

[Cite as *State v. Kent*, 2010-Ohio-4343.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90795

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHN KENT

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-485882

BEFORE: McMonagle, J., Kilbane, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: September 16, 2010

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CHRISTINE T. McMONAGLE, J.:

{¶ 1} On April 27, 2010, this court granted John Kent's application for reopening as filed pursuant to App.R. 26, appointed counsel to represent Kent, and ordered that the original appellate judgment as journalized on August 17, 2009, in *State v. Kent*, Cuyahoga App. No. 90795, 2009-Ohio-3889, be reopened. Our decision to reopen Kent's appeal was premised upon the finding that there existed a genuine issue as to whether he was deprived of effective assistance of counsel on appeal, as a result of the conviction for the offense of aggravated robbery under R.C. 2911.01(A)(3). Specifically, we

found that based upon *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169, Kent had demonstrated the existence of a genuine issue as to whether an error in Count 3 of the indictment and the court's jury instruction, with regard to the mens rea of recklessness, permeated the trial from beginning to end and placed into question the reliability of the trial court in serving its function relative to the determination of guilt or innocence. Kent was permitted to file a single assignment of error that dealt with the issue of whether his conviction for the offense of aggravated robbery, pursuant to R.C. 2911.01(A)(3), violated *Colon*.

{¶ 2} Kent's sole assignment of error is that:

{¶ 3} "Counsel was constitutionally ineffective when he failed to raise the issue of a defective indictment and jury instructions because the indictment and jury instruction failed to include the mens rea element necessary for Aggravated Robbery (R.C. 2911.0[1](A)(3)) in count three. Sixth and Fourteenth Amendments of the federal Constitution. In the alternative, plain error under Crim [sic] R [sic] requires reversal of the conviction."

{¶ 4} Kent's assignment of error is premised upon the holding in *Colon*, which held that the mens rea of recklessness was associated with the offense of aggravated robbery as contained within R.C. 2911.01(A)(3). *Colon*,

however, was overruled by the Supreme Court of Ohio in *State v. Horner*, Slip Opinion No. 2010-Ohio-3830. The court, in *Horner*, held that:

{¶ 5} “Today we recognize the confusion created by *Colon I* and *II* and hold that when an indictment fails to charge a mens rea element of the crime, but tracks the language of the criminal statute describing the offense, the indictment provides the defendant with adequate notice of the charges against him and is, therefore, not defective. * * * Consequently, we respond to the certified question by holding *Colon I* [citation omitted], and *State v. Colon* [citation omitted], are inapplicable to the offense of aggravated robbery in violation of R.C. 2911.01(A)(3). In fact, *Colon I* is overruled, and *Colon II* is overruled to the extent that it holds that such an indictment is defective.” *Horner* at ¶45.

{¶ 6} “Accordingly, under the *Wac/Maxwell* approach to applying R.C. 2901.21(B), in defining the offense of serious-physical-harm aggravated robbery, R.C. 2911.01(A)(3) ‘plainly indicates an intent to impose strict liability.’ * * *

{¶ 7} “ * * * Accordingly, R.C. 2911.01(A)(3) does not require proof of a mental state and an indictment that does not identify a mental state is not defective.” *Horner* at ¶52-53.

{¶ 8} Based upon the holding of *Horner*, we find that Kent has not established any error with regard to his conviction for the offense of

aggravated robbery under R.C. 2911.01(A)(3), as premised upon a claim of a defective indictment and jury instruction. It was not necessary for the indictment to contain the mens rea of recklessness with regard to the offense of aggravated robbery under R.C. 2911.01(A)(3) nor was it necessary for the trial court to instruct the jury with regard to the mens rea of recklessness.

{¶ 9} Accordingly, we find that Kent's sole assignment of error is not well taken.

{¶ 10} Judgment, as to Count 3, is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

MARY EILEEN KILBANE, P.J., and
JAMES J. SWEENEY, J., CONCUR