

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case Nos. (2009-1878) & 2009-1958
Plaintiff-Appellant,	:	
	:	On Appeal from the Montgomery
v.	:	County Court of Appeals
	:	Second Appellate District
FRANK ROBERT HAMILTON, III,	:	
	:	C.A. Case No. 22895
Defendant-Appellee.	:	

BRIEF OF APPELLEE, FRANK ROBERT HAMILTON, III

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LAW AND ARGUMENT

APPELLEE'S FIRST PROPOSITION OF LAW

This Court should dismiss a case as improvidently accepted when there are previously unaddressed procedural matters that effectively nullify the appellate court's holding below.

The court of appeals held that the trial court “erred in allowing the State to amend the indictment” to include the mental state of recklessness. *State v. Hamilton*, 183 Ohio App. 3d 819, 2009-Ohio-4602, ¶ 23. But the State never amended the indictment. Rather, the trial court merely granted the State’s motion to amend the indictment. Neither the trial court nor the State subsequently amended the indictment. Thus, after objecting to the legal sufficiency of the indictment, Mr. Hamilton ultimately pled no contest to the same indictment that both the trial court and the State recognized to be deficient. This case is not the proper vehicle to resolve the issue put before this Court by the State, and should be dismissed as having been improvidently accepted.

As noted by the appeals court,

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) [sic] of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.”

Id., at ¶ 22. On May 14, 2008, Mr. Hamilton moved to dismiss the indictment, observing that it omitted the “mens rea element” of the offense charged. In response, the State moved to have the court issue an order amending the indictment to include the word “recklessly” before the word “discharge.” Motion to Amend Indictment, May 29, 2008. The trial court denied Mr. Hamilton’s motion to dismiss the indictment, and granted the State’s motion to amend the

indictment. Decision and Entry Denying Motion to Dismiss and Granting Motion to Amend Indictment, June 4, 2008. (“The Defendant’s Motion to Dismiss is DENIED; the State’s Motion to Amend is GRANTED.”)

But there was never an amended indictment filed by the State. Nor did the trial court ever issue an order amending the indictment, as authorized by Crim. R. 7(D).¹ It is firmly established that “[a] court of record speaks only through its journal entries.” *State ex rel. Fogle v. Steiner* (1995), 74 Ohio St. 3d 158, 163. Here, the journal entries of the trial court reflect merely that a motion was granted, not that the indictment was ever amended.

The transcript of Mr. Hamilton’s plea change hearing further establishes that no amendment of the indictment ever occurred. At that hearing, which took place two weeks after the trial court issued its ruling on the State’s motion to amend the indictment, the court asked the State for “a statement of the charge.” June 18, 2008, Plea Hearing Transcript, p. 7. The State responded that

[t]he date of this offense occurred on September 8, 2007, here in Montgomery County, Ohio, wherein this defendant, Frank Robert Hamilton, III, did discharge a firearm upon or over a public road or highway, Salem Avenue, and said violation caused serious physical harm to a person who was shot three times, contrary to law.

Id. It is this charge—one that in no way indicates the requisite mental state—to which Mr. Hamilton pled no contest.

Because there was never an amendment of the indictment, and because Mr. Hamilton ultimately pled no contest to the original, defective charge, the appellate court’s holding—that

¹ This is contrary to what occurred at the trial level in the certified conflict case, *State v. Rice*, Hamilton Common Pleas No. B0800593B, where the trial court *did* file an order amending the indictment to include the appropriate mental state. See Appendix A-2, Entry Amending the Indictment, issued by the Hamilton County Common Pleas Court on April 23, 2008.

the indictment was improperly amended—reaches a legal conclusion about something that never occurred. As the holding in question serves as the sole basis of the State’s motion to certify a conflict and the State’s lone proposition of law, the instant appeal should be dismissed as having been improvidently accepted.

APPELLEE’S SECOND PROPOSITION OF LAW

Amendment of an indictment, over a defendant’s objection, to include an element that was never presented to the grand jury, impermissibly undermines the constitutional right to face prosecution only upon “presentment or indictment of a grand jury.”

CERTIFIED CONFLICT ISSUE

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

Even though the foregoing demonstrates that no amendment occurred to Mr. Hamilton’s indictment, if an amendment had occurred it would have been in violation of the Ohio Constitution. The state constitution provides that no one shall be held to answer for a felony except on “presentment or indictment of a grand jury.” Sec. 10, Art. I, Ohio Constitution. Here, because Mr. Hamilton objected to amendment of his indictment to include an element not presented to the grand jury, and because such an amendment affected his substantial, constitutional right to face trial only upon indictment by a grand jury, the court of appeals’ decision must be affirmed.

Criminal Rule 7(B) provides that an indictment “may be in the words of the applicable section of the statute, provided the words of the statute charge an offense.” The words of R.C. 2923.162(A)(3) and (C)(4), relied upon as the basis for Mr. Hamilton’s indictment, do not charge an offense, because the required mental state is specified nowhere in R.C. 2923.162. Thus, the

grand jury indictment, by tracking the language of R.C. 2923.162, did not allege that Mr. Hamilton acted recklessly, and, thus, did not allege a crime.

Allowing the indictment to be amended to add the word “recklessly” may seem to cure the defect in the indictment, as “[a]n indictment meets constitutional requirements if it first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.” *State v. Buehner*, 110 Ohio St. 3d 403, 405, 2006-Ohio-4707, at ¶ 9. But this analysis, which is correct as far as it goes, entirely overlooks another constitutional aspect of the grand jury indictment process.

Specifically, the above-quoted passage does not recognize that “[t]he very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.” *Russell v. United States* (1962), 369 U.S. 749, 771 (construing the Fifth Amendment to the United States Constitution, which, in relevant part, is worded identically to the grand jury provision of the Ohio Constitution). Because it would be improper for a defendant to be “convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him,”

[t]o allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure.

Id. at 770.

Here, an amendment to insert the word “recklessly” into the indictment is considerably more objectionable than a “subsequent guess” by the trial court or the prosecution as to “what was in the minds of the grand jury” when they indicted Mr. Hamilton. That is because such an

amendment would actually insert an element into the indictment that the members of the Montgomery County Grand Jury almost certainly did *not* find: that Mr. Hamilton acted recklessly. The wording of R.C. 2923.162 does not reflect that the grand jury must determine that the accused acted recklessly, and nothing in the record suggests that the grand jurors were informed that they must find that Mr. Hamilton acted recklessly. Thus, there is no basis—let alone a reasonable basis—for believing that the grand jurors considered that element, that they in fact made such a determination, and that the finding was accidentally omitted from the indictment signed by the foreperson of the grand jury.²

The United States Supreme Court has eloquently explained why an amendment of the sort requested here by the State, and ostensibly allowed by Crim. R. 7(D), runs afoul of the constitutional right to indictment by a grand jury:

If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed. . . . Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the

² This is in stark contrast to the scenario in the amended-indictment case recently decided by this Court, *State v. Pepka*, Slip Opinion No. 2010-Ohio-1045, ¶ 23. In *Pepka*, because the statutory language for a felony-three endangering charge explicitly mandates a finding of serious physical harm, “[t]he fact that the grand jury returned an indictment for third-degree-felony child endangering under R.C. 2919.22(A) against Pepka means that it made the necessary factual finding of serious physical harm.” And Pepka’s counsel at argument acknowledged that “[w]e all know that the actual facts necessary to indict for the third-degree felony were present and probably were at the grand jury’ and that the fact that the indictment alleged third-degree felonies without specifying that Pepka caused serious physical harm was due to a ‘ministerial mistake.’”

Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists.

Russell v. United States, 369 U.S. 770-71 (quoting *Ex parte Bain* (1887), 121 U.S. 1, 10-13). In sum, Mr. Hamilton faced an indictment issued not solely by the grand jury, but one issued by the grand jury and by the prosecution. As such, the amended indictment violated his constitutional right to “indictment of a grand jury.”

This Court has previously recognized and upheld the same principles protected by the United States Supreme Court in *Russell*. In *Harris v. State* (1932), 125 Ohio St. 257, a case cited favorably in *Pepka*, the Court stated that

[t]he 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, 125 Ohio St. at 264 (emphasis added). The subsequent adoption of Crim. R. 7(D) does not extinguish a defendant’s constitutional right to face only an indictment issued by the grand jury—as opposed to an indictment issued by the grand jury, and the trial court, and/or the prosecution—and that rule cannot properly be employed to eviscerate Mr. Hamilton’s constitutional rights. To the extent that *State v. O’Brien* reached a conclusion at odds with *Harris*, it is because the former case focused on the “notice” aspect of the indictment as a charging instrument, and not on the constitutional principles discussed above. *State v. O’Brien* (1987), 30 Ohio St.3d 122, 126 (O’Brien “had notice of both the offense and the applicable statute,” and “was neither misled nor prejudiced by the amendment to the originally defective indictment.”)

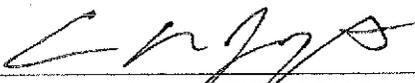
As noted by the court of appeals, because Mr. Hamilton objected to the defective indictment while he was still in the trial court, he is not subject to the standard of review established in *Colon II*, concerning matters raised for the first time on appeal. *State v. Hamilton*, 2009-Ohio-4602, ¶ 24 (citing *State v. Colon*, 119 Ohio St. 3d 204, 2008-Ohio-3749). If an amendment to Mr. Hamilton's indictment is deemed to have occurred, that amendment violated his constitutional right to have his jeopardy limited to "offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge," and the appeals court's decision must stand.

CONCLUSION

For the foregoing reasons, this Court should either adopt Mr. Hamilton's first proposition of law, and dismiss this case as improvidently accepted, or adopt his second proposition of law, and affirm the court of appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellee, Frank Robert Hamilton, III, was served by ordinary U.S. Mail, postage-prepaid, this 13th day of April, 2010, upon Kirsten Brandt, Assistant Montgomery County Prosecutor, 301 West Third Street, Suite 500, Dayton, Ohio 45422.



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IN THE SUPREME COURT OF OHIO

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APPENDIX TO

BRIEF OF APPELLEE, FRANK ROBERT HAMILTON, III

§ 2923.162. Discharge of firearm on or near prohibited premises

(A) No person shall do any of the following:

(1) Without permission from the proper officials and subject to division (B)(1) of this section, discharge a firearm upon or over a cemetery or within one hundred yards of a cemetery;

(2) Subject to division (B)(2) of this section, discharge a firearm on a lawn, park, pleasure ground, orchard, or other ground appurtenant to a schoolhouse, church, or inhabited dwelling, the property of another, or a charitable institution;

(3) Discharge a firearm upon or over a public road or highway.

(B) (1) Division (A)(1) of this section does not apply to a person who, while on the person's own land, discharges a firearm.

(2) Division (A)(2) of this section does not apply to a person who owns any type of property described in that division and who, while on the person's own enclosure, discharges a firearm.

(C) Whoever violates this section is guilty of discharge of a firearm on or near prohibited premises. A violation of division (A)(1) or (2) of this section is a misdemeanor of the fourth degree. A violation of division (A)(3) of this section shall be punished as follows:

(1) Except as otherwise provided in division (C)(2), (3), or (4) of this section, a violation of division (A)(3) of this section is a misdemeanor of the first degree.

(2) Except as otherwise provided in division (C)(3) or (4) of this section, if the violation created a substantial risk of physical harm to any person or caused serious physical harm to property, a violation of division (A)(3) of this section is a felony of the third degree.

(3) Except as otherwise provided in division (C)(4) of this section, if the violation caused physical harm to any person, a violation of division (A)(3) of this section is a felony of the second degree.

(4) If the violation caused serious physical harm to any person, a violation of division (A)(3) of this section is a felony of the first degree.

HISTORY:

148 v S 107. Eff 3-23-2000; 150 v H 52, § 1, eff. 6-1-04.

THE STATE OF OHIO, HAMILTON COUNTY

COURT OF COMMON PLEAS

CRIMINAL DIVISION



STATE OF OHIO

NO. B0800593 A,B

Plaintiff

(Judge Robert C. Winkler)

vs.

ENTRY AMENDING THE
INDICTMENT

NICHOLAS DONNERBERG
REGINALD RICE

Defendant

This matter came on to be heard upon the Plaintiff's Motion to Amend the Indictment, and the Court, being fully advised FINDS that there is a defect, imperfection or omission in form or substance or that the Indictment is at variance with the evidence and the requested amendment will not change the name or identify of the crime charged.

IT IS ORDERED that the Indictment be amended as follows:

Count two shall be amended to add the word "recklessly" before "inflicted or attempted to inflict or threatened to inflict physical harm on MICHAEL CERVAY,".




Robert C. Winkler, Judge
H. GORMAN
Hamilton County Court of Common Pleas