

**THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	<b>O P I N I O N</b>
Plaintiff-Appellee,	:	
- vs -	:	<b>CASE NO. 2008-L-177</b>
DAJUAN L. BANKS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 07 CR 000751.

Judgment: Affirmed.

*Charles E. Coulson*, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

*James A. Gay*, 3324 Martin Luther King Jr. Drive, Cleveland, OH 44104 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Mr. Dajuan L. Banks appeals from the Lake County Court of Common Pleas judgment, which amended three counts of his indictment to include the culpable mental states or mens rea of the underlying offenses on two counts of aggravated burglary and one count of kidnapping. Ultimately, Mr. Banks and the state reached a plea agreement, and Mr. Banks pled guilty to one count each of aggravated murder, aggravated burglary, and kidnapping, all three with firearm specifications. Pursuant to the plea agreement, the state entered a nolle prosequi on the death penalty

specifications as to the count of aggravated murder, and the other counts and specifications in the indictment. The court accepted the plea agreement and sentenced him accordingly.

{¶2} Mr. Banks now appeals, arguing that he was denied his right to due process because he was deprived of adequate notice of all the essential elements of the alleged offenses as set forth in the indictment, and that the trial court committed prejudicial error in failing to dismiss the defective indictment prior to accepting his guilty plea.

{¶3} We determine Mr. Banks' assignments of error are wholly without merit because he was not misled or prejudiced by the amended indictment, nor was the identity or nature of the crimes charged changed. More fundamentally, Mr. Banks waived any arguments as to the constitutional infirmity of the indictment when he pled guilty to the substantive crimes of aggravated murder, aggravated burglary, and kidnapping. Thus, we affirm.

{¶4} **Substantive and Procedural Facts**

{¶5} In mid-October of 2007, Mr. Banks murdered his ex-girlfriend's fiancé, Mr. Sam Nicholson, Jr., in her home. The state presented evidence at the change of plea and sentencing hearing that Mr. Banks admitted to the brutal murder of Mr. Nicholson with the aid of a gun and a knife. Shortly before Mr. Nicholson was to leave for work, Mr. Banks slashed the tires on Mr. Nicholson's car, and then returned to the home approximately thirty minutes later. He entered the house and held Mr. Nicholson at gunpoint in his bedroom while questioning him about his love for his ex-girlfriend, Ms. Jackie Duncan. Mr. Banks then hit Mr. Nicholson in the back of the head with the gun several times, ordered him to lie on the floor face down, and slit his throat. Ms. Duncan

discovered Mr. Nicholson, lying face-up in a pool of blood, with his arms extended and throat cut when she returned from work later that morning.

{¶6} A grand jury indicted Mr. Banks on six counts: three counts of aggravated murder with two death penalty specifications and a firearm specification on each; two counts of aggravated burglary with firearm specifications, and one count of kidnapping with a firearm specification.

{¶7} Multiple motions were filed during the discovery phase of the case, including a motion for a bill of particulars, as well as a second motion for a “meaningful” bill of particulars and supplemental witness list. The state filed a brief in opposition to the second motion for a “meaningful” bill of particulars and several months later filed an amended bill of particulars and witness supplement to Mr. Banks’ prior request for a bill of particulars. The amended bill of particulars added the mens rea of “knowingly” for the underlying offense of burglary to the aggravated burglary charge on counts four and five, and “purposely” to count six, kidnapping.

{¶8} The state then filed a motion to amend the indictment pursuant to *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 (“*Colon I*”), which the Supreme Court of Ohio decided while Mr. Banks’ case was pending, arguing that an amendment should be allowed because neither the name or identity, nor the severity of the crimes were changed by the amendments; and that this case is distinguishable from *Colon I*.

{¶9} Several days later, the court denied Mr. Banks’ second motion for a “meaningful” bill of particulars and supplement, finding that the state provided an adequate bill of particulars, open file discovery, including all police reports, witness’ statements and an exhibit/evidence list; as well as numerous supplemental filings.

{¶10} In early July of 2008, the court held a hearing on the state's motion to amend the indictment. The court issued an opinion and journal entry on July 22, 2008, finding that Mr. Banks failed to make an objection to the form of the indictment pursuant to Crim.R. 12(C)(2) and that Crim.R. 7(D) permits the amendment of an indictment provided it still meets constitutional requirements. The court further found that Mr. Banks did not and could not show surprise or prejudice, and that this case was fundamentally distinguishable from *Colon I*, where the error permeated the entire trial.

{¶11} Specifically, the court found that the line of cases declaring that the omission of an element of an underlying offense in an indictment may be remedied by identifying the underlying offense in a bill of particulars is still good law, as long as the name or identity of the crime charged does not change. In fact, the state had filed an amended bill of particulars two months prior in response to Mr. Banks' first motion for a bill of particulars. Thus, the court granted the state's motion to amend the indictment because neither the name nor identity of the crimes changed, Mr. Banks had timely notice, was not misled or prejudiced by the omission of such elements, and showed a readiness at the hearing to proceed to trial on the originally scheduled date, despite the amended indictment.

{¶12} Before the case proceeded to trial, Mr. Banks reached a plea agreement with the state and, on October 30, 2008, filed a motion to withdraw his not guilty plea and enter a new plea. Specifically, Mr. Banks pled guilty to aggravated murder with a life term of imprisonment without parole, aggravated burglary, and kidnapping, all with firearm specifications. In exchange, the state agreed to nolle prosequi the death penalty specifications as to the count of aggravated murder, as well as the remaining counts and specifications of the indictment. After holding a hearing, the court accepted

his plea, and sentenced him to life imprisonment without parole for aggravated murder, and ten years each for aggravated burglary and kidnapping, as well as a consecutive, merged three-year term for the firearm specification, for a total term of imprisonment of 23 years in addition to the life term of imprisonment without parole.

{¶13} Mr. Banks now appeals the amended indictment raising two assignments of errors:

{¶14} “[1.] Appellant was denied his right to Due Process under Article I, Section 10 of the Ohio State Constitution and the Fifth and the Fourteenth Amendments to the Constitution of the United States of America, to have adequate notice of all of the essential elements of the alleged offenses set forth in an indictment, which was handed down by the Lake County Grand Jury.

{¶15} “[2.] The Trial Court committed prejudicial error when it failed to dismiss the defective indictment prior to accepting a plea of “guilty” from the defendant.”

{¶16} **Adequate Notice of an Indictment**

{¶17} Because Mr. Banks makes similar arguments in his assignments of error, we will address them together as they fall under the same analysis; that of a defective indictment. In his first assignment of error, Mr. Banks contends that a bill of particulars cannot be used to cure an otherwise defective indictment that lacks the essential elements of all the offenses charged. Mr. Banks argues that pursuant to the Supreme Court of Ohio’s holding in *Colon I*, the issue of a defective indictment can be raised at anytime, and that the court committed prejudicial error by allowing the state to file an amended indictment because it deprived him of adequate notice of the charges.

{¶18} Similarly in his second assignment of error, Mr. Banks argues the trial court erred in amending the indictment because it was without subject-matter

jurisdiction to do so. In effect, he argues that the amended indictment resulted in a new charge that was never presented to a grand jury. Mr. Banks, however, waived any arguments as to a defective indictment when he pled guilty, and even if *Colon I* did apply, it is distinguishable from the present case, as the Supreme Court of Ohio explained in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 (“*Colon II*”).

{¶19} Mr. Banks’ arguments fail for several reasons and, thus, we find his assignments of error to be without merit.

**{¶20} Waiver upon Guilty Plea**

{¶21} Firstly, “when a defendant enters a guilty plea and thereby admits that he is in fact guilty of the offense[s] 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. Smith*, 2d Dist. No. 08CA0060, 2009-Ohio-5048, ¶24, citing *State v. Spates* (1992), 64 Ohio St.3d 269, 272, quoting *Tollett v. Henderson* (1973), 411 U.S. 258, 267. See, also, *State v. Dudas*, 11th Dist. Nos. 2008-L-109 and 2008-L-110, 2009-Ohio-1001, ¶28 (when a criminal defendant admits in open court that he is guilty of an offense, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea).

{¶22} Thus, Mr. Banks’ plea of guilty to the substantive charges of aggravated murder, aggravated burglary, and kidnapping waives any defect in the indictment occasioned by the failure to allege any culpable mental state. *Smith* at ¶25, see, also, *State v. Gant*, 3d Dist. No. 1-08-22, 2008-Ohio-5406; *State v. Morgan*, 181 Ohio App.3d 747, 2009-Ohio-1370; *State v. Cain*, 9th Dist. No. 08MA123, 2009-Ohio-1015; *State v. Smith*, 6th Dist. No. L-07-1346, 2009-Ohio-48; *State v. Sadowsky*, 8th Dist. Nos. 90696 and 91796, 2009-Ohio-341. See, also, *State v. Haney*, 180 Ohio App.3d 554, 2009-

Ohio-149; *State v. Neal*, 9th Dist. Nos. 24392 and 24398, 2009-Ohio-3170; *State v. Moxley*, 2d Dist. No. 22889, 2009-Ohio-3767; *State v. Tabor*, 10th Dist. No. 08AP-1066, 2009-Ohio-2657; *State v. Pond*, 8th Dist. No. 91061, 2009-Ohio-849.

{¶23} As the Second Appellate District aptly noted in *Smith*, we see nothing in the *Colon* decisions that indicate the Supreme Court of Ohio intended to overrule the longstanding waiver rules with respect to guilty pleas. *Id.*; see, also, *Smith*, 2009-Ohio-48; *Gant*; *State v. Easter*, 2d Dist. No. 22487, 2008-Ohio-6038.

{¶24} Mr. Banks admitted he committed the substantive crimes of aggravated murder, aggravated burglary, and kidnapping, and as such, he has waived any alleged indictment defects for purposes of appeal.

{¶25} **Colon I Distinguished**

{¶26} Secondly, even if waiver did not apply, *Colon I* is distinguishable from this case. The Supreme Court of Ohio explained in *Colon II*, that the facts that led to *Colon I* are unique, stating that “[i]n 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 review 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. *Id.* at ¶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.

{¶27} “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 the determination of guilt or innocence.’ Id. at ¶23, citing *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶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.” *Smith* at ¶27-28, quoting *Colon II* at 205-06.

{¶28} In *Colon I*, which was decided on April 9, 2008, while Mr. Banks’ case was in the discovery phase, the facts presented were unique because the defect in the *Colon* indictment was not the only error that occurred, but, rather, resulted in several other violations of Mr. Colon’s rights that permeated the trial. *Colon II* at ¶6. Thus, in *Colon I*, multiple errors occurred throughout the case and, most importantly, the trial, all due to the defective indictment. The court concluded that “there was no evidence to show that the defendant had notice that recklessness was an element of the crime of robbery, nor was there evidence that the state argued that the defendant’s conduct was reckless. Id. at ¶30. Further, the trial court did not include recklessness as an element of the crime when it instructed the jury. Id. at ¶31. In closing argument, the prosecuting attorney treated robbery as a strict-liability offense. Id.” Id.

{¶29} No errors such as the ones presented in *Colon I* occurred in Mr. Banks’ case.

{¶30} **Underlying Offenses of a Charge**

{¶31} Thirdly, nothing in *Colon I* or *Colon II* overrules the longstanding rule that an indictment is not defective when the state fails to identify the elements of the underlying offense of the charged crime. *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, ¶10.

{¶32} The Supreme Court of Ohio explained in *Buehner* that “[w]here the indictment sufficiently tracks the wording of the statute of the charged offense, the omission of an underlying offense in the indictment can be remedied by identifying the underlying offense in the bill of particulars.” *Id.*, citing *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶30. Thus, the court in *Buehner* held that “an indictment that tracks the language of the charged offense and identifies a predicate offense by reference to the statute number need not also include each element of the predicate offense in the indictment. The state’s failure to list the elements of a predicate offense in the indictment in no way prevents the accused from receiving adequate notice of the charges against him.” *Id.* at ¶11. See, also, *Smith*, 2009-Ohio-48, at ¶76 (“\*\*\* while the *Colon* decision cites *Buehner*, there is nothing in the decision indicating any attempt to overrule *Buehner*, because the aggravated burglary indictment in this case properly tracked the statutory language setting forth the charged offense, pursuant to *Buehner*, the indictment was not defective. Therefore, it is not necessary for us to consider whether a plain error analysis or the *Colon* [I] structural analysis applies here”).

{¶33} **No Change to Name or Identity of Crime Charged**

{¶34} Finally, nothing in *Colon I* or *II* indicates the Supreme Court intended a new interpretation of Crim.R. 7(D), which allows the court, “at any time before, during, or after a trial to amend the indictment, information, complaint or bill of particulars in respect to any defect, imperfection, or omission in form or substance, or of any variance

with the evidence, provided no change is made in the name or identity of the crime charged. \*\*\*.”

{¶35} In *State v. O'Brien* (1987), 30 Ohio St.3d 122, where the original indictment was defective because it omitted the essential element of “recklessness” for the crime of endangering children, the Supreme Court of Ohio explained that “[t]he indictment, although insufficient in its original form was amended pursuant to Crim.R. 7(D). The jury was indisputably charged on the essential element, and the defendant-appellee was not misled or prejudiced by the amendment.” *Id.* at 127. Thus, the court in *O'Brien* held 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. (Crim.R. 7(D), construed and applied.)” *Id.* at paragraph two of the syllabus.

{¶36} The Supreme Court of Ohio recently reaffirmed and expanded on *O'Brien* in *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, reiterating the basic tenant of Crim.R. 7(D), that “a court may amend an indictment ‘at any time’ if the amendment does not change the ‘name or identity of the crime charged.’” *Id.* at ¶1. The court went on to hold that an amendment becomes impermissible, however, when it changes the penalty or degree of a charged offense because “such a change alters the identity of the offense.” *Id.*

{¶37} In this case, the court found Mr. Banks was neither misled nor prejudiced by the defective indictment. Indeed, the state provided Mr. Banks with open discovery and an amended bill of particulars, which provided Mr. Banks with notice as to the culpable mental states the state needed to prove in counts four, five, and six. The court

found Mr. Banks could not show surprise or prejudice at the hearing on the state's motion to file an amended indictment, and remained committed to the trial schedule, even if the court allowed the amended indictment. The court also noted that unlike in *Colon I*, the state would not treat the charges of aggravated burglary and kidnapping as strict liability offenses, and that if a jury trial was held, the jury would be properly instructed as to the correct mens rea. Thus, any possible defects in the indictment were corrected early, and would not and did not permeate Mr. Banks' criminal prosecution.

{¶38} We determine that no plain error occurred in this case. Mr. Banks admitted his guilt to the substantive crimes of aggravated murder, aggravated burglary, and kidnapping. There is no evidence that he was prejudiced or misled, and most fundamentally, neither the penalty nor the degree of the charged offense was amended, and the nature or identity of the crimes remained unchanged; therefore, Mr. Banks' first and second assignments of error are without merit.

{¶39} The judgment of the Lake County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

COLLEEN MARY O'TOOLE, J.,

concur.