

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

CASE NO. (09-1878) & 09-1958

Plaintiff-Appellant,

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

vs.

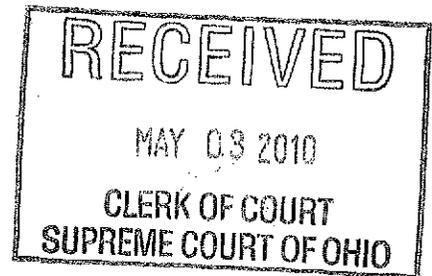
FRANK ROBERT HAMILTON, III

COURT OF APPEALS
CASE NO. 22895

Defendant-Appellee.

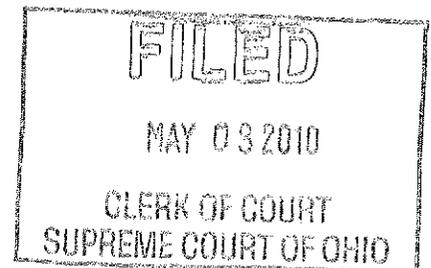
APPELLANT'S REPLY BRIEF

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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.”

Appellee Frank Robert Hamilton, III responds to the State’s proposition of law with two separate propositions of law. In his first proposition of law, Hamilton argues that this Court should dismiss this case as improvidently accepted because the trial court did not file an entry amending the indictment to add the mens rea of “recklessly” to the charge of discharging a firearm upon or over a public road or highway; thus, the indictment was never amended. In his second proposition of law, Hamilton argues that the amendment to his indictment forced him to face an indictment issued, not by the grand jury, but by the court and prosecutor in violation of his constitutional right to a grand jury indictment. Neither of Hamilton’s arguments have merit.

A. Hamilton’s indictment was amended to add the mental state of “recklessly.”

First, the trial court amended Hamilton’s indictment through its Decision and Entry Denying Motion to Dismiss Indictment and Granting Motion to Amend Indictment. That decision was a written entry filed with the clerk of courts that granted the State’s request to amend the indictment to read that Hamilton “did recklessly discharge a firearm upon or over a public road or highway[.] * * *” (Summary of the Docket from Common Pleas Case No. 2007 CR 03702, hereinafter “SD,” Entry Nos. 37-38) No amended indictment or separate order from

the court amending the indictment was necessary, as the trial court's decision effectively journalized the amendment of the indictment to add the mental state of "recklessly." In fact, Hamilton recognized the amendment of the indictment when he subsequently filed his Motion to Reconsider Court's Decision Denying Motion to Dismiss Indictment, challenging the court's "allowing the State to add an essential element that the Grand Jury never considered." (SD Entry No. 40)

Hamilton's reliance on the prosecutor's "statement of the charge" at the plea hearing is misplaced. The prosecutor's statement was not a verbatim reading of the indictment, as evidenced by the fact that the prosecutor's statement communicated facts, such as the location of the crime and a description of the serious physical harm suffered by the victim, neither of which appears in the original indictment or the indictment as amended. (Transcript of June 18, 2008 Plea Hearing, p. 7)

When Hamilton pled no contest, he admitted the truth of the facts alleged in the indictment. Crim.R. 11(B)(2). As set forth above, that indictment was amended through the trial court's Decision and Entry Denying Motion to Dismiss Indictment and Granting Motion to Amend Indictment. Consequently, when Hamilton pled no contest, he admitted that, on or about September 8, 2007, in the County of Montgomery and State of Ohio, he did recklessly discharge a firearm upon or over a public road or highway and that said violation caused serious physical harm to a person.

B. The amendment to the indictment to add “recklessly” did not violate Hamilton’s constitutional right not to answer for a crime charged other than on presentment or indictment of a grand jury.

Hamilton’s second argument challenging the validity of the amendment also fails. Hamilton relies on *Russell v. United States* (1962), 369 U.S. 749, 82 S.Ct.1038, 8 L.Ed.2d 240, to argue that only the grand jury, and not the court or prosecutor, could add “recklessly” to his indictment. However, *Russell* is not controlling.

Like *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 (“*Colon I*”), on which the court of appeals relied to reverse Hamilton’s conviction, *Russell* addressed the sufficiency of an indictment in its original form. In *Russell*, the sole issue before the United States Supreme Court was whether or not indictments charging refusal to answer certain questions when summoned before a congressional subcommittee were required to identify the actual subject under inquiry, as opposed to merely alleging in the words of the statute that the defendant refused to answer questions that were “pertinent to the question under inquiry.” *Id.* at 752-53. The Court held that, in such a case, an indictment “must state the question under congressional subcommittee inquiry as found by the grand jury.” *Id.* at 754-55, 771. Since the indictments in question did not identify the question under inquiry, they were fatally defective, and the trial court committed error in denying the defendants’ motions to quash the indictments. *Id.* at 752-53, 755.

On pages 4 and 5 of his merit brief, Hamilton quotes two passages from *Russell* in which the Court discussed the importance of the defendant’s right to a grand jury indictment, which would be violated if the prosecutor or the court were allowed to “make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment[.]” *Id.* at 770. However, that discussion was in response to the argument that a bill of particulars would provide

the requisite notice to the defendant of the identity of the topic under subcommittee inquiry. *Id.* at 769-71. Just as in *Colon I*, the indictments at issue in *Russell* were never amended to correct the defect.

Russell, like *Colon I*, merely affirmed the principle that an indictment that omits an essential element is defective. It did not answer the separate question of whether (and when) an indictment that is defective in its original form may be amended to correct that defect without running afoul of a defendant's constitutional right to a grand jury indictment.

That issue was squarely resolved in *State v. O'Brien* (1987), 30 Ohio St.3d 122, 508 N.E.2d 144, which this Court continues to follow after *Colon I*. In *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, 903 N.E.2d 609, this Court reaffirmed *O'Brien's* holding that an indictment may be amended to include an omitted element if the name or the identity of the crime is not changed. *Davis*, at ¶6. This Court reaffirmed *O'Brien* once again in *State v. Pepka*, -- Ohio St.3d --, 2010-Ohio-1045, -- N.E.2d --, at ¶15, which was decided March 25, 2010.

In fact, in *Pepka*, this Court made clear that “[a]s long as the state complies with Crim.R. 7(D), it may cure a defective indictment by amendment, *even if the original indictment omits an essential element of the offense with which the defendant is charged.*” (Emphasis added.) *Id.* at ¶15. Cases decided prior to the enactment of Crim.R. 7(D) that hold otherwise, like *State v. Wozniak* (1961), 172 Ohio St. 517, 178 N.E.2d 800 (and logically *Harris v. State* (1932), 125 Ohio St. 257, 181 N.E. 104, which *Wozniak* quoted), have no application. *Pepka*, at ¶23.

Under *O'Brien*, an indictment, which does not contain all the essential elements of an offense, may be amended under Crim.R. 7(D) to include the omitted element, if the name or the identity of the crime is not changed. An amendment that comports with Crim.R. 7(D) necessarily preserves a defendant's constitutional right to a grand jury indictment because, when

the amendment does not change the name or identity of the crime charged, the defendant is not convicted of a charge essentially different from that found by the grand jury.

In this case, Hamilton was not convicted of a charge essentially different from that found by the grand jury. The amendment of Hamilton's indictment to include the mental state of "recklessly" did not change the name or identity of the offense. "Recklessly" is not an element that identifies and characterizes the crime of discharging a firearm upon or over a public highway. Its inclusion in the indictment did not transform the offense from discharging a firearm upon or over a public road or highway into another separate offense, requiring Hamilton to answer for a different crime. Compare *Harris*, at 263-64 ("Under the form in which it is drawn this indictment savors a charge of embezzlement by breach of trust rather than [the intended] offense of obtaining money by false pretense.") Hamilton was charged with the same offense both before and after amendment. Nor did the inclusion of "recklessly" in the indictment increase the penalty or the degree of the offense. The crime charged was a felony of the first degree before amendment, and it was a felony of the first degree after amendment. The potential penalty remained the same throughout. 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, as well as the law and argument set forth in Appellant's Merit Brief, it is respectfully requested that this Court decide this case in accordance with *O'Brien* that an indictment, which does not contain the mens rea element of the offense charged, may be amended under Crim.R. 7(D) and Section 10, Article I of the Ohio Constitution to include the omitted mens rea element, if the name or the identity of the crime is not changed, and the defendant has not been misled or prejudiced by the amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief was sent by first class on this 30th day of April, 2010, to Opposing Counsel: Craig M. Jaquith, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215

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