

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant,

vs.

FRANK ROBERT HAMILTON, III

Defendant-Appellee.

CASE NO. 09-1878 & 09-1958

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

COURT OF APPEALS
CASE NO. 22895

APPELLANT'S MERIT BRIEF

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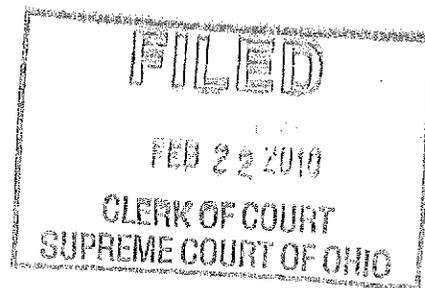
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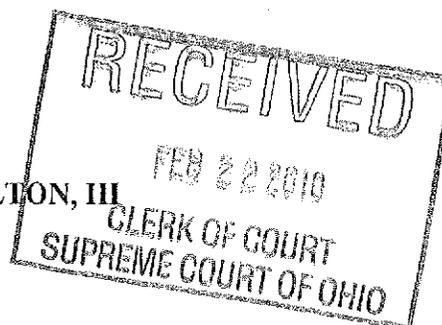


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STATEMENT OF THE CASE

On December 12, 2007, Appellee Frank Robert Hamilton, III was charged in a one-count indictment with the first-degree felony of discharging a firearm upon or over a public road or highway, with a firearm specification. Hamilton moved to dismiss his indictment because it did not allege that the firearm was discharged recklessly. The State opposed the dismissal and asked the court to allow it to amend the indictment by adding “recklessly” as the culpable mental state. The court allowed the State’s amendment under Crim.R. 7(D) and denied Hamilton’s request to reconsider its ruling.

Two weeks later, Hamilton pled no contest to the charge in the indictment in exchange for the State’s agreement to nolle the firearm specification and not object to a sentence of community control. The trial court imposed community control on July 16, 2008.

Hamilton appealed. On September 4, 2009, the Second District Court of Appeals (“court of appeals”) reversed Hamilton’s conviction. (Final Entry of the Second District Court of Appeals) It found that the trial court’s allowance of the amendment to include “recklessly” in the charged offense violated Hamilton’s constitutional right to a grand jury indictment. (Opinion of the Second District Court of Appeals, at p. 8)

Ten days later, the State asked the court of appeals to certify a conflict between its judgment and the judgment rendered in *State v. Rice*, Hamilton App. No. C-080444, 2009-Ohio-1080. The court of appeals found that a conflict existed and certified the following issue:

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?

In the meantime, the State also filed a timely notice of appeal and memorandum in support of jurisdiction asking this Court to invoke its appellate and discretionary jurisdiction

over the same issue. This Court accepted the State's claimed appeal of right and discretionary appeal in Case No. 2009-1878 and ordered it consolidated with the certified conflict case in Case No. 2009-1958. Both causes are now before this Court.

STATEMENT OF FACTS

The indictment at issue in this case used the following language to charge Hamilton with discharging a firearm upon or over a public road or highway:

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 and present 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.

(Emphasis sic.)(Summary of the Docket from Common Pleas Case No. 2007 CR 03702, hereinafter "SD," Entry No. 14)

On April 9, 2008, this Court decided *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 ("*Colon I*"). Just over a month later, Hamilton moved to dismiss the indictment. Citing *Colon I*, he argued that the requisite mental state for discharging a firearm upon or over a public road or highway was recklessness and that his indictment did not charge that the firearm was discharged recklessly. (SD Entry No. 34)

The State filed a motion asking the trial court, pursuant to Crim.R. 7(D) and *State v. O'Brien* (1987), 30 Ohio St.3d 122, 508 N.E.2d 144, to allow the indictment to be amended to include the mens rea of "recklessly" before the phrase "discharge a firearm upon or over a public road or highway[.]" (SD Entry No. 37) The court allowed the amendment and offered Hamilton a reasonable continuance upon a showing that he had been misled or prejudiced by the amendment. (SD Entry No. 38) Hamilton did not request a continuance.

ARGUMENT

Issue Certified for Review:

“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?”

Proposition of Law:

“*State v. Colon* did not overrule *State v. O’Brien*. Amendment of an indictment to include an omitted mens rea element does not violate the defendant’s right not to answer for a crime charged other than on presentment or indictment of a grand jury where the amendment does not change the name or identity of the offense.”

The issue certified for review in the certified conflict case in Case No. 2009-1958 and the State’s proposition of law in the State’s claimed appeal of right and discretionary appeal in Case No. 2009-1878 involve the same issue. To avoid duplication of argument, the State will address both together.

The issue is this: May an indictment which does not contain all the elements of an offense be amended to include an omitted mens rea element? The answer is yes, where the amendment does not change the name or identity of the offense and the defendant has not been misled or prejudiced by the omission of the mens rea from the indictment. This Court so held in *State v. O’Brien* (1987), 30 Ohio St.3d 122, 508 N.E.2d 144.

A. *O'Brien* and its progeny.

The defendant in *O'Brien* was indicted with two counts of endangering children in violation of R.C. 2919.22(B)(3). *Id.* at 122. At trial, prior to impanelling the jury, the defendant moved to dismiss the counts because the indictment omitted the requisite mens rea of “recklessness.” *Id.* at 122-23. The court overruled the motion, and the trial proceeded. *Id.* at 123. After the defense rested, the State moved to amend the indictment to include “recklessness.” *Id.* The trial court granted the State’s motion and instructed the jury on that element. *Id.* The jury convicted the defendant. *Id.* The court of appeals reversed the conviction after concluding that “the omission of the mental state element fatally flawed the indictment, and that allowing [the State] 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.*

This Court first considered whether “recklessness” was an essential element of endangering children. *Id.* at 123-24. It held that it was. *Id.* at 124. It also held that the defendant’s indictment in its original form was insufficient under Crim.R. 7(B) for failure to charge the essential element of “recklessness.” *Id.* at 125.

However, this Court did not end its analysis there and affirm the court of appeals. *Id.* This is because the indictment in *O'Brien* did not remain in its original form; rather, it was amended to add the missing mens rea element. *Id.* As a result, this Court went on to consider whether the amendment comported with Crim.R. 7(D). *Id.* That rule sets forth the procedure for amending indictments and provides that:

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. If any amendment is made to the substance of the indictment * * *, or to cure a variance between the indictment * * * and the proof, the defendant is entitled to a discharge of the jury on the defendant’s motion, if a

jury has been impanelled, 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 a postponement thereof to a later day with the same or another jury.

Crim.R. 7(D).

This Court held that the addition of the mens rea element of "recklessness" to the charge of endangering children did not change either the name or the identity of the crime charged. *O'Brien*, at 126. The name of the crime remained the same both before and after the amendment, and the identity of the crime did not change because neither the penalty nor the degree of the offense was altered by the amendment. *Id.* The amendment did alter the substance of the indictment. *Id.* at 126. Therefore, the defendant was entitled to both a discharge of the jury and a reasonable continuance if he was misled or prejudiced by the amendment, but the defendant could show neither. *Id.* Accordingly, this Court held that the requirements of Crim.R. 7(D) were satisfied, and the State's amendment to add "recklessness" to the indictment was proper. *Id.*

This Court rejected the defendant's argument that the amendment to his indictment to include the essential mens rea element allowed the jury to convict him on a charge different from that found by the grand jury. *Id.* at 126-27. This Court readily distinguished the amendment in *O'Brien* from the one made in *State v. Headley* (1983), 6 Ohio St.3d 475, 453 N.E.2d 716. In *Headley*, the State amended the charge of aggravated trafficking to add the identity of the controlled substance, which was previously omitted. *Id.* at 475. The severity of a particular trafficking offense is dependent upon the type of drug involved. *Id.* at 479. "Under this analysis, it is evident that R.C. 2925.03 [defining the crime of trafficking] sets forth more than one criminal offense with the identity of each being determined by the type of controlled substance

involved.” *Id.* In *Headley*, the type of controlled substance was an essential element, the omission of which could not be cured by amendment, because to do so “would change the very identity of the offense charged.” *Id.*

Contrastingly, in *O’Brien*, the amendment of the indictment to include the element of “recklessness” in the charge of endangering children “in no way alter[ed] either the name, identity or severity of the offense charged.” *O’Brien*, at 127. As a result, the defendant in *O’Brien* was not convicted on a charge different from that found by the grand jury.

This Court continues to follow *O’Brien*. As recently as September 16, 2008, after *Colon I* was decided, this Court relied on *O’Brien* to reaffirm that Crim.R. 7(D) does not permit the amendment of an indictment when the amendment changes the penalty or degree of the charged offense because amending the indictment to change the penalty or degree changes the identity of the offense. *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, 903 N.E.2d 609, at ¶9. At issue in *Davis* was an amendment that increased the amount of the controlled substance in an aggravated drug trafficking charge. *Id.* at ¶2-3. As a result of the amendment, the offense went from a felony of the fourth degree to a felony of the second degree. *Id.* In deciding whether or not the amendment was proper, this Court again recognized the critical distinction between *O’Brien* and *Headley*. *Davis*, at ¶6-8. This Court stated that the amendment in *O’Brien* was proper because the inclusion of the mens rea of “recklessness” did not change the penalty or the degree of the offense; therefore, the identity of the offense remained the same both before and after amendment. *Davis*, at ¶6. In contrast, the amendment in *Davis* that increased both the degree and potential penalty of the offense by increasing the amount of the controlled substance was not permissible under Crim.R. 7(D). *Id.* at ¶9.

B. *Colon I* did not overrule *O'Brien*.

The court of appeals based its holding in this case on *Colon I*, which it found implicitly overruled *O'Brien*. (Opinion of the Second District Court of Appeals, at p. 5, 8) The court of appeals' conclusion that *Colon I* overruled *O'Brien* cannot be reconciled with this Court's decision in *Davis*, which relied on *O'Brien* as controlling authority for when an amendment to an indictment is proper. Despite the continued vitality of *O'Brien's* holding, recognized in *Davis*, the court of appeals rejected *O'Brien* and held that the omission of "recklessly" from Hamilton's indictment could not be cured by amendment and that doing so violated Hamilton's constitutional right to a grand jury indictment. (Opinion of the Second District Court of Appeals, at p. 8)

Colon I did not overrule *O'Brien*. The issue in *Colon I* was whether an indictment that fails to include the mens rea of the offense charged may be challenged for the first time on appeal. *Id.* at ¶19. It did not address whether such an indictment could be amended to add the omitted mens rea element because the indictment in *Colon I* was never amended, as it was in *O'Brien* and this case. Rather, the indictment in *Colon I* remained defective up to and throughout the defendant's trial.

The defective indictment led to significant errors during the defendant's trial. *Id.* at ¶23, 29. The indictment was unconstitutional because it omitted the mens rea for inflicting physical harm, an essential element of robbery. *Id.* at ¶29. Additionally, the defendant's due process rights were violated because there was no evidence that he had notice that the State had to prove that he acted recklessly in order to convict him of robbery. *Id.* at ¶30. The State did not argue that the defendant's conduct in inflicting physical harm on the victim was reckless. *Id.* The court failed to include the mens rea for the offense in its jury instruction. *Id.* at ¶31. The

defendant's counsel did not object to the incomplete instruction. *Id.* There was no evidence that the jury considered whether the defendant acted recklessly in inflicting physical harm on the victim. *Id.* And, finally, the State treated the robbery as a strict liability offense during its closing argument. *Id.* The errors that were caused by the defective indictment permeated the entire criminal proceeding and resulted in structural error. *Id.* at ¶32.

The conclusion in *Colon I* that the defendant could challenge his defective indictment for the first time on appeal did not affect the holding in *O'Brien*. In *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169 ("*Colon II*"), this Court subsequently limited the holding of *Colon I* to its unique facts. This Court explained that "the defect in the defendant's indictment was not the only error that had occurred." *Colon II*, at ¶6. Structural error existed in *Colon I* because of the multiple errors that were inextricably linked to the flawed indictment, which permeated the trial from beginning to end. *Colon II*, at ¶7. This Court stated that, in most cases, when a defendant fails to object to an indictment that is defective because the indictment did not include an essential element of the charged offense, plain-error analysis, pursuant to Crim.R. 52(B), will be the proper analysis to apply. *Id.* at ¶7. Accordingly, automatic reversal despite the defendant's failure to object is reserved for the rare case in which multiple errors at trial follow the defective indictment. *Id.* at ¶8.

The conclusion in *Colon I* that the indictment was defective likewise did not affect the holding in *O'Brien*. In concluding that *Colon I* overruled *O'Brien*, the court of appeals relied on the emphasis this Court placed on the critical function of the grand jury in fairly instituting criminal proceedings and on the following quotation in *Colon I*, at ¶17:

[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.” *Harris v. State* (1932), 125 Ohio St. 257, 264, 181 N.E. 104.

(Opinion of the Second District Court of Appeals, at p. 6-7) Neither the above passage nor this Court’s emphasis on the constitutional significance of the grand jury call into question *O’Brien’s* holding that an amendment to include an omitted element from an indictment is proper where the amendment does not change the name or the identity of the crime.

This Court explained in *Davis* that “[t]he above passage makes two statements: first, an indictment that omits an essential element is defective; second, a court cannot allow an amendment that would allow the court to convict the accused on a charge different from that found by the grand jury.” *Id.* at ¶10. This Court cited the above quotation in section I(B) of its opinion in *Colon I*. *Colon I*, at ¶17. That section discussed the Court’s reasons for finding that the indictment was defective. *Id.* at ¶10. Accordingly, this Court was relying on the quotation to support its conclusion that the indictment was defective – not to suggest that an amendment to the indictment under Crim.R. 7(D) would have been unconstitutional. The Second District interpreted *Colon I* too broadly when it concluded that it overruled *O’Brien*.

In fact, *O’Brien’s* holding is consistent with the above quotation. The amendment in *O’Brien* that added the mens rea of “recklessness” to the charged offense fully comported with Crim.R. 7(D). *O’Brien*, at 126. Crim.R. 7(D) embodies the protections guaranteed in Section 10, Article I of the Ohio Constitution by limiting the court’s power to amend indictments “provided no change is made in the name or identity of the crime charged.” *State v. Headley* (1983), 6 Ohio St.3d 475, 479, 453 N.E.2d 716; *State v. Strozier* (Oct. 5, 1994), Montgomery

App. No. 14021, at *2. The amendment in *O'Brien* did not change the name or identity of the offense and thus did not allow the jury to convict the defendant on a charge different from that found by the grand jury. *O'Brien*, at 126-27.

The court of appeals incorrectly found that *Colon I* overruled *O'Brien*. The issue in *Colon I* was whether a defective indictment that remains defective up to and throughout the defendant's trial and results in significant errors during the trial may be challenged for the first time on appeal. *Colon I* did not address *O'Brien's* core holding regarding when an amendment of an indictment is proper, and *O'Brien* remains good law after *Colon I*.

The First District Court of Appeals reached this same conclusion in *State v. Rice*, Hamilton App. No. C-080444, 2009-Ohio-1080, the case that conflicts with the court of appeals' judgment below. *Rice*, at ¶11-13. *Rice* relied on *O'Brien* to hold that the amendment to the indictment to add "recklessly" to the offense of robbery was permissible. *Id.* at ¶13.

C. *O'Brien* controls the outcome of this case.

The amendment to the indictment in this case was no different than the amendment at issue in *O'Brien*. Thus, *O'Brien* controls the outcome of this case. Like the amendment in *O'Brien*, the amendment to Hamilton's indictment to include the mens rea of "recklessly" in the charge of discharging a firearm upon or over a public road or highway did not change the name of the offense. Nor did it change the identity of the offense: the inclusion of "recklessly" did not alter the degree of the offense or the potential penalties. Hamilton was charged with the same offense both before and after amendment. Although the amendment changed the substance of the indictment, Hamilton did not complain that he was misled or prejudiced by the amendment. He did not ask for a reasonable continuance. In fact, Hamilton knew that the State was required to prove that he acted recklessly, as evidenced by his efforts to dismiss the indictment for failure

to include that element. Therefore, in accordance with *O'Brien*, the amendment to Hamilton's indictment was proper under Crim.R. 7(D) and Section 10, Article I of the Ohio Constitution.

CONCLUSION

In view of the foregoing law and argument, it is respectfully requested that this Court decide this case in accordance with *O'Brien* that the amendment to Hamilton's indictment to include the mens rea of "recklessly" was proper under Crim.R. 7(D) and Section 10, Article I of the Ohio Constitution because it did not change the name or identity of the charged offense, and Hamilton was not misled or prejudiced by the omission of "recklessly" from the indictment.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

BY



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Assistant Prosecuting Attorney

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief was sent by first class on this 19th day of February, 2010, to Opposing Counsel: Daniel J. O'Brien, 1210 Talbot Tower, 131 Ludlow Street, Dayton, Ohio 45402.

By: 

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Assistant Prosecuting Attorney

APPELLATE DIVISION

APPENDIX

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

CASE NO. 09-1878

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 APPEAL OF APPELLANT, THE STATE OF OHIO

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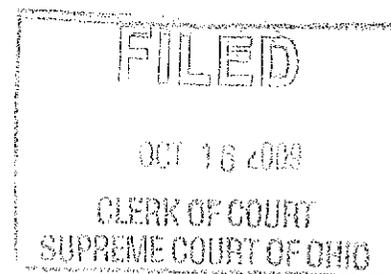
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NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO

Appellant, the State of Ohio, through the Office of the Prosecuting Attorney for Montgomery County, hereby gives notice of appeal to the Supreme Court of Ohio, from 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 September 4, 2009.

This case involves a felony and presents a substantial constitutional question and a question of public or great general interest.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

BY 

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APPELLATE DIVISION

COUNSEL FOR APPELLANT,
STATE OF OHIO

CERTIFICATE OF SERVICE

I hereby certify that a copy of this notice of appeal was sent by first class mail on this 17th day of October, 2009, to the following: Daniel J. O'Brien, 1210 Talbott Tower, 131 North Ludlow Street, Dayton, Ohio 45402 and Timothy Young, Ohio Public Defender Commission, 250 East Broad Street, Suite 1400, Columbus, OH 43215-9311.



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file

IN THE SUPREME COURT OF OHIO

09-1958

STATE OF OHIO

CASE NO. 09-1878

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

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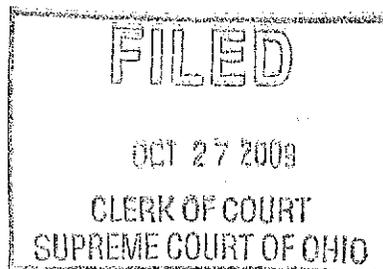
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COUNSEL FOR APPELLEE, FRANK ROBERT HAMILTON, III.



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

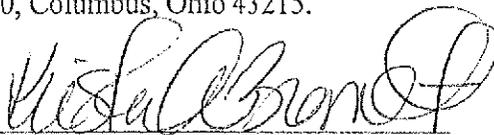
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STATE OF OHIO

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.


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APPELLATE DIVISION



FILED
COURT OF APPEALS
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MONTGOMERY CO. OHIO
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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	:	(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
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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.

Copies mailed to:

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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GREGORY A. BRUSH
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MONTGOMERY CO. OHIO
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In the Common Pleas Court of Montgomery County, Ohio

STATE OF OHIO,	:	Case No. 07-CR-3702
Plaintiff,	:	(JUDGE JEFFREY E. FROELICH)
v.	:	
FRANK ROBERT HAMILTON, III,	:	DECISION AND ENTRY DENYING
Defendant	:	MOTION TO DISMISS
	:	INDICTMENT AND GRANTING
	:	MOTION TO AMEND
	:	INDICTMENT

The Defendant was indicted for violating R.C. 2923.162(A)(3)(C)(4) in that he "did discharge a firearm upon or over a public road or highway and said violation caused serious physical harm to a person...."

The Defendant has moved to dismiss the indictment because it "fails to specify any requisite degree of culpability...." The Defendant argues that recklessness is the required culpable mental state and that, as such, it must be stated in the indictment. *State v. Colon* ___ Ohio St.3d ___, 2008-Ohio-1624. The State agrees that recklessness is required and has moved to amend the indictment to read that the Defendant "did recklessly discharge a

firearm upon or over a public road..."

Crim. R. 7(D) 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. In *Colon*, the indictment, of which the Defendant was convicted, omitted the required mens rea for the charge. Second, there was no evidence in the record that the Defendant was aware that the State was required to prove recklessness. Additionally, throughout the trial, the State treated the offense as a strict liability offense. *Colon* held that a Defendant can challenge for the first time on appeal an indictment that omits an essential element of the crime. *Id.* at ¶45.

However, 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. *State v. O'Brien* (1987), 30 Ohio St.3d 122.

The Defendant is entitled to a reasonable continuance, especially if he has been misled or prejudiced by the amendment. *State v. Carter*, 89 Ohio St.3d 593, 2000-Ohio-172; *State v. Davis*, Clark App. No. 2002-CA-43, 2003-Ohio-4839. There is no such allegation in the Defendant's motion.

The Defendant's Motion to Dismiss is DENIED; the State's Motion to Amend is GRANTED.

APPROVED:


JEFFREY E. FROELICH, JUDGE

Copies of this Decision, Order and Entry were forwarded to all parties listed below by ordinary mail this filing date.

KENNETH R. POHLMAN, Assistant Prosecuting Attorney, Montgomery County Prosecutor's Office, 301 West Third Street, Fifth Floor, Dayton, Ohio 45422 (937)225-5757, fax (937)225-3470

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CASE FLOW SERVICES

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OH Const. Art. I, § 10

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Constitution of the State of Ohio (Refs & Annos)
▣ Article I. Bill of Rights (Refs & Annos)
→ **O Const I Sec. 10 Rights of criminal defendants**

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

CREDIT(S)

(1912 constitutional convention, am. eff. 1-1-13; 1851 constitutional convention, adopted eff. 9-1-1851)

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Rules of Criminal Procedure (Refs & Annos)

→ **Crim R 7 The indictment and the information**

(A) Use of indictment or information

A felony that may be punished by death or life imprisonment shall be prosecuted by indictment. All other felonies shall be prosecuted by indictment, except that after a defendant has been advised by the court of the nature of the charge against the defendant and of the defendant's right to indictment, the defendant may waive that right in writing and in open court.

Where an indictment is waived, the offense may be prosecuted by information, unless an indictment is filed within fourteen days after the date of waiver. If an information or indictment is not filed within fourteen days after the date of waiver, the defendant shall be discharged and the complaint dismissed. This division shall not prevent subsequent prosecution by information or indictment for the same offense.

A misdemeanor may be prosecuted by indictment or information in the court of common pleas, or by complaint in the juvenile court, as defined in the Rules of Juvenile Procedure, and in courts inferior to the court of common pleas. An information may be filed without leave of court.

(B) Nature and contents

The indictment shall be signed in accordance with Crim.R. 6(C) and (F) and contain a statement that the defendant has committed a public offense specified in the indictment. The information shall be signed by the prosecuting attorney or in the name of the prosecuting attorney by an assistant prosecuting attorney and shall contain a statement that the defendant has committed a public offense specified in the information. 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. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. Each count of the indictment or information shall state the numerical designation of the statute that the defendant is alleged to have violated. Error in the numerical designation or omission of the numerical designation shall not be ground for dismissal of the indictment or information, or for reversal of a conviction, if the error or omission did not prejudicially mislead the defendant.

(C) Surplusage

The court on motion of the defendant or the prosecuting attorney may strike surplusage from the indictment or

information.

(D) Amendment of indictment, information, or complaint

The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, 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. If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, 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 a postponement thereof to a later day with the same or another jury. Where a jury is discharged under this division, jeopardy shall not attach to the offense charged in the amended indictment, information, or complaint. No action of the court in refusing a continuance or postponement under this division is reviewable except after motion to grant a new trial therefor is refused by the trial court, and no appeal based upon such action of the court shall be sustained nor reversal had unless, from consideration of the whole proceedings, the reviewing court finds that a failure of justice resulted.

(E) Bill of particulars

When the defendant makes a written request within twenty-one days after arraignment but not later than seven days before trial, or upon court order, the prosecuting attorney shall furnish the defendant with a bill of particulars setting up specifically the nature of the offense charge and of the conduct of the defendant alleged to constitute the offense. A bill of particulars may be amended at any time subject to such conditions as justice requires.

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(Adopted eff. 7-1-73; amended eff. 7-1-93, 7-1-00)

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

Court of Appeals of Ohio, Second District, Mont-
gomery County.

STATE of Ohio, Plaintiff-Appellee,

v.

Terrell L. STROZIER, Defendant-Appellant.

No. 14021.

Oct. 5, 1994.

Mathias H. Heck, Jr., Joseph C. Mollica, Dayton, OH

Karen S. Williams, Carrollton, OH

OPINION

GRADY.

*1 Defendant Terrell L. Strozier appeals from his convictions for Carrying a Concealed Weapon, R.C. 2923.12(A), Having Weapons Under Disability, R.C. 2923.13(A)(2), and Aggravated Burglary, R.C. 2911.11(A)(3). He was also found guilty on a prior offense of violence specification attached to each of those convictions as well as a firearm specification attached to the Weapons Under Disability conviction. Strozier was sentenced according to law. He now presents three assignments of error, which are discussed below.

I.

Strozier's first assignment of error states:

THE TRIAL COURT ERRED IN ALLOWING
THE PROSECUTOR TO AMEND THE INDICT-

MENT ON THE DAY TRIAL BEGAN; AND TO
PROCEED ON THE INDICTMENT AS
AMENDED.

Strozier was convicted of Having Weapons While Under Disability, R.C. 2923.13, which provides:

(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

(1) Such person is a fugitive from justice;

(2) Such person is under indictment for or has been convicted of any felony of violence, or has been adjudged a juvenile delinquent for commission of any such felony;

(3) Such person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse, or has been adjudged a juvenile delinquent for commission of any such offense;

(4) Such person is drug dependent or in danger of drug dependence, or is a chronic alcoholic;

(5) Such person is under adjudication of mental incompetence.

(B) Whoever violates this section is guilty of having weapons while under disability, a felony of the fourth degree.

Count 2 of the indictment alleged that Defendant Strozier

"[D]id knowingly acquire, have, carry, or use any firearm, to-wit: 9mm semi-automatic pistol, said defendant having been previously convicted in the State of Ohio of a felony of violence, to-wit: Aggravated Trafficking, on December 27, 1989, in the

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case of the State of Ohio versus Terrell Strozier, being Case Number 89-CR-3713, in the Common Pleas Court of Montgomery County, Ohio.”

On the day of trial the State moved to amend Count 2 by substituting for the words *felony of violence* the words *trafficking in any drug abuse*. The State argued that the amendment made the wording of the indictment conform to the prior conviction alleged, Aggravated Trafficking, which is not an offense of violence and instead constitutes trafficking in any drug of abuse.

The Defendant objected to the amendment requested (T. 8), though he disclaimed surprise or an inability to defend, stating: “We just feel that an amendment on the day of trial of the indictment (sic) I think is unfair to the defendant.” (T. 9).

The trial court granted the State's motion and ordered the indictment amended as requested. The charge was tried to a jury, which returned a verdict of guilty on the charge of Having a Weapon Under Disability upon proof of the prior Aggravated Trafficking offense alleged.

*2 Crim.R. 7(D) provides, *inter alia*:

Amendment of indictment, information, or complaint. The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, 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. If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, 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 a postponement thereof to a later date with the same or another jury.

Crim.R. 7(D) embodies the protections guaranteed in Section 10, Article I, of 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.” “This provision guarantees the accused that the essential facts constituting the offense for which he is tried will be found in the indictment of the grand jury. Where one of the vital elements identifying the crime is omitted from the indictment, it is defective and cannot be cured by the court as such a procedure would permit the court to convict the accused on a charge essentially different from that found by the grand jury.” *State v. Headley* (1983), 6 Ohio St.3d 475, at 478-479 (citations omitted.)

An unconsented-to amendment which changes the name or identity of the offense charged, being expressly forbidden by Crim. R. & (D), is reversible error, regardless of whether a defendant can demonstrate prejudice as a result of the amendment. *State v. Jackson* (1992), 78 Ohio App.3d 479.

It seems obvious from the text of the Rule that not every change to the substance of an indictment constitutes a change in the name or identity of the offense charged. In the event of these other changes of a lesser order, the defendant is entitled to a reasonable continuance and to discharge of the jury if one has been impaneled. The court is required to grant that relief on the defendant's motion, “unless it clearly appears from the whole of the proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made.”

Here, the amendment created no change in the name of the crime alleged, Having Weapons While Under Disability. While the amendment did modify the wording of the indictment, we believe that the change did not affect the identity of the crime alleged, but only cured a variance between the essen-

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tial facts constituting the disability and the category of disability alleged. The amendment changed that category to conform to the grounds alleged to constitute the disability. The change worked no prejudice to his right to know the facts against which he was required to defend, which were founded on the same legal requirements.

*3 The Defendant would have been entitled to a continuance under the terms of Civ.R. 7(D) when the amendment was made, but he did not ask for one. Indeed, he conceded that he was not prejudiced by it, which removes any basis for a continuance. It also confirms, we believe, that the amendment made worked no injury to his right to notice of the essential facts of the offense with which he is charged, which is the purpose of Crim.R. 7(D).

The first assignment of error is overruled.

II.

The second assignment of error states:

IT WAS PLAIN ERROR AND A VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS FOR THE PROSECUTOR TO USE THE EXISTENCE OF A FIREARM TO PROVE ELEMENTS OF CARRYING A CONCEALED WEAPON; WEAPONS UNDER DISABILITY; AND A FIREARM SPECIFICATION.

This assignment of error pertains to the firearm specification attached to Count 2 of the indictment.

Defendant-Appellant's specific argument in this regard is that use of the same evidence, in this case a firearm, to prove Count 1, Carrying a Concealed Weapon, and Count 2, Having Weapons Under Disability, as well as the firearm specification attached to Count 2, deprived him of due process of law.

We are not aware of any constitutional impediment to the convictions both for Carrying a Concealed Weapon and for Having a Weapon Under Disability on this record. The two offenses, R.C. 2923.12(A)

and R.C. 2923.13(A)(2), respectively, are not allied offenses of similar import as defined by R.C. 2941.25, which embodies the double jeopardy test, and may be charged on related facts. *State v. Rice* (1982), 69 Ohio St.2d 422.

Defendant-Appellant argues that his right not to be twice placed in jeopardy or punished for the same offense was violated because the firearm specification attached to Count 2 subjects him to an additional punishment for the offense in Count 2. He relies on *State v. Witwer* (1992), 64 Ohio St.3d 421, which in a footnote characterizes the penalty provided in R.C. 2929.71 for conviction of a firearm specification to be "additional to" the punishment for the underlying felony. *Id.* at 426, n. 4.

Witwer did not involve the use of a firearm. The purpose of the recitation in the footnote concerned seems to be to illustrate how the R.C. 2941.143 physical harm specification alleged in *Witwer* did not provide an additional penalty, but only a greater sentence, by comparing it to a R.C. 2941.141 firearm specification, which the Supreme Court stated *does* provide an additional penalty by way of the sentencing provision of R.C. 2929.71.

The State responds to this argument by urging that the only purpose of specification is to give the defendant notice that he is subject to a penalty for the underlying felony greater than the indefinite term provided in R.C. 2929.11 if the facts alleged in the specification are proved. This view that a firearm specification creates only an enhanced single penalty, not a separate offense or a separate penalty, such that a defendant is not required to endure multiple or cumulative sentences for the same offense, has been adopted in a number of appellate decisions. See, *State v. Mullins* (1986), 34 Ohio App.3d 192; *State v. Price* (1985), 24 Ohio App.3d 186; *State v. Hughley* (1984), 20 Ohio App.3d 77; *State v. Loines* (1984), 20 Ohio App.3d 64; *State v. Sonis* (1984), 19 Ohio App.3d 87; *State v. Vasquez* (1984), 18 Ohio App.3d 92. The statements of the Supreme Court in *Witwer*, which was decided in 1992, runs contrary to this line of authority.

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*4 While the Double Jeopardy Clauses of the United States and Ohio Constitutions clearly protect a defendant against multiple punishments for the same offense, *North Carolina v. Pearce* (1969), 395 U.S. 711; *State v. Johnson* (1983), 6 Ohio St.3d 420, it does not follow that every imposition of multiple or cumulative punishments violates double jeopardy. In *Missouri v. Hunter* (1983), 459 U.S. 361, the United States Supreme Court held:

With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.

Simply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. *Whalen v. United States* 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715; *Albernaz v. United States* 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275. The rule of statutory construction whereby cumulative punishments are not permitted "in the absence of a clear indication of contrary legislative intent," *Whalen, supra* 445 U.S. at 692, 100 S.Ct. at 1438, is not a constitutional rule requiring courts to negate clearly expressed legislative intent. Accordingly, *where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those statutes proscribe the "same" conduct under Blockburger, a court's task of statutory construction is at an end and the prosecution may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.* *Syllabus.* (Emphasis added.)

R.C. 2929.71 provides that the court shall impose a three year term of actual incarceration "in addition to" the indefinite term for any underlying felony other than R.C. 2923.12, Carrying a Concealed Weapon, if the offender is "also convicted of, or pleads guilty to, a specification charging him with

having a firearm on or about his person or under his control while committing the felony." An exception is made for automatic and silencer-equipped firearms, for which R.C. 2929.72 provides a six year term of actual incarceration.

The terms of R.C. 2929.71 manifest the General Assembly's intent to create a penalty for conviction of a firearm specification additional to that provided for an applicable underlying felony, including the underlying felony of Having Weapons White Under A Disability. Accordingly, even if the specification provides a separate penalty for the same conduct, as the Supreme Court suggests in *Witwer*, the General Assembly has specifically authorized that cumulative punishment and it is, therefore, not a double jeopardy violation under the rule of *Missouri v. Hunter, supra*. See, also: *State v. Roe* (1989), 41 Ohio St.3d 18. The second assignment of error is overruled.

III.

*5 The third assignment of error states:

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT-APPELLANT'S MOTION TO DISMISS THE SPECIFICATION HEARING BECAUSE IT DID NOT BEGIN WITHIN THE TIME LIMITS SET FORTH IN R.C. 2945.71.

Defendant-Appellant was brought to trial sixty-nine days after his arrest, which was well within the ninety day limit provided by R.C. 2945.71(C)(2) for charges of this kind. However, the hearing on the prior offense of violence specification was held separately from the trial, on Defendant's own motion, and did not commence until the ninety-fifth day after his arrest. He argues that this bifurcation constitutes a violation of his statutory right to a speedy trial.

R.C. 2945.72(F) provides that the times provided by R.C. 2945.71 within which an accused must be brought to trial may be extended by "[a]ny period of delay necessitated by of a plea in bar or abate-

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ment, motion, proceeding, or action made or instituted by the accused.”

The allegations of the prior offense of violence specifications could have been heard by the jury in the course of the trial, but Defendant exercised his right pursuant to R.C. 2941.143 to have those allegations determined by the trial court. His exercise of that right, which was made by written notice, resulted in the period of delay concerned.

The jury trial concluded on April 15, 1993. The court referred the Defendant to its Probation Department for a presentence investigation and report to be filed April 30, 1993. The hearing before the court on the prior offense of violence specifications was held on May 10, 1993. The ten day difference from the time the report was due, which was actually six business days, was not unreasonable delay.

The third assignment of error is overruled.

IV.

Having overruled all assignments of error, we will affirm the judgment of the trial court.

FAIN and YOUNG, JJ., concur.

FINAL ENTRY PURSUANT TO THE OPINION
OF THIS COURT RENDERED ON THE DAY OF
, 1994, THE JUDGMENT OF THE TRIAL
COURT IS AFFIRMED.

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