

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

STATE OF OHIO

Plaintiff-Appellee

v.

DORRIAN D. JONES

Defendant-Appellant

Appellate Case No. 22879

Trial Court Case No. 08-CR-1893

(Criminal Appeal from  
Common Pleas Court)

.....  
OPINION

Rendered on the 11<sup>th</sup> day of September, 2009.

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FAIN, J.

{¶ 1} Defendant-appellant Dorrian D. Jones appeals from his conviction and  
sentence, following a guilty plea, upon a charge of Aggravated Robbery, with a

firearm specification. Jones contends that his trial counsel was ineffective, and that his indictment was defective for having failed to include a mens rea element.

{¶ 2} We conclude that the record fails to support Jones's claim that he failed to receive the effective assistance of counsel. We further conclude that Jones's indictment was not defective, because the mens rea elements required for the offense appear either expressly, or by reference, in the indictment. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} Jones was charged by indictment with one count of Aggravated Robbery, with a firearm specification. His indictment, exclusive of the firearm specification, charges that Jones: "on or about May 9, 2008 in the County of Montgomery, aforesaid, and State of Ohio, in attempting or committing a theft offense as defined in Section 2913.01(K) of the Revised Code, or in fleeing immediately after the attempt or offense, did have a deadly weapon, to-wit: handgun, on or about his/her person or under his/her control and did recklessly display the weapon, brandish the weapon, indicate possession of the weapon or use the weapon; contrary to the form of the statute (in violation of Section 2911.01(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio."

{¶ 4} The record does not reflect any pre-trial motions or rulings before Jones appeared in open court and pled guilty to both the charge and the specification. At a later date, Jones was sentenced to the minimum term for Aggravated Robbery –

imprisonment for three years – plus the mandated term of three years for the firearm specification, to be served consecutively with, and prior to, the three-year term for Aggravated Robbery, as mandated by statute.

{¶ 5} From his conviction and sentence, Jones appeals.

## II

{¶ 6} Jones's First Assignment of Error is as follows:

{¶ 7} "DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF [sic] THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION."

{¶ 8} Jones pled guilty to the charge of Aggravated Robbery and the firearm specification. At the plea hearing, his assigned counsel, Anthony Van Noy, was not present, but Jennifer L. Horner, an attorney in Van Noy's law office, was present. After a general discussion of the nature of the plea, the following colloquy ensued:

{¶ 9} "THE COURT: Mr. Jones, how old are you, Sir?

{¶ 10} "MR. JONES: Nineteen.

{¶ 11} "THE COURT: How far did you go in school?

{¶ 12} "MR. JONES: Ninth Grade.

{¶ 13} "THE COURT: Are you able to read and understand these forms?

{¶ 14} "MR. JONES: Yes.

{¶ 15} "THE COURT: If there's something that you don't understand, will you ask your attorney about it?

{¶ 16} "MR. JONES: Yes.

{¶ 17} "THE COURT: Will you also tell me about it if you don't understand something this morning?

{¶ 18} "MR. JONES: Yes.

{¶ 19} "THE COURT: Are you under the influence today of any drug, alcohol or medication?

{¶ 20} "MR. JONES: No.

{¶ 21} "THE COURT: Do you have any physical or mental problems that would prevent you from understanding what's happening here?

{¶ 22} "MR. JONES: No, Sir.

{¶ 23} "THE COURT: The nature of the charge?

{¶ 24} "STATE: Your Honor, if this matter proceeded to trial, the State of Ohio would be prepared to prove beyond a reasonable doubt, that on May 9, 2008, in Montgomery County, State of Ohio, Dorrian D. Jones, in attempting or committing a theft (indiscernable) defined in Section 2913.01.k [sic] of the Ohio Revised Code, or in fleeing immediately after the attempt or the offense, did have a deadly weapon, to wit, a handgun, on or about his person or under his or her control and did recklessly display the weapon, brandish the weapon, indicate possession of the weapon or used the weapon. This is in violation of 2911.01.1.1 [sic] of the Ohio Revised Code. It is aggravated robbery, a felony of the first degree.

{¶ 25} "THE COURT: Do you understand that charge?

{¶ 26} "MR. JONES: Yes.

{¶ 27} "THE COURT: Aggravated robbery, a felony of the first degree, with a

deadly weapon.

{¶ 28} "MR. JONES: Yes.

{¶ 29} "THE COURT: All right.

{¶ 30} "STATE: And, then, Your Honor, with regard to the specification to Count One, the State of Ohio would have been able to prove beyond a reasonable doubt that this defendant had on or about his person or under his control a firearm and displayed the firearm, brandished the firearm, indicated he possessed a firearm or used the firearm to facilitate the offense. This is a violation of 2914 and 2941.145 of the Ohio Revised Code, the firearm specification.

{¶ 31} "THE COURT: Do you understand that firearm specification? That three year firearm specification?

{¶ 32} "MR. JONES: Yes, Sir.

{¶ 33} "THE COURT: Actually, Mr. Van Noy is your listed counsel. Is it all right for Ms. Horner to be standing in today from his office?

{¶ 34} "MR. JONES: Yes.

{¶ 35} "THE COURT: Okay. Any questions that you have so far?

{¶ 36} "MR. JONES: No, Sir.

{¶ 37} "THE COURT: And the felony of the first degree, aggravated robbery, deadly weapon. The penalty for that is anywhere from three up to ten years in prison. It's my understanding that Judge Tucker who was going to be your sentencing Judge has indicated to your attorney and to the prosecutor, that if you were to enter this plea, that he would sentence you to three years on that charge. Do you understand that?

{¶ 38} "MR. JONES: Yes, Sir.

{¶ 39} “THE COURT: However, there’s also a three year firearm specification which has to be consecutive, so that means back to back. So you’ve got three years on the charge, three years on the firearm specification. That’s a total of six years. Do you understand that?”

{¶ 40} “MR. JONES: Yes, Sir.

{¶ 41} “THE COURT: On the, those charges together, technically you’re eligible for community control or supervision on the aggravated robbery, but you’re not eligible for any kind of supervision on the three year firearm specification. And that means that you won’t even be able to apply for any kind of judicial release until three and a half years into your sentence. Do you understand that?”

{¶ 42} “MR. JONES: Yes, Sir.

{¶ 43} “THE COURT: It is my understanding, also, that Judge Tucker has indicated to your counsel that he would seriously consider judicial release when you can apply. That’s three and a half years. But that depends on a lot of things. One is what happens between now and then; whether or not he is inclined to give you judicial release at that time. So, that depends on what happens and also how he considers that and whether the State opposes it. So, you’re not eligible until three and a half years and whether or not you get it is going to be up to Judge Tucker. Do you understand that?”

{¶ 44} At this point, the trial court explained post-release control to Jones. The colloquy then continued as follows:

{¶ 45} “THE COURT: A plea of guilty is a complete admission of guilty [sic]. Do you understand that?”

{¶ 46} "MR. JONES: Yes, Sir.

{¶ 47} "THE COURT: After a plea of guilty, the court will find you guilty and then set your case for sentencing and get a pre-sentence in the meantime. Do you understand that?

{¶ 48} "MR. JONES: Yes, Sir.

{¶ 49} "THE COURT: You have rights that you give up when you enter a plea. You have the right to a jury trial. You have a right to require the prosecutor to prove your guilt beyond a reasonable doubt to all of the jurors. You have the right to confront witnesses against you. To have them on the witness stand and have them cross examined under oath. You have the right to have the Court order in witnesses that you want to appear, even if they don't want to appear, and at your trial you cannot be forced or compelled to have to take the witness stand and testify against yourself. Do you understand each of those rights that you are giving up?

{¶ 50} "MR. JONES: Yes, Sir.

{¶ 51} "THE COURT: Do you have any questions of me or of Ms. Horner about this case or about the plea that you are entering?

{¶ 52} "MR JONES: No, Sir.

{¶ 53} "THE COURT: Have you discussed this with counsel and decided that you want to do this voluntarily of your own free will?

{¶ 54} "MR. JONES: Yes, Sir.

{¶ 55} "THE COURT: How, then, do you plea [sic] to the charge of aggravated robbery, deadly weapon, a felony of the first degree? How do you plea [sic] to that?

{¶ 56} "MR. JONES: Guilty.

{¶ 57} "THE COURT: And how do you plea [sic] to the three year firearm specification also in the indictment?

{¶ 58} "MR. JONES: Not guilty.

{¶ 59} "THE COURT: I'm sorry?

{¶ 60} "MR. JONES: Not guilty.

{¶ 61} "THE COURT: Not guilty to the firearm specification? If you want to plead not guilty to the firearm specification, then we're going to need to schedule this case for trial.

{¶ 62} "MS. HORNER: Can I have a moment, Your Honor?

{¶ 63} "THE COURT: You may.

{¶ 64} "MS. HORNER: Your Honor, he's going to enter a guilty plea to the gun spec.

{¶ 65} "THE COURT: Let me ask you again, then, Mr. Jones. How do you plea [sic], first of all to the aggravated robbery, deadly weapon, felony of the first degree?

{¶ 66} "MR. JONES: Guilty.

{¶ 67} "THE COURT: How do you plea [sic] to the firearm specification, the three year firearm specification?

{¶ 68} "MR. JONES: Guilty.

{¶ 69} "THE COURT: Any questions about that that you have of me or that you have of your lawyer?

{¶ 70} "MR. JONES: No, Sir.

{¶ 71} "THE COURT: Are you doing that voluntarily, Sir?

{¶ 72} "MR. JONES: Yes, Sir.



{¶ 73} “THE COURT: If those are your pleas, then review the rights forms. If that’s what you want to do, and you understand those forms, please review them and sign them. I should say form, there’s only one, isn’t there? The Court finds the defendant has entered his plea voluntarily. That he knowingly, intelligently and voluntarily waived his Constitutional rights. The Court finds he understands the nature of the charge, penalties involved. That he is eligible for community control on the aggravated robbery, but he is not on the firearm specification because that’s a mandatory incarceration. He understands the effect of his plea and that the Court will proceed to judgment and sentencing. We will make a finding of guilt. I will order a pre-sentence investigation. You’ll be back in Court July 9, 2008. We’ll get a pre-sentence investigation in the meantime. And we’ll see you then.

{¶ 74} “MS. HORNER: Thank you, Your Honor.”

{¶ 75} Jones predicates his claim that he received ineffective assistance of trial counsel upon a number of facts. First, he points out that his assigned counsel did not appear with him at either the plea hearing or at the sentencing hearing. That fact was noted by the trial court at the plea hearing, and the trial court specifically asked Jones if it was alright with him that Horner, of Van Noy’s law office, was standing in for Van Noy at the hearing. Jones responded affirmatively. Although the same question was not asked at the sentencing hearing, Jones was given an open-ended opportunity to tell the trial court anything he wanted (“anything you want to tell me, Sir?”) at the outset of that hearing, and Jones responded negatively. If Jones was dissatisfied with the fact that Horner was substituting for Van Noy at either of these hearings, he was given the opportunity to express that dissatisfaction, and did not do so.

{¶ 76} Next, Jones points to the fact that the sentencing memorandum filed on his behalf refers to him by the wrong name in two places, and, in its prayer, asks that the minimum sentence of ten years be imposed. In the preceding paragraph, the memorandum suggests that a three year sentence (the correct minimum) would be appropriate.

{¶ 77} We have read the sentencing memorandum. It refers to Jones by his correct name in nine places, not including the caption, and in two places, again not including the caption, by his correct first and last names. It appears to be a suitable sentencing memorandum, stressing Jones's youth, lack of a prior criminal record, and model behavior while in jail on this charge. Although the sentencing memorandum erroneously recites ten years as the minimum sentence for the Aggravated Robbery, which it urges upon the court, there does not appear to be any likelihood that this error prejudiced Jones, since the trial court did, in fact, impose the minimum three-year sentence for Aggravated Robbery. Although the trial court ordered this sentence to be served consecutively with the three-year sentence for the firearm specification, the statute mandates that these sentences be served consecutively. In short, the trial court imposed the sentence that Jones's sentencing memorandum recommended, which belies the suggestion that it was ineffective. The only better result that Jones could have obtained would have been the imposition of community control sanctions for Aggravated Robbery, but he does not argue on appeal that his counsel was ineffective for having failed to advocate for the imposition of a community control sanction.

{¶ 78} Jones next argues that the trial court did not inquire whether he had the opportunity to review all the elements of the offense, discovery, or possible defenses,

with trial counsel. Jones does not suggest that the trial court was required to do so. The only circumstance appearing on the record that Jones can point to that suggests that he might not have understood the charge is the fact that he initially tendered a plea of not guilty to the firearm specification. But it had previously been made clear that a plea of guilty to both the Aggravated Robbery charge and the firearm specification was contemplated; Jones was given an opportunity to consult with his substituted counsel after the trial court advised him that the effect of his not guilty plea to the firearm specification would require that the specification be set for trial; Jones then tendered a plea of guilty to the firearm specification after again tendering a plea of guilty to Aggravated Robbery; and the trial court, after Jones tendered his guilty plea to the firearm specification, gave him an opportunity to put any questions he might have about the firearm specification, or his plea to the specification, to the trial court or to trial counsel. Jones declined the invitation to do so.

{¶ 79} We can only speculate why Jones initially responded “not guilty” as his plea to the firearm specification. After he consulted with trial counsel, he tendered a guilty plea to the specification, and there is nothing in the record to indicate that any confusion he may initially have had concerning the mechanics of his plea to the firearm specification had not been cleared up, to his satisfaction, before he tendered his plea of guilty to the specification.

{¶ 80} Finally, Jones argues that he was not advised that by pleading guilty, we would be waiving “most issues for appeal.” Jones was advised of the constitutional rights he would be waiving by pleading guilty; he was also advised that by pleading guilty he would be admitting guilt, and that upon accepting his plea, the trial court would

find him guilty.

{¶ 81} We are not aware of any cases holding that a trial court must, before accepting a guilty plea, advise a defendant of the difference between a guilty plea and a plea of no contest. But we can see why that might be salutary in some cases. A plea of no contest preserves for appellate review adverse dispositions of pre-trial motions. Crim. R. 12(I). A plea of guilty does not. In this case, the record does not reflect any pre-trial motions. Therefore, there would not have been any adverse pre-trial rulings that could have been preserved for appellate review by a no-contest plea.

{¶ 82} In short, we find no support in the record for Jones's contention that he received the ineffective assistance of trial counsel. Jones's First Assignment of Error is overruled.

### III

{¶ 83} Jones's Second Assignment of Error is as follows:

{¶ 84} "DEFENDANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE OHIO AND UNITED STATES CONSTITUTIONS WAS VIOLATED WHEN HIS INDICTMENT FAILED TO CHARGE ESSENTIAL ELEMENTS OF AGGRAVATED ROBBERY."

{¶ 85} Jones cites *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 (*Colon I*), reconsidered at 119 Ohio St.3d 204, 2008-Ohio-3749 (*Colon II*), for the proposition that an indictment must specify a mens rea element for any element of the offense that is not a strict-liability element. He then relies upon *State v. Lester*, Hamilton County App. No. C-070383, 2008-Ohio-3570, an appeal decided after *Colon I* and before *Colon II*, for the proposition that the failure to include the mens rea element of "knowingly" in an

indictment for Aggravated Robbery is a fatal defect in the indictment.

{¶ 86} *Colon II* significantly limited the extent of the holding in *Colon I*. Among other limitations, *Colon II* made it clear that the failure to include a necessary mens rea element in an indictment is not a basis for a reversal, in the absence of some objection in the trial court, unless the omission of the mens rea element has permeated the proceedings in the trial court. In *Colon*, not only was the necessary mens rea element omitted from the indictment, it was also omitted from the jury instructions, and the State treated the offense as a strict-liability offense in its closing argument.

{¶ 87} Here, Jones's indictment for Aggravated Robbery expressly charged that he was in the act of "attempting or committing a theft offense as defined in Section 2913.01(K) of the Revised Code." With the exception of the circular references in Section 2913.01(K) to Section 2911.01 (Aggravated Robbery) and Section 2911.02 (Robbery), each of which requires that the offender be in the commission or attempted commission of a theft offense, all the offenses listed in Section 2913.01(K) require the mens rea elements of "knowingly" or "purposely."

{¶ 88} In a case decided after *Colon I* and *Colon II*, we have decided that a reference in an indictment to a predicate offense, thereby incorporating by reference the mens rea elements required for that predicate offense, is sufficient. *State v. Smith*, Montgomery App. Nos. 21463, 22334, 2008-Ohio-6330, ¶ 76. In the case before us, the "knowingly" or "purposeful" mens rea elements for the various theft offenses referred to in R.C 2913.01(K) have been incorporated in the indictment by express reference to that Section. And the indictment expressly includes the mens rea element of "recklessly" for the additional element of displaying, brandishing, indicating the possession of, or using

a deadly weapon.

{¶ 89} We do not find any omission of a necessary element to have permeated these proceedings as in *Colon II*. Jones's Second Assignment of Error is overruled.

IV

{¶ 90} Both of Jones's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN and FROELICH, JJ., concur.

Copies mailed to:

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Hon. Michael L. Tucker