

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23119
v.	:	T.C. NO. 95CR1245/ 95CR1244/95CR819
JAI RICHARD	:	
Defendant-Appellant	:	(Criminal appeal from Common Pleas Court)
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OPINION

Rendered on the 31st day of July, 2009.

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5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

JAI RICHARD, #318-195, London Correctional Institute, P. O. Box 69, London, Ohio 43140
Defendant-Appellant

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FROELICH, J.

{¶ 1} Jai Demetrius Richard appeals from a judgment of the Montgomery County Court of
Common Pleas, which denied his “Motion to Void Judgment.”

{¶ 2} In 1995, Richard pled guilty to two counts of aggravated robbery, two counts of rape,
and one count of attempted aggravated murder, and he was sentenced accordingly. On August 4,

2008, he filed a motion to void his aggravated robbery convictions on the basis that the indictment failed to include the culpable mental state of recklessness. The trial court overruled the motion, relying on *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 (“*Colon I*”), and *State v. Colon*, 119 Ohio St.3d 2004, 2008-Ohio-3749 (“*Colon II*”).

{¶ 3} Richard appeals, pro se, raising two assignments of error, which we will address together. The assignments state:

{¶ 4} I. “THE APPELLANT WAS DENIED HIS RIGHTS GUARANTEED BY ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION, FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT CONVICTED AND SENTENCED HIM VIA AN INDICTMENT THAT LACKED A VITAL AND MATERIAL ELEMENT AND THUS, THE COURT LACKED JURISDICTION AND IT ABUSED IT’S [SIC] DISCRETION WHEN IT DENIED THE MOTION TO VOID JUDGMENT WHICH SEEKED [SIC] TO CORRECT THE ERROR.”

{¶ 5} II. “BY FAILING TO CHARGE ANY LEVEL OF MENS REA FOR THE SERIOUS PHYSICAL INJURY ELEMENT OF AGGRAVATED ROBBERY, UNDER 2911.01(A)(1) THE INDICTMENT FAILED TO PROPERLY CHARGE MR. WINSTON [SIC] AND FAILED TO GIVE HIM NOTICE OF THE CHARGES AGAINST HIM. THIS ERROR VIOLATED MR. WINSTON’S [SIC] CONSTITUTIONAL RIGHTS OF INDICTMENT BY A GRAND JURY AND THE RIGHT TO DUE PROCESS AND THE COURT ABUSED IT’S [SIC] DISCRETION BY ASSERTING THAT HE HAD TO BE ON DIRECT REVIEW WHEN COLON WAS ANNOUNCED TO RECEIVE THIS BASIC CONSTITUTIONAL PROTECTION.”

{¶ 6} Richard claims that he “was entitled to an indictment charging every essential

element” of aggravated robbery and that the trial court lacked jurisdiction to convict him of aggravated robbery because the indictment failed to include the mens rea. Richard emphasizes that he did not rely exclusively on *Colon I* in his motion, but also relied on the Ohio and United States Constitutions in asserting that the trial court did not have jurisdiction. As such, he claims that he was entitled to relief even if *Colon I* did not apply to his case.

{¶ 7} R.C. 2911.02, which defines robbery, provides:

{¶ 8} “(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶ 9} “(1) Have a deadly weapon on or about the offender’s person or under the offender’s control;

{¶ 10} “(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;

{¶ 11} “(3) Use or threaten the immediate use of force against another.”

{¶ 12} R.C. 2911.01, which defines aggravated robbery, contains similar provisions to those contained in R.C. 2911.02, but contemplates more serious conduct, such as the brandishing of the weapon in one’s possession or the infliction of serious physical harm.

{¶ 13} *Colon I* held that a robbery indictment for a violation of R.C. 2911.02(A)(2) is defective if it fails to state that the physical harm was *recklessly* inflicted, threatened, or attempted because, in omitting the mens rea, the indictment omits one of the essential elements of the crime. *Colon I* at ¶10. *Colon II* narrowly limited the holding in *Colon I* and held that the holding in *Colon I* is prospective in nature.

{¶ 14} The trial court held that Richard was not entitled to relief under *Colon I* because he had no appeal pending at the time that case was decided, and it applied prospectively only. For

several reasons, we find no error in the trial court's denial of Richard's motion to void his conviction.

{¶ 15} Richard was indicted for Aggravated Robbery in violation of R.C. 2911.01(A), which provides that “[n]o person, in attempting or committing a theft offense, ***, or in fleeing immediately after the attempt or offense, shall *** [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it[.]” In its brief, the State asserts that Richard's indictment was not defective because no mens rea was required to establish the deadly weapon element of aggravated robbery under which he was charged. We agree.

{¶ 16} The Supreme Court of Ohio has held that “the General Assembly intended that a theft offense, committed while an offender was in possession or control of a deadly weapon, is robbery and no intent beyond that required for the theft offense must be proven.” *State v. Wharf*, 86 Ohio St.3d 375, 377-378, 1999-Ohio-112; see, also, R.C. 2911.02(A)(1). In other words, the Court held that a robbery predicated on the possession or control of a deadly weapon is a strict liability offense. We have applied the Supreme Court's reasoning in *Wharf* to a case charged under R.C. 2911.01(A)(1), the statute under which Richard was charged. We explained:

{¶ 17} “The thrust and philosophy of [the deadly weapon element of Aggravated Robbery] is to remove the potential for harm that exists while armed with a weapon. Merely having the weapon is the potentially dangerous factual condition warranting the more severe penalty. As to the weapon, no mental condition or actual use is necessary or required under the statute.” *State v. Williamson*, Montgomery App. No. 22878, 2008-Ohio-6246, at ¶17, citing *State v. Edwards* (1976), 50 Ohio App.2d 63, 66-67.

{¶ 18} Based on the holdings in *Wharf* and *Williamson*, we conclude that the indictment charging Richard with aggravated robbery was not defective in failing to state the mens rea because it charged him with a strict liability offense for which no mens rea was required. Although we base our decision primarily on our conclusion that aggravated robbery, as charged in this case, is a strict liability offense, the trial court was correct in holding that Richard was not entitled to relief under *Colon I*. *Colon I* applies prospectively only, *Colon II* at ¶3, and Richard’s case was not pending when *Colon I* was decided. The trial court also correctly observed that Richard failed to object to the indictment, failed to show plain error by alleging any particular prejudice, and did not present any of the extenuating circumstances present in *Colon I*. Thus, the trial court properly concluded that Richard was not entitled to “void” his conviction on the authority of *Colon I* and *Colon II*.

{¶ 19} Richard’s first and second assignments of error are overruled.

{¶ 20} The judgment of the trial court will be affirmed.

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FAIN, J. and HARSHA, J., concur.

(Hon. William H. Harsha, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

- Meliana M. Ford
- Jai Richard
- Hon. Timothy N. O’Connell