

May 2009 Case Digest
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Colon and Aggravated Robbery under R.C. 2911.01(A)(1)

When the Ohio Supreme Court decided that a "reckless" mens rea applies to the physical-harm form of robbery under R.C. 2911.02(A)(2), see *State v. Colon*, 118 Ohio St.3d 26, 2008- Ohio-1624 (*Colon I*), it could be expected that the defense bar would seek the extension of *Colon I* to the various forms of aggravated robbery.

The deadly-weapon form of aggravated robbery in R.C. 2911.01(A)(1) involves the offender possessing a deadly weapon and using, brandishing, or displaying the weapon during the theft offense. The appellate courts have split on the question of whether reckless applies.

Mainly based on *State v. Wharf* (1999), 86 Ohio St.3d 375, which held that "reckless" did not apply to the deadly-weapon form of robbery, most appellate courts have held that the deadly-weapon form of aggravated robbery likewise does not have a reckless mens rea. See, e.g., *State v. Jelks*, 3d Dist. No. 17-08-18, 2008-Ohio-5828; *State v. Peterson*, 8th Dist. No. 90263, 2008-Ohio-4239; *State v. Ferguson*, 10th Dist. No. 07AP-640, 2008-Ohio-3827; *State v. Williamson*, 2nd Dist. No. 22878, 2008-Ohio-6246; *State v. Lucas*, 5th Dist. No. 2007CA292, 2009-Ohio-19; *State v. Jackson*, 6th Dist. No. L-07-1281, 2008-Ohio-6805.

But two districts have concluded that reckless applies to the deadly-weapon form of aggravated robbery. *State v. Lester*, 1st Dist. No. C-070383, 2008-Ohio-3570; *State v. Jones*, 7th Dist. No. 07-MA-200, 2008-Ohio-6971. The Ohio Supreme Court recently held oral argument in the *Lester* case, and so a decision on the issue can be expected in the next few months.

Questioning from the Court during the *Lester* argument provides some hope that reckless will not be applied to the deadly-weapon form of aggravated robbery. The strong public-safety rationale stated in *Wharf* for recognizing strict liability as to the possession-of-deadly-weapon element of robbery applies with even greater force when the robber brandishes, displays, or uses the weapon.

More importantly, the reckless-importation provision in R.C. 2901.21(B) really should not result in any importation of a reckless mens rea into any form of aggravated robbery. Recklessness ought not be imported into a section of the Revised Code if that "section" already includes a mens rea in any of its provisions. *State v. Maxwell* (2002) 95 Ohio St.3d 254, 257 ("in determining whether R.C. 2901.21(B) can operate to supply the mental element of recklessness ***, we need to determine whether the entire section includes a mental element, not just whether division (A)(6) includes such an element."); *State v. Wac* (1981), 68 Ohio St.2d 84. *Maxwell* and *Wac* remain good authority. See *State v. Fairbanks*, 117 Ohio St.3d 543, 2008-Ohio-1470, ¶¶ 11, 13-14. Because the aggravated robbery "section" contains a "knowing" degree of culpability in the offense defined in paragraph (B) of that statute, the "section" is not completely silent on mens rea, and R.C. 2901.21(B) does not operate to import a mental state of recklessness into any part of the "section."

The Seventh District's citation to the summary reversal in *State v. Davis*, 119 Ohio St.3d 113, 2008-Ohio-3879, is misplaced. The Supreme Court accepted and summarily reversed the *Davis* case based on a misleading proposition of law, which contended that the physical-harm form of robbery was involved in that case, not the deadly-weapon form of aggravated robbery. By the time the

prosecutor and amicus pointed out the misstatements, the Court was applying the difficult “reconsideration” standard of review, and therefore the denial of reconsideration in *Davis* cannot be taken as settling the issue of whether reckless applies to the deadly-weapon form of aggravated robbery.

Colon, Strict Liability, and Statutory Rape

In *State v. O'Dell*, 2nd Dist. No. 22691, 2009-Ohio-1040, the defendant contended that *Colon I* required a mens rea for the “sexual conduct” element of statutory rape under R.C. 2907.02(A)(1)(b) and that, absent a mens rea, the strict liability imposed by the statute violated due process. The Second District rejected both arguments, concluding that *Colon I* was inapplicable given that the rape statute sets forth mens rea as to other forms of rape but not as to statutory rape. “All of this plainly indicates to us that the legislature intended to impose strict liability for engaging in sexual conduct with a child under thirteen.” See, also, *State v. Ferguson*, 10th Dist. No. 07AP-999, 2008-Ohio-6677 (rejecting *Colon*-based argument that statutory rape requires showing of reckless as to sexual conduct).

The Second District also rejected the due process challenge to statutory rape. The court could find no case finding the statute unconstitutional in imposing strict liability for sexual conduct with a child under thirteen. “To the contrary, at least one appellate district expressly has rejected the constitutional argument *O'Dell* asserts here.” See *State v. Haywood* (2001), 8th Dist. No. 78276.

Colon, Felony Murder, & Allied Offenses

In *State v. Nesbitt*, 1st Dist. No. C-0800010, 2009-Ohio-972, the court addressed whether a charge of felony murder predicated on felonious assault was required to state the element of knowingly. The court concluded that it was sufficient that the charge of felony murder referenced the felonious assault, and another count alleged all of the elements of felonious assault. The charge of felony murder was not defective, as “[t]he mens rea for felony murder is found in its predicate offense * * *.”

The court also rejected the contention that felony murder must merge with felonious assault. Those offenses are not allied offenses even when felonious assault is serving as the predicate for the compound homicide offense of felony murder.

This decision is consonant with the long line of cases holding that a compound homicide offense never merges with its predicate offense. See *State v. Rance* (1999), 85 Ohio St.3d 632 (involuntary manslaughter); *State v. Moss* (1982), 69 Ohio St.2d 515 (aggravated felony murder).

Amending Indictment to Add Reckless after *Colon I*

In *State v. Rice*, 1st Dist. No. C-080444, 2009-Ohio-1080, the trial court allowed the prosecution to amend the robbery charge to add “reckless.” The First District upheld the amendment.

Although there was dicta in *Colon I* indicating that an amendment to add reckless would be improper, the Supreme Court in *State v. O'Brien* (1987), 30 Ohio St.3d 122, expressly had approved an amendment to a child-endangering charge to add reckless. The *O'Brien* Court had concluded that “[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 the 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.”

The First District observed that *Colon I* had not overruled *O'Brien*. Even after *Colon I*, the Supreme Court had cited *O'Brien* with apparent approval in *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537. The First District held that, “[i]n light of the court’s approval of *O'Brien* in *Davis*, we conclude that the *O'Brien* holding remains good law.”

Lethal Injection Litigation

In *State v. Rivera*, 08CA009426, 2009-Ohio-1428, the trial court had conducted extensive proceedings as to the legality of Ohio’s lethal injection protocol, ultimately concluding that the statute was unconstitutional to the extent it authorized the use of a combination of drugs. The trial court did not dismiss the death specifications but, instead, issued an order that barred any use of a multiple-drug protocol if the defendants were to receive the death penalty.

The State sought leave to appeal, and the defense cross-appealed. The Ninth District concluded (2-1) that the trial court’s order was not a final appealable order.

Each appellate judge was critical of the trial court’s actions. The lead opinion commented that “the trial court created a proceeding when none was authorized by law. * * * The trial court’s hearing on the constitutionality of Ohio’s death penalty had no effect on whether or how the underlying case would continue, except that it interrupted the orderly administration of justice.”

The concurring judge criticized the trial court for several missteps, including that the trial court “appeared to be personally vested in the matter before him. Defendant Rivera moved to dismiss the death penalty specification from the indictment. Rather than address this narrow issue, [the trial court] presided over a hearing to broadly consider whether the death penalty in Ohio is unconstitutional. This is not what Defendant wanted, as noted by the majority decision. But [the trial court] took control and lead the parties where he wanted to go.”

The dissenter believed that the order was final, since the trial court in effect had erroneously granted a declaratory judgment. “The motion before the trial court was ‘an ill-disguised request for . . . a declaratory judgment,’ * * * that the trial court willingly considered and granted.”

Nurse Stealing Medications and Intervention in Lieu of Conviction

To be eligible for intervention in lieu of conviction, R.C. 2951.041(B)(1) requires that the defendant must be subject to sentencing under R.C. 2929.13(B)(2)(b). The offender will not be subject to such sentencing if “[t]he offender held a public office or position of trust and the offense related to that office or position; the offender’s position obliged the offender to prevent the offense or to bring those committing it to justice; or the offender’s professional reputation or position facilitated the offense or was likely to influence the future conduct of others.”

In *State v. Massien*, 9th Dist. No. 24369, 2009-Ohio-1521, the court addressed whether a nurse stealing drugs from her employer should be found to have occupied a “position of trust.” The court concluded (2-1), that in most cases a nurse would not be found to have violated a position of trust. The court did not fully accept the defendant’s argument that only public employees could occupy a position of trust. But the majority cited various professional licensing statutes, including one for nurses, which recognize that the professional could in some cases receive intervention in lieu of conviction. “In light of this provision, we are convinced that legislature intended ILC to apply to offender’s just like Massien; that is,

medical professionals who have ready access to drugs at their place of employment, who ultimately take and use those drugs, but who would benefit more from treatment for their offense, than being subject to criminal punishment for it.”

The majority acknowledged that its conclusion conflicted with decisions of the Tenth District holding that a nurse occupies a position of trust. See *State v. France*, 10th Dist. No. 04AP-1124, 2006-Ohio-1204.

The dissenter found no language limiting “position of trust” to public positions alone. The dissenter also noted that the statutes recognizing the potential applicability of intervention-in-lieu to professionals like nurses did not resolve the question of whether nurses stealing drugs from their employer had violated a position of trust. Professionals who violate the drug laws when not working would not be violating their position of trust, and presumably might receive intervention-in-lieu for such offenses occurring outside their position of trust. The potential availability of intervention-in-lieu in some cases did not mean it was allowed in all cases.

Importuning and Compelling Prostitution

In *State v. Hartman*, 8th Dist. No. 91040, 2009-Ohio-1069, the 50-year-old defendant engaged an eight-year-old neighbor girl in conversation while they were both seated in the girl’s clubhouse in her backyard. The defendant offered the girl \$40 to do a lap dance, which the girl understood to involve moving her body around on his lap. The defendant gave her the \$40, but the girl declined to perform. When her mother went to the clubhouse, she saw that defendant was seated in the clubhouse and that his penis was exposed.

The Eighth District upheld convictions for importuning and compelling prostitution. Both offenses involve soliciting a child for sexual activity, and the court concluded that there was sufficient solicitation. “[D]espite the lack of a definition in the Ohio Revised Code, the common sense and accepted usage of the term ‘lap dance’ fits the definition of sexual activity.” “[W]e agree that in common usage a lap dance is considered in everyday parlance to mean some form of sexual conduct or contact.”

Present Sense Impressions

In *State v. Graves*, 9th Dist. No. 08CA009397, 2009-Ohio-1133, the defendant and two companions were placed in a highway patrol cruiser during a traffic stop. Recording equipment in the cruiser recorded the threesome’s comments to each other as the search of the car drew closer to the trunk, where drugs were found.

It appears doubtful that the statements were offered for their truth, since the statements more likely were being admitted for the purpose of circumstantially showing the defendant’s knowledge of the drugs located in the trunk. But, even assuming the statements were offered for their truth, the Ninth District concluded that they fit within the exception for present sense impressions under Evid.R. 803(1). “Their comments reflect their frustration to have been stopped by police and their fear that the contents of the vehicle will be located, which mounts as the search moves from the passenger compartment to the trunk. The statements are spontaneous and immediately contemporaneous to the search that the speakers witnessed, and the conversation fits squarely within the definition of present sense impressions.” And since the statements were not being made under questioning by law enforcement, the statements did not qualify as “testimonial” so as to be inadmissible under the Confrontation Clause.