01 (A)(3).

In the Lucas County Court of Common Pleas, Defendant-Appellant, Gregory Horner (hereafter referred to as "Defendant") was convicted upon a plea of no contest to five (5) counts of a six (6) count Indictment with firearm specifications. A *nolle prosequi* was entered as to the remaining Count (Count Six), and Count Three was amended during the Change of Plea hearing.

Counts One through Five of the Indictment read as follows:

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that **GREGORY A. HORNER and JAMES K. HAHN**, on or about the 30<sup>th</sup> day of March, 2006, in Lucas County, Ohio, in attempting or committing a theft offense as defined in §2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, did inflict, or attempt to inflict, serious physical harm on another, in violation of **§2911.01(A)(3) OF THE OHIO REVISED CODE, AGGRAVATED ROBBERY, BEING A FELONY OF THE FIRST DEGREE**, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION THAT OFFENDER DISPLAYED, BRANDISHED, INDICATED POSSESSION OF OR USED FIREARM-§2941.145

The Grand Jury further find and specify that the said **GREGORY A. HORNER and JAMES K. HAHN**, had a firearm on or about the offender or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm or used it to facilitate the offense.

SECOND COUNT

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that **GREGORY A. HORNER and JAMES K. HAHN**, on or about the 30<sup>th</sup> day of March, 2006, in Lucas County, Ohio, in attempting or committing a theft offense as defined in §2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, did inflict, or attempt to inflict, serious physical harm on another, in violation of **§2911.01(A)(3) OF THE OHIO REVISED CODE, AGGRAVATED ROBBERY, BEING A FELONY OF THE FIRST DEGREE**, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

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THIRD COUNT

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that **GREGORY A. HORNER and JAMES K. HAHN**, on or about the 30<sup>th</sup> day of March, 2006, in Lucas County, Ohio, in attempting or committing a theft offense as defined in §2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, did inflict, or attempt to inflict, serious physical harm on another, in violation of **§2911.01(A)(3) OF THE OHIO REVISED CODE, AGGRAVATED ROBBERY, BEING A FELONY OF THE FIRST DEGREE**, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

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#### FOURTH COUNT

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that **GREGORY A. HORNER and JAMES K. HAHN**, on or about the 30<sup>th</sup> day of March, 2006, in Lucas County, Ohio, did knowingly cause serious physical harm to another, in violation of **§2911.01(A)(3) OF THE OHIO REVISED CODE, AGGRAVATED ROBBERY, BEING A FELONY OF THE SECOND DEGREE**, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

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#### FIFTH COUNT

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that **GREGORY A. HORNER and JAMES K. HAHN**, on or about the 30<sup>th</sup> day of March, 2006, in Lucas County, Ohio, did knowingly cause serious physical harm to another, in violation of **§2911.01(A)(3) OF THE OHIO REVISED CODE, AGGRAVATED ROBBERY, BEING A FELONY OF THE SECOND DEGREE**, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION THAT OFFENDER DISPLAYED,  
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The Grand Jury further find and specify that the said **GREGORY A. HORNER and JAMES K. HAHN**, had a firearm on or about the offender or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm or used it to facilitate the offense.

Count Three was amended during the Change of Plea Hearing as follows

(Transcript of Change of Plea Hearing at 3-4):

In order to effectuate this plea, the State at this time would request an amendment to count number three of the indictment, which is simply this, Judge: State would ask that the code section being charged be amended from 2911.01 (A) (3) to section (A) (1). Preliminarily, that does not change the level of the offense, but potential penalty is not based on any facts or circumstances different from what has already been discussed between the parties. What it does is imply allege that instead of inflicting or attempting to inflict serious physical harm on another, specifically the victim would be Kyle Peck in this case, the State, in order to conform with the evidence would be alleging that the Defendants had a deadly weapon on or about their person or under their control, either displayed it, brandish it, indicate that the owner possessed it, or used it. Again, this changes nothing as far as the level of the offense, potential penalties. The State would submit without being prejudiced to the Defense.

A copy of the Indictment is included in the Appendix.

Clearly, the allegations of Counts Four and Five included the applicable culpable mental state of "knowingly". Count One and Count Two include no allegation of any culpable mental state. Count Three is a strict liability offense (see, State vs. Lester, 123 O.St.3d 346, 2009-Ohio-4225). Defendant was convicted on Counts One, Two Three, Four and Five upon his plea of no contest.

Prior to sentencing, Defendant filed a Motion to Withdraw his plea. A hearing was

held after which that motion was denied. The trial court then proceeded directly to sentencing and imposed an aggregate prison term of eleven (11) years. The Judgment of Sentence provides as follows (Judgment entry filed June 1, 2007 and journalized June 4, 2007 at 2):

It is ORDERED that defendant serve a term of 4 years as to counts 1, 2, and 3 to be served concurrently to one another; 4 years as to counts 4 and 5 to be served concurrently to one another and an additional term is imposed as a mandatory and consecutive term pursuant to R.C. 2929.14 (D)(1) of 3 years to each of the five attached firearm specifications to be served concurrently to one another. The sentence in counts 1, 2 & 3 is ordered to be served consecutively to the sentence imposed in counts 4 & 5. The sentence imposed as to the attached firearm specifications are to be served consecutively to the sentence imposed in counts 1, 2, & 3 as well as to the sentence imposed in counts 4 & 5 for a total of 11 years in prison.

Defendant filed a timely appeal. His convictions were affirmed by the Lucas County Court of Appeals in State vs. Horner, 6<sup>th</sup> District, 2008-Ohio-6161. The Lucas County Court of Appeals subsequently certified its decision as being in conflict with the decision of the Eighth District Court of Appeals in State vs. Briscoe, 8<sup>th</sup> District, 2008-Ohio-8276 and the decision of the Third District Court of Appeals in State vs. Alvarez, 3<sup>rd</sup> District, 2008-Ohio-5184.

This case comes before this Court on a Notice of Certified Conflict. Such further facts as may be pertinent to the question presented for review are set forth under the Proposition of Law, *infra*.

**PROPOSITION OF LAW: The culpable mental state for the offense of Aggravated Robbery in violation of R.C. 2911.01 (A)(3) is recklessness, which constitutes an essential element of that offense**

Under Counts One and Two of the Indictment in this case, Defendant was convicted

of Aggravated Robbery, a violation of R.C. 2911.01 (A)(3) upon a plea of no contest. These counts of the Indictment did not include any allegation regarding the culpable mental state or *mens rea* for the Aggravated Robbery offenses sought to be charged. Defendant contends that Counts One and Two of the Indictment were defective and failed to state an offense.

Relying upon this Court's decision in State vs. Colon, 118 O.St.3d 26, 2008-Ohio-1624 ("Colon I"), the Cuyahoga County Court of Appeals and the Defiance County Court of Appeals have held that the culpable mental state for the offense of Aggravated Robbery under R.C. 2911.01 (A)(3) is recklessness which constitutes an essential element of that offense. State vs. Briscoe, 8<sup>th</sup> District, 2008-Ohio-8276; State vs. Alvarez, 3<sup>rd</sup> District, 2008-Ohio-5184.

In the instant case, the Lucas County Court of Appeals held that this Court's decision in Colon applies only to the offense of Robbery under R.C. 2911.02 (A)(2) and not to the offense of Aggravated Robbery under R.C. 2911.01 (A)(3). On this basis, the Court below affirmed Defendant's convictions on Counts One and Two. The decision below was certified as being in conflict with the decision in Briscoe and Alvarez.

Defendant respectfully contends that since the culpable mental state of recklessness is an essential element of the offense of Robbery under R.C. 2911.02 (A)(2), as established in State vs. Colon, *supra*, there is no rational basis for concluding that the same culpable mental state of recklessness is not also an essential element of Aggravated Robbery under R.C. 2911.01 (A)(3).

The statute at issue in Colon, R.C. 2911.02 (A)(2) reads, in pertinent part, as follows:

No person, in attempting or committing a theft offense or in

following immediately thereafter the attempt of offense, shall do any of the following:

\* \* \*

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

That statute at issue in the instant case, R.C. 2911.01 (A)(3) reads, in pertinent part, as follows:

No person, in attempting or committing a theft offense, as defined in Section 2913.01 of the Revised Code, or in following immediately after the attempt or the offense shall do any of the following:

\* \* \*

(3) Inflict, or attempt to inflict, serious physical harm on another.

The conduct (or *actus reus*) prohibited by R.C. 2911.02 (A)(2) is substantially identical to the conduct (or *actus reus*) prohibited by R.C. 2911.01 (A)(3). The only difference between these statutory provisions is that R.C. 2911.01 (A)(3) omits any reference to the act of threatening and includes an additional requirement that the physical harm that inflicted or attempted to be inflicted be of a "serious" nature. Given the very similar nature of the *actus reus* in each statute, there is no rational basis upon which to conclude that the culpable mental state or *mens rea* for each of these offenses is not the same.

Neither statute expressly sets forth a particular culpable mental state. Under such circumstances, R.C. Section 2901.21 (B) applies. That statute reads, in pertinent part, as follows:

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

Accordingly, "recklessness is the catchall culpable mental state for criminal statutes that fail to mention any degree of culpability, except for strict liability statutes, where the accused's mental state is irrelevant. However, for strict liability to be the mental standard, the statute must plainly indicate purpose to impose it." State vs. Lozier, 101 O.St.3d 161, 2004-Ohio-732 at ¶21.

In State vs. Colon, *supra*, this Honorable Court held that R.C. 2911.02 (A)(2) does not plainly indicate that strict liability is the applicable mental standard for the offense of Robbery defined in that statute. This court concluded that the applicable mental standard or *mens rea* is recklessness, which is an essential element of the offense of Robbery under R.C. 2911.02 (A)(2). This being so, there is no rational basis upon which to conclude that culpable mental state or *mens rea* for the offense of Aggravated Robbery under R.C. 2911.01 (A)(3) would not also be that of recklessness, which would be an essential element of that offense.

Under each of these statutes the prohibited conduct or *actus reus* is substantially similar. Nothing in either of these statutes plainly indicates that strict liability is the applicable mental standard. Indeed, it would appear that the offense of Robbery under R.C. 2911.02 (A)(2) is a lesser included offense of Aggravated Robbery under R.C. 2911.02 (A)(3). In such a situation, it would make no sense to hold that the *mens rea* element of the more serious offense would be a mental standard lower than that for the less serious offense.

In the instant case, no culpable mental state or *mens rea* element was set forth in Counts One and Two of the Indictment. These Counts read as follows:

THE JURORS OF THE GRAND JURY of the State of Ohio,  
within and for Lucas County, Ohio, on their oaths, in the

name and by the authority of the State of Ohio, do find and present that **GREGORY A. HORNER and JAMES K. HAHN**, on or about the 30<sup>th</sup> day of March, 2006, in Lucas County, Ohio, in attempting or committing a theft offense as defined in §2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, did inflict, or attempt to inflict, serious physical harm on another, in violation of **§2911.01(A)(3) OF THE OHIO REVISED CODE, AGGRAVATED ROBBERY, BEING A FELONY OF THE FIRST DEGREE**, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

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SECOND COUNT

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that **GREGORY A. HORNER and JAMES K. HAHN**, on or about the 30<sup>th</sup> day of March, 2006, in Lucas County, Ohio, in attempting or committing a theft offense as defined in §2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, did inflict, or attempt to inflict, serious physical harm on another, in violation of **§2911.01(A)(3) OF THE OHIO REVISED CODE, AGGRAVATED ROBBERY, BEING A FELONY OF THE FIRST DEGREE**, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

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firearm on or about the offender or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm or used it to facilitate the offense.

It is clear that Counts One and Two omit to set forth any *mens rea* element for the offenses charged. Accordingly, under State vs. Colon, *supra*, these Counts are defective and fail to state an offense.

In affirming Defendant's convictions on Counts One and Two, the Court of Appeals applied a plain error standard of review. However, since Defendant was convicted upon a plea of no contest, the proceedings should not properly have been reviewed under a plain error standard.

The tender of a no contest plea by Defendant expressly presented the question of whether each Count of the Indictment as to which the no contest plea was being entered was sufficient to state an offense. State vs. Bird, 81 O.St.3d 582 at 584, 1998-Ohio-606; State ex rel Stern vs. Mascio, 75 O.St.3d 422 at 423-425, 1996-Ohio-93. If the counts of a felony indictment contain sufficient allegations to state the offenses charged, the appropriate judicial response to a plea of no contest would ordinarily be to enter a finding of guilty. *Id.* But, where a plea of no contest is entered to counts of a felony indictment which do not state all essential elements of the offense sought to be charged, the allegations of the indictment are insufficient to state an offense. Under such circumstances, the appropriate judicial response is to dismiss the defective counts. State ex rel Stern vs. Mascio, *supra*, State vs. Thorpe, 9 O.App.3d 1 at 3 (1983).

Under the holding of Colon I, *supra*, a count of an Indictment that does not set forth the *mens rea* element of the offense sought to be charged is defective and does

not state an offense. Counts One and Two of the Indictment in the instant case each suffer from this defect and therefore, do not state an offense. The question of whether Counts One and Two each stated an offense was presented directly to the trial court for determination when Defendant entered his plea of no contest. The trial court should properly have dismissed said counts and erred by not doing so. Since the question presented had been expressly placed before trial court for decision, this is not a case where the plain error doctrine or the structural error doctrine should be applied on review.

In this regard, it cannot be said that Appellant has somehow waived or forfeited the question that was presented for review. Pursuant to Crim. R. 51, an exception is not necessary to lay a foundation for review. Crim.R.51 provides as follows:

An exception, at any stage or step of the case or matter, is unnecessary to lay a foundation for review, whenever a matter has been called to the attention of the court by objection, motion, or otherwise, and the court has ruled thereon.

In the instant case, the question of whether the allegations of Counts One and Two were sufficient to state an offense was put at issue by Defendant's tendering plea of no contest to those counts. The trial court's attention to the matters was invoked by the plea of no contest and the trial court decided that question by entering a finding of guilty. By operation of Crim. R. 51, no subsequent exception or other action had to be taken to lay a foundation for appellate review. Accordingly, it constituted error for the Court of Appeals to have utilized a plain error standard of review in this case.

Accordingly, the holding on reconsideration in State vs. Colon, 119 O.St.3d 204, 2008-Ohio-3242 ("Colon II") has no application to the issues presented in the instant case. The Court below erred by applying a plain error standard of review. Because the

question of whether Counts One and Two of the Indictment each stated an offense was presented to the trial court for decision when Defendant entered his plea of no contest, that question had been properly and adequately preserved that question for appellate review, and should not have been reviewed under a plain error standard.

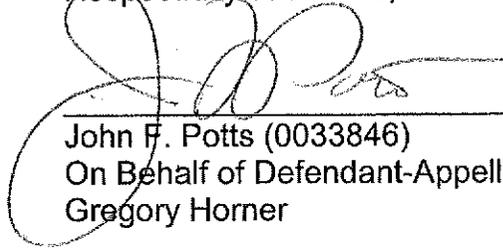
Article I, Section 10 of the Ohio Constitution provides, in pertinent part, that "no person shall be held to answer for a capital, or other infamous crime, unless presentment or indictment of a grand jury". Defendant's rights under Article I, Section 10 were violated when the trial court entered findings of guilty upon Defendant's plea of no contest to Counts One and Two charging Defendant with Aggravated Robbery under R.C. 2911.01 (A)(3) because the Indictment failed to set forth all essential elements of that offense. This is not a matter that was required to be raised in a pretrial motion because Crim.R.12 (C)(2) expressly provides that the failure of an Indictment to charge an offense "shall be noticed by the court any time during the pendency of the proceedings". Defendant's plea of no contest operated to require the trial court to determine whether the counts of the Indictment to which the no contest plea was entered were sufficient to state an offense. Counts One and Two were defective in this regard. It was therefore contrary to law and constituted error for the trial court to have entered findings of guilty on these counts. Likewise, it was contrary to law and constituted error for the Court of Appeals to have affirmed Defendant's conviction on these counts. In this regard, it is not clear why the Court of Appeals applied a plain error standard of review as this is not a case where the error complained of was unpreserved.

For these reasons, Defendant's convictions on Count One and Count Two must be reversed.

**CONCLUSION**

For these reasons, the Decision and Judgment Entry of the Sixth District Court of Appeals affirming Defendant's convictions on Counts One and Two of the Indictment in this case must be reversed, and this case should be remanded for dismissal of said counts.

Respectfully submitted,

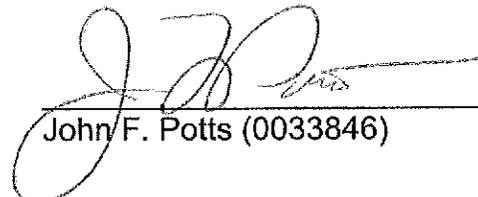


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John F. Potts (0033846)  
On Behalf of Defendant-Appellant,  
Gregory Horner

**CERTIFICATION**

This is to certify that a copy of the foregoing was served by ordinary U.S. mail this 21<sup>st</sup> day of December, 2009, upon: David F. Cooper, Assistant Lucas County Prosecutor, 700 Adams Street, 2<sup>nd</sup> Floor, Toledo, OH 43604.



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John F. Potts (0033846)