[Cite as *State v. Smith*, 2009-Ohio-5048.]

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 08CA0060
vs.	:	T.C. CASE NO. 06CR0013
VIRGIL SMITH	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 25th day of September, 2009.

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GRADY, J.:

{¶ 1} Defendant, Virgil Smith, appeals from his convictions and sentences for aggravated robbery and felonious assault.

{¶ 2} This case involves three separate incidents in which victims were robbed and physically assaulted during the late evening hours of December 19, 2005 and early morning hours of

December 20, 2005, in various locations in Springfield.

{¶ 3} In the early morning hours of December 20, 2005, Defendant approached Paul Profeta in the parking lot of the Meijer's store at 1500 Hillcrest Avenue. Defendant demanded money from Profeta and hit him several times in the head with a bottle, resulting in serious physical harm. This incident relates to the charges in counts one and three of the indictment.

{¶ 4} During the late evening hours of December 19, 2005, Defendant approached Waeshiea Sipes in the parking lot of the Pizza Hut at 2501 E. Main Street. Defendant demanded money and items Sipes had in her possession. Defendant hit Sipes in the head with a bottle and punched her in the face. Defendant fled after taking several items from Sipes. This incident relates to the charges in counts five and six in the indictment.

{¶ 5} During the late evening hours of December 19, 2005, Defendant approached Victoria Kuhn near the intersection of South Limestone Street and Southern Avenue. Defendant demanded money from Kuhn, and when she did not turn her money over to him, Defendant hit her in the head and back with a bottle. Defendant then fled.

{¶ 6} Defendant was subsequently identified from a photographic lineup by Waeshiea Sipes and Victoria Kuhn. Moreover, Defendant's two accomplices, Jarred Smith and Curtis

Dailey, confessed to police and implicated Defendant in these crimes.

{¶ 7} Defendant was indicted on three counts of aggravated robbery, four counts of felonious assault, and one count of attempted murder. Defendant filed a motion to suppress evidence of his pretrial photographic identifications by the victims and all evidence seized from his residence pursuant to a search warrant. The trial court overruled Defendant's motion to suppress the evidence following a hearing.

{¶ 8} Defendant entered pleas of guilty pursuant to a negotiated plea agreement as follows: concerning the attack on Paul Profeta, count one, aggravated robbery in violation of R.C. 2911.01(A)(3), and count three, felonious assault in violation of R.C. 2903.11(A)(1); concerning the attack on Waeshiea Sipes, count five, aggravated robbery in violation of R.C. 2911.01(A)(3), and count six, felonious assault in violation of R.C. 2903.11(A)(2); concerning the attack on Victoria Kuhn, count seven, aggravated robbery in violation of R.C. 2911.01(A)(3), and count eight, felonious assault in violation of R.C. 2903.11(A)(2). In exchange, the State dismissed the other charges. The parties jointly recommended an agreed twenty year prison sentence, which the trial court imposed in consecutive prison terms of four years on counts one and three, and three years on counts five, six, seven and

eight.

{¶ 9} We granted Defendant leave to file a delayed appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 10} "THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING BRANCH I OF DEFENDANT'S MOTION TO SUPPRESS ALL PHOTOIDENTIFICATION AND IN-COURT IDENTIFICATION."

SECOND ASSIGNMENT OF ERROR

{¶ 11} "THE TRIAL COURT ERRED IN FINDING A SUBSTANTIAL BASIS FOR PROBABLE CAUSE IN THE SEARCH WARRANT."

{¶ 12} In these assignments of error Defendant challenges the trial court's decision overruling his motion to suppress evidence. Defendant argues that the pretrial identification procedure used by police in this case, a photographic lineup, was impermissibly suggestive and resulted in unreliable identifications of him by two of the three victims. Defendant additionally argues that the affidavit submitted in support of the search warrant authorizing a search of Defendant's residence, being based largely upon uncorroborated statements of an anonymous informant, without any showing of the informant's veracity, reliability or basis of knowledge, failed to establish probable cause for the search.

{¶ 13} By pleading guilty in this case to aggravated robbery and felonious assault, Defendant waived his right to claim error

with respect to the trial court's denial of his motion to suppress evidence. *Huber Heights v. Duty* (1985), 27 Ohio App.3d 244; *State v. Hanneman*, Montgomery App. No. 21772, 2007-Ohio-5175; *State v. Frost*, Clark App.NO. 06CA0083, 2008-Ohio-1869; *State v. Perez-Diaz*, Clark App. No. 06CA0130, 2008-Ohio-2722. A plea of guilty waives all appealable errors that may have occurred during the trial, unless such errors precluded Defendant from knowingly and voluntarily entering his guilty plea. *State v. Kelley* (1991), 57 Ohio St.3d 127; *State v. Kidd*, Clark App.No. 03CA0043, 2004-Ohio-6784; *Frost, supra; Perez-Diaz, supra*. Our examination of the transcript of the guilty plea proceeding convinces us that no such defect is portrayed on this record.

{¶ 14} Defendant's first and second assignments of error are overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 15} "THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO CONSECUTIVE SENTENCES."

{¶ 16} Defendant argues that, as to each of the three victims, the trial court erred in imposing consecutive sentences for aggravated robbery and felonious assault because those offenses are allied offenses of similar import under R.C. 2941.25 that must be merged.

{¶ 17} As to each of his three victims, Defendant pled guilty to aggravated robbery, a first degree felony which carries a potential sentence of three to ten years in prison. R.C. 2911.01(C), 2929.14 (A)(1). Defendant also pled guilty to felonious assault, a second degree felony that carries a potential sentence of two to eight years in prison. R.C. 2903.11(D)(1), 2929.14(A)(2). The trial court sentenced Defendant to consecutive four year prison terms on the aggravated robbery and felonious assault charges involving Paul Profeta, and to consecutive three year prison terms on the aggravated robbery and felonious assault charges involving Waeshiea Sipes and Victoria Kuhn, for a total aggregate sentence of twenty years.

{¶ 18} The State argues that Defendant waived the right to challenge the agreed sentence the court imposed because the component sentences are authorized by law. R.C. 2953.08(D)(1). In that circumstance, per that section, the sentence is not reviewable on appeal for an abuse of discretion. *State v. Brown*, Clark App. No. 2008CA33, 2009-Ohio-1933. Defendant's particular contention, however, is that the court erred as a matter of law because his two convictions with respect to each victim should have been merged pursuant to R.C. 2941.25(A) as allied offenses of similar import. In that event, multiple sentences concerning each victim could not be imposed, and would

then be contrary to law. Therefore, the error assigned is not waived pursuant to R.C. 2953.08(D)(1).

{¶ 19} Contrary to Defendant's contention, the Ohio Supreme Court in *State v. Johnson*, 120 Ohio St.3d 320, 2008-Ohio-6247, did not hold that aggravated robbery and felonious assault are allied offenses of similar import. Rather, the Supreme Court held in *Johnson* that convictions for two counts of felonious assault in violation of R.C. 2903.11(A)(1) and (2), and convictions for two counts of aggravated robbery in violation of R.C. 2911.01(A)(1) and (3), were, respectively, allied offenses of similar import, such that the two counts of felonious assault should have merged into one count, and the same with the two counts of aggravated robbery.

{¶ 20} Felonious assault, R.C. 2903.11, and aggravated robbery, R.C. 2911.01, are not allied offenses of similar import. *State v. Preston* (1986), 23 Ohio St.3d 64; *State v. Walker* (June 30, 2000), Montgomery App. No. 17678; *State v. Sherman* (May 7, 2001), Clermont App. No. CA99-11-106; *State v. Kelly* (Aug. 22, 2000), Franklin App. No. 99AP-1302; *State v. Gonzalez* (Mar. 15, 2001), Cuyahoga App.No. 77338. Merger was not required.

{¶ 21} Defendant's third assignment of error is overruled.

SUPPLEMENTAL ASSIGNMENT OF ERROR

{¶ 22} "SMITH'S INDICTMENT WAS DEFECTIVE AND WAS NOT AMENDED PRIOR TO HIS PLEA."

{¶ 23} In an amendment to his original brief, Defendant adds this additional assignment of error, in which he argues that the counts in the indictment charging the offense of aggravated robbery, to which he pled guilty (Counts 1, 5, and 7), fail to include the culpable mental state of recklessness, and that defect constitutes "structural error" requiring reversal of his convictions per *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 (*Colon I*), and *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 (*Colon II*).

{¶ 24} At the outset we note that when a defendant enters a guilty plea and thereby admits that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. *State v. Spates* (1992), 64 Ohio St.3d 269, 272, quoting *Tollett v. Henderson* (1973), 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235.

{¶ 25} Defendant's plea of guilty to the aggravated robbery charges waives any defect in the indictment occasioned by the failure to allege any culpable mental state. *State v. Gant*, Allen App. No. 1-08-22, 2008-Ohio-5406; *State v. Morgan*,

Hamilton App. No. C-080011, 2009-Ohio-1370; *State v. Cain*, Mahoning App. No. 08MA123, 2009-Ohio-1015; *State v. Smith*, Lucas App. No. L-07-1346, 2009-Ohio-48; *State v. Sadowsky*, Cuyahoga App. Nos. 90696, 91796, 2009-Ohio-341. We see nothing in the *Colon* decisions that indicates the Ohio Supreme Court intended to overrule the longstanding waiver rules with respect to guilty pleas. *Smith; Gant; State v. Easter*, Montgomery App. No. 22487, 2008-Ohio-6038.

{¶ 26} Alternatively, we note that the Ohio Supreme Court in *Colon II* stated:

{¶ 27} "In a defective-indictment case that does not result in multiple errors that are inextricably linked to the flawed indictment such as those that occurred in *Colon I*, structural-error analysis would not be appropriate. As we stated in *Colon I*, when a defendant fails to object to an indictment that is defective because the indictment did not include an essential element of the charged offense, a plain-error analysis is appropriate. 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, ¶ 23. Pursuant to Crim.R. 52(B), 'plain errors' that affect a defendant's substantial rights 'may be noticed although they were not brought to the attention of the court.' In most defective-indictment cases in which the indictment fails to include an essential element of the charge, we expect that

plain-error analysis, pursuant to Crim.R. 52(B), will be the proper analysis to apply.

{¶ 28} "Applying structural-error analysis to a defective indictment is appropriate only in rare cases, such as *Colon I,* in which multiple errors at the trial follow the defective indictment. In *Colon I,* the error in the indictment led to errors that 'permeate[d] the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence.' *Id .* at ¶ 23, 885 N.E.2d 917, citing *State v. Perry,* 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, at ¶ 17. Seldom will a defective indictment have this effect, and therefore, in most defective indictment cases, the court may analyze the error pursuant to Crim.R. 52(B) plain-error analysis. Consistent with our discussion herein, we emphasize that the syllabus in *Colon I* is confined to the facts in that case." *Colon II,* 119 Ohio St.3d at 205-06.

{¶ 29} While we agree with Defendant that the counts in the indictment charging aggravated robbery were defective because they fail to allege any culpable mental state, we nevertheless conclude that plain error analysis is appropriate, rather than structural error analysis, because the defect did not result in multiple errors that are inextricably linked to the flawed

indictment. *Colon I*, 118 Ohio St.3d 32; *State v. Easter*, Montgomery App.No. 22487, 2008-Ohio-6038. We note in that regard that Defendant pled guilty instead of proceeding to trial, which fundamentally distinguishes this case from *Colon I*, in which the multiple errors occurred during the trial and flowed from the defective indictment.

{¶ 30} The facts recited by the prosecutor at the guilty plea proceeding, that Defendant admitted he understood his offenses and was pleading guilty to committing them, clearly support the inference that Defendant purposely, R.C. 2901.22(A), or knowingly, R.C. 2901.22(B), inflicted or attempted to inflict serious physical harm on the victims by hitting each in the head with a bottle. Either of those culpable mental states is sufficient to establish the default mens rea of recklessness, the element missing from the aggravated robbery counts in Defendant's indictment. R.C. 2901.21(B), 2901.22(E); *Easter*. We are confident that the trial court appreciated the fact that the State's burden of proof in this case included the culpable mental state of recklessness. *Easter*.

{¶ 31} Had this case gone to trial, the evidence likely would have established the required culpable mental state of recklessness. The facts of the record to which Defendant pled guilty give rise to an inference that Defendant acted purposely

or knowingly in causing serious physical harm to the victims. The court's failure to inquire during the plea colloquy whether Defendant understood that the State was required to prove that he acted recklessly in inflicting serious physical harm on the victims did not preclude Defendant from understanding the nature of the charges or impact the knowing and voluntary character of his guilty plea. No plain error is demonstrated.

{¶ 32} Defendant's supplemental assignment of error is overruled. The judgment of the trial court will be affirmed.

DONOVAN, P.J., And FAIN, J. concur.

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