

SUPREME COURT OF OHIO

State v. Colon, 119 Ohio St. 3d 204

893 N.E.2d 169 (Ohio 2008) · Decided July 31, 2008

OPINION

MOYER, J.

Moyer, C.J. {¶ 1} This matter is before us on a motion for reconsideration filed by appellee, the state of Ohio. Appellee’s motion for reconsideration was supported by amici curiae, the Clark County Prosecutor’s Office and the Ohio Prosecuting Attorneys Association. Defendant-appellant, Vincent Colon, filed a memorandum opposing reconsideration. {¶ 2} In *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 {“Colon I”}, this court held that the indictment against defendant was defective because it failed to charge an essential element of the offense, the mens rea of the charged offense.

Id. at ¶ 19. We further held that the defendant did not waive the defect in the indictment by failing to raise that issue at trial. *Id.* at syllabus. I {¶ 3} Our holding in *Colon I* is only prospective in nature, in accordance with our general policy that newly declared constitutional rules in criminal cases are applied prospectively, not retrospectively.

In *State v. Evans* (1972), 32 Ohio St.2d 185, 61 O.O.2d 422, 291 N.E.2d 466, we stated that “ ‘application of a new rule of law to a pending appeal is not retrospective,’ and * * * the new rule applie[s] to the cases pending on the announcement date.” *Id.* at 186, 61 O.O.2d 422, 291 N.E.2d 466, quoting *State v. Lynn* (1966), 5 Ohio St.2d 106, 108, 34 O.O.2d 226, 214 N.E.2d 226. {¶ 4} We recently restated this principle in *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, 819 N.E.2d 687, at ¶ 6: “A new judicial ruling may be applied *205only to cases that are pending on the announcement date.

The new judicial ruling may not be applied retroactively to a conviction that has become final, i.e., where the accused has exhausted all of his appellate remedies.” (Citations omitted.) {¶ 5} Therefore, the rule announced in *Colon I* is prospective in nature and applies only to those cases pending on the date *Colon I* was announced. II {¶ 6} We assume that the facts that led to our opinion in *Colon I* are unique.

As we stated in *Colon I*, the defect in the defendant’s indictment was not the only error that had occurred: the defective indictment resulted in several other violations of the defendant’s rights. 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, ¶ 29.

In *Colon I*, we 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.* {¶ 7} 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. {¶ 8} 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, 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 *206discussion herein, we emphasize that the syllabus in *Colon I* is confined to the facts in that case. Judgment accordingly. Pfeifer, O'Connor, and Wolff, JJ., concur. Lundberg Stratton, O'Donnell, and Lanzinger, JJ., dissent. William H. Wolff Jr., of the Second Appellate District, sitting for Cupp, J.