[Cite as *State v. Neal*, 2009-Ohio-3170.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C.A. No. 24392 & 24398
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
BRUCE NEAL	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 07 08 2799 (B)

DECISION AND JOURNAL ENTRY

Dated: June 30, 2009

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Bruce Neal pleaded guilty to eight counts of aggravated robbery, and the trial court sentenced him to a total of twenty-one years in prison. He has appealed his convictions, arguing that the indictment was defective and that his lawyer was ineffective for not moving to dismiss it. This Court affirms because Mr. Neal forfeited his right to challenge the sufficiency of the indictment and he has not established that his lawyer's performance was deficient.

INDICTMENT

{¶2} Mr. Neal's assignment of error is that the indictment was defective because it failed to address each and every element of the offenses for which he was charged, specifically, the mens rea element. He has argued that the indictment failed to give him proper notice of the charges against him and "violated [his] constitutional rights of indictment by a grand jury and to

due process." He has also argued that his lawyer was ineffective for not moving to dismiss the indictment as insufficient.

{¶3} Mr. Neal pleaded guilty to eight counts of aggravated robbery under Section 2911.01(A)(1) of the Ohio Revised Code. The Ohio Supreme Court has held that a defendant "waive[s] any deficiency in the indictment by failing to object to the indictment and by pleading guilty to the offense." *State v. Barton*, 108 Ohio St. 3d 402, 2006-Ohio-1324, at ¶73. In reaching that conclusion, it noted that "[t]he plea of guilty is a complete admission of the defendant's guilt." *Id*. (quoting Crim. R. 11(B)(1)). "By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime." *State v. Barnett*, 73 Ohio App. 3d 244, 248 (1991) (quoting *United States v. Broce*, 488 U.S. 563, 570 (1989)).

{¶4} In *State v. Colon*, 118 Ohio St. 3d 26, 2008-Ohio-1624, the Ohio Supreme Court held that, "[w]hen an indictment fails to charge a mens rea element of a crime and the defendant fails to raise that defect in the trial court, the defendant has not waived the defect in the indictment." *Id*. at syllabus. The defendant in *Colon*, however, did not plead guilty like Mr. Neal. "*Colon* did not overrule the longstanding waiver rules with regard to guilty pleas." *State v. Wilson*, 3d Dist. No. 1-08-60, 2009-Ohio-1735, at ¶20 (quoting *State v. Gant*, 3d Dist. No. 1-08-22, 2008-Ohio-5406, at ¶13); see also *State v. Morgan*, 1st Dist. No. C-080011, 2009-Ohio-1370, at ¶28; *State v. Easter*, 2d Dist. No. 22487, 2008-Ohio-6038, at ¶27; *State v. Smith*, 6th Dist. No. L-07-1346, 2009-Ohio-48, at ¶10; *State v. Cain*, 7th Dist. No. 08MA123, 2009-Ohio-1015, at ¶13; *State v. Sadowsky*, 8th Dist. Nos. 90696, 91796, 2009-Ohio-341, at ¶24. This Court, therefore, concludes that Mr. Neal forfeited his right to challenge the sufficiency of the indictment.

INEFFECTIVE ASSISTANCE

{¶5} Although Mr. Neal forfeited direct review of the indictment's sufficiency, this Court may consider his argument that his lawyer was ineffective for not moving to dismiss it. To establish ineffective assistance of counsel, Mr. Neal "must show (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the proceeding's result would have been different." *State v. Hale*, 119 Ohio St. 3d 118, 2008-Ohio-3426, at ¶204 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *State v. Bradley*, 42 Ohio St. 3d 136, paragraph two of the syllabus (1989)).

{¶6} Mr. Neal has argued that his lawyer's performance was deficient because he failed to recognize that the indictment was not sufficient to charge him with aggravated robbery. He has argued that his lawyer should have recognized that the indictment was defective under *State v. Colon*, 118 Ohio St. 3d 26, 2008-Ohio-1624.

{¶7} Mr. Neal entered his guilty plea on March 3, 2008. The Ohio Supreme Court did not decide *Colon* until April 9, 2008, over a month later. "Because attorney performance is not to be judged by hindsight, courts generally do not find that an attorney performs deficiently by failing to anticipate a future decision or development in the law." *State v. Hutton*, 100 Ohio St. 3d 176, 2003-Ohio-5607, at ¶50. Furthermore, even if Mr. Neal's lawyer had anticipated the result in *Colon*, it is not clear that the indictment in this case was insufficient under that decision.

{¶8} The defendant in *Colon* was convicted of robbery under Section 2911.02(A)(2) of the Ohio Revised Code. *State v. Colon*, 118 Ohio St. 3d 26, 2008-Ohio-1624, at ¶2. That section provides that "[n]o person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall . . . [i]nflict, attempt to inflict, or threaten to inflict

physical harm on another." R.C. 2911.02(A)(2). The Grand Jury indicted Mr. Neal on twelve counts of aggravated robbery for violating subpart (A)(1) of Section 2911.01, and twelve counts of robbery for violating subpart (A)(1) or (A)(2) of Section 2911.02. All of the robbery counts and all but one of the aggravated robbery counts had firearm specifications under Section 2941.14.5. Mr. Neal pleaded guilty to eight counts of aggravated robbery under Section 2911.01(A)(1), each of which had a firearm specification.

{¶9} Mr. Neal has argued that the indictment was defective under *Colon*, noting that subpart (A)(2) of the robbery statute contains language that is similar to subpart (A)(3) of the aggravated robbery statute. R.C. 2911.01(A)(3), 2911.02(A)(2). Mr. Neal did not plead guilty to violating subpart (A)(3) of the aggravated robbery statute, however, he pleaded guilty to violating subpart (A)(1), which contains substantially different language from the robbery provision that was at issue in *Colon*. Section 2911.01(A)(1) 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."

{¶10} The Ohio Supreme Court has not addressed whether Section 2911.01(A)(1) requires a mens rea other than that required for the underlying theft offense. In *State v. Wharf*, 86 Ohio St. 3d 375 (1999), however, it considered whether a similar provision under subpart (A)(1) of the robbery statute requires the State to prove a mens rea element. See R.C. 2911.02(A)(1). It concluded that it does not, holding that "[t]he deadly weapon element of R.C. 2911.02(A)(1) . . . does not require the *mens rea* of recklessness." *Wharf*, 86 Ohio St. 3d 375, at paragraph one of the syllabus. "To establish a violation of R.C. 2911.02(A)(1), it is not

necessary to prove a specific mental state regarding the deadly weapon element of the offense of robbery." *Id*. at paragraph two of the syllabus.

{¶11} The only difference between Section 2911.01(A)(1) and Section 2911.02(A)(1) is that, under Section 2911.01(A)(1), the offender must not only have "a deadly weapon on or about [his] person or under [his] control," he must also "either display the weapon, brandish it, indicate that the offender possesses it, or use it." R.C. 2911.01(A)(1), 2911.02(A)(1). Most of the appellate courts that have considered whether Section 2911.01(A)(1) is a strict liability offense like Section 2911.02(A)(1) have determined that it is. See *State v. Smith*, 2d Dist. Nos. 21463, 22334, 2008-Ohio-6330, at ¶73; *State v. Jelks*, 3d Dist. No. 17-08-18, 2008-Ohio-5828, at ¶20; *State v. Haney*, 4th Dist. No. 08CA1, 2009-Ohio-149, at ¶17; *State v. Thompson*, 5th Dist. No. 08 COA 018, 2008-Ohio-5332, at ¶30-31; *State v. Mason*, 6th Dist. No. L-06-1404, 2008-Ohio-5034, at ¶65; *State v. Wade*, 8th Dist. No. 90145, 2008-Ohio-4870, at ¶7; *State v. Ferguson*, 10th Dist. No. 07AP-640, 2008-Ohio-3827, at ¶42-50; *State v. Williams*, 11th Dist. No. 2008-T-0101, 2009-Ohio-1435, at ¶27. The First and Seventh Districts have concluded that Section 2911.01(A)(1) is not a strict liability offense. *State v. Jones*, 7th Dist. No. 07-MA-200, 2008-Ohio-6971, at ¶50 (concluding recklessness is the required mens rea for a violation of Section 2911.01(A)(1)); *State v. Lester*, 1st Dist. No. C-070383, 2008-Ohio-3570, at ¶23. Those cases, however, were not decided until after Mr. Neal pleaded guilty.

{¶12} It is not necessary in this case to determine whether Section 2911.01(A)(1) is a strict liability offense. Even if recklessness is the required mens rea for a violation of Section 2911.01(A)(1), in light of the development of the law at the time Mr. Neal entered his guilty plea, his lawyer's failure to challenge the sufficiency of the indictment did not cause his representation of Mr. Neal to fall below an objective standard of reasonableness. Accordingly,

Mr. Neal has failed to establish that his lawyer's assistance was ineffective. See *State v. Ray*, 9th Dist. No. 22459, 2005-Ohio-4941, at ¶13 (concluding that, if a defendant fails to demonstrate deficient performance, this Court does not have to address the prejudice element of the *Strickland* test). Mr. Neal's assignment of error is overruled.

CONCLUSION

{¶13} By pleading guilty, Mr. Neal forfeited his right to challenge the sufficiency of the indictment on appeal, and his lawyer was not ineffective for not moving to dismiss the indictment. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
CONCURS

CARR, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶14} I concur in judgment only because I would analyze his claim of ineffective assistance of counsel to determine whether he has demonstrated prejudice. The Ohio Supreme Court has held that "[i]n ineffective-assistance claims in guilty-plea cases, 'the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, at ¶89, quoting *Hill v. Lockhart* (1985), 474 U.S. 52, 59. This inquiry turns on whether counsel's failure to move to dismiss on the grounds of a defective indictment "prejudiced" Mr. Neal by causing him to plead guilty rather than going to trial, which in turn depends on the likelihood that counsel would have succeeded on his motion. See *Lockhart*, 474 U.S. at 59. Because counsel would not likely have prevailed on such a motion, Mr. Neal has failed to demonstrate prejudice.

APPEARANCES:

JANA DELOACH, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and HEAVEN DIMARTINO, assistant prosecuting attorney, for appellee.