

**OPINION NO. 85-026****Syllabus:**

R.C. 2951.02(F)(3), which provides that a criminal offender may not be placed on probation when the offense involved was committed while the offender was armed with a firearm or dangerous ordnance, is inapplicable to a criminal offender who has been indicted and convicted for aggravated robbery where the only reference in the indictment to a firearm is contained in R.C. 2929.71 specifications and such specifications are dismissed prior to conviction.

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**To: Richard P. Seiter, Director, Ohio Department of Rehabilitation and Correction, Columbus, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, June 19, 1985**

I have before me your request for my opinion on the question whether R.C. 2951.02(F)(3), which provides that a criminal offender may not be placed on probation when the offense involved was committed while the offender was armed with a firearm, applies when a defendant is indicted for aggravated robbery with the only reference to a firearm being contained in R.C. 2929.71 specifications and the specifications are dismissed. It is my understanding, based on information furnished in your letter, that this question stems from the authority of the Department of Rehabilitation and Correction to assist counties in developing their own probation services and to supervise probationers from local courts. See R.C. 5149.06 (establishing the Probation Development and Supervision Section within the Department of Rehabilitation and Correction). In order to answer your question I must first examine the following relevant statutes.

R.C. 2951.02(F) states in part:

An offender shall not be placed on probation. . .when any of the following applies:

....  
(3) The offense involved was not a violation of section 2923.12 of the Revised Code [prohibiting the carrying of a concealed weapon] and was committed while the offender was armed with a firearm or dangerous ordnance, as defined in section 2923.11 of the Revised Code.

Under R.C. 2951.02(F)(3), a defendant must be denied probation when he is

convicted of committing an offense, other than a violation of R.C. 2923.12, while armed with a firearm.

In your opinion request you specifically ask about the application of R.C. 2951.02(F)(3) to an offender who has committed aggravated robbery in violation of R.C. 2911.01 which states:

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:

(1) Have a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code, on or about his person or under his control;

(2) Inflict, or attempt to inflict serious physical harm on another.

(B) Whoever violates this section is guilty of aggravated robbery, an aggravated felony of the first degree. (Emphasis added.)

See R.C. 2923.11(A) (defining "deadly weapon" as "any instrument, device, or thing capable of inflicting death, and designed or specifically adapted for use as a weapon, or possessed, carried, or used as a weapon"); R.C. 2923.11(B) (including a firearm as a type of deadly weapon); R.C. 2923.11(J)(1) (including within the term "dangerous ordnance," "[a]ny automatic or sawed-off firearm, or zipgun"). But see R.C. 2923.11(K) (excluding from the term "dangerous ordnance" certain types of firearms).

R.C. 2911.01 provides that a defendant may be convicted of aggravated robbery if, in attempting to commit or committing a theft offense or in fleeing after such attempt or offense, he either has on his person or under his control a deadly weapon or dangerous ordnance, or inflicts or attempts to inflict serious physical harm on another. See *State v. Merriweather*, 64 Ohio St. 2d 57, 413 N.E.2d 790 (1980); *State v. Frazier*, 58 Ohio St. 2d 253, 389 N.E.2d 1118 (1979); *State v. Eley*, 56 Ohio St. 2d 169, 383 N.E.2d 132 (1978). See generally *State v. Cimpritz*, 158 Ohio St. 490, 110 N.E.2d 416 (1953) (indictment must state all statutory elements of crime).

Concerning sentencing for felony offenses involving firearms, R.C. 2929.71 states, in pertinent part:

(A) The court shall impose a term of actual incarceration of three years in addition to imposing . . . an indefinite term of imprisonment pursuant to section 2929.11 of the Revised Code, if both of the following apply:

(1) The offender is convicted of, or pleads guilty to, any felony other than a violation of section 2923.12 of the Revised Code;

(2) The offender is also convicted of, or pleads guilty to, a specification charging him with having a firearm on or about his person or under his control while committing the felony. The three-year term of actual incarceration imposed pursuant to this section shall be served consecutively with, and prior to . . . the indefinite term of imprisonment.

(C) No person shall be sentenced pursuant to division (A) of this section unless the indictment, count in the indictment, or information charging him with the offense contains a specification as set forth in section 2941.141 of the Revised Code.

See R.C. 2929.01(C) (defining "actual incarceration"); R.C. 2929.71(D). Under R.C. 2929.71(A), the court must impose a term of actual incarceration of three years when the offender is convicted of or pleads guilty to any felony, other than a violation of R.C. 2923.12, and to a specification charging him with having a firearm on his person or under this control while committing the felony.

R.C. 2941.141 sets forth the requirements for the imposition of a term of actual incarceration under R.C. 2929.71(A) as follows:

(A) Imposition of a term of actual incarceration upon an offender under division (A) of section 2929.71 of the Revised Code for having a firearm on or about his person or under his control while committing a felony is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender did have a firearm on or about his person or under his control while committing the offense. A specification to an indictment, count in the indictment, or information charging the offender with having a firearm on or about his person or under his control while committing a felony shall be stated at the end of the body of the indictment, count, or information, and shall be in substantially the following form:

SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT).  
The Grand Jurors (or insert the person's or the prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender had a firearm on or about his person or under his control while committing the offense).

(B) As used in this section, "firearm" has the same meaning as in section 2923.11 of the Revised Code.

Pursuant to R.C. 2929.71 and R.C. 2941.141, an offender who is convicted of or pleads guilty to a felony and to a specification, found in the indictment or information, that the offender had a firearm on his person or under his control while committing the offense must be sentenced to a three year term of actual incarceration in addition to an indefinite term of imprisonment. See R.C. 2929.11 (sentencing).

You specifically ask about the application of R.C. 2951.02(F)(3) to an offender who has committed the offense of aggravated robbery in violation of R.C. 2911.01. R.C. 2951.02(F)(3), which provides that a criminal offender may not be placed on probation when the offense involved was committed while the offender was armed with a firearm or dangerous ordnance, applies when a defendant is indicted and convicted of aggravated robbery pursuant to division (A)(1) of R.C. 2911.01, since a defendant may be convicted of violating that division of R.C. 2911.01 only if he had a deadly weapon or dangerous ordnance on or about his person or under his control when he committed or attempted to commit a theft offense. R.C. 2951.02(F)(3) applies under these circumstances regardless of whether R.C. 2929.71 specifications are included in the indictment, since an indictment charging a violation of R.C. 2911.01(A)(1) would include a reference to a deadly weapon or dangerous ordnance as one of the elements of a violation of that provision.

Indictment and conviction for aggravated robbery pursuant to division (A)(2) of R.C. 2911.01, however, does not necessarily trigger the proscription against probation set forth in R.C. 2951.02(F)(3), since possession or control of a firearm is not one of the elements of such offense. See State v. Frazier; State v. Eley. If, however, R.C. 2929.71 specifications charging the offender with having a firearm on or about his person or under his control while committing the theft offense are included in the indictment under R.C. 2911.01(A)(2), the inclusion of such specifications triggers the application of R.C. 2951.02(F)(3).

Lastly, the prohibition against probation found in R.C. 2951.02(F)(3) does not apply when a defendant has been indicted for aggravated robbery with the only reference in the indictment to a firearm being contained in R.C. 2929.71 specifications and the specifications are dismissed. See Ohio Crim. R. 11(C)(3). A dismissal completely terminates that part of the prosecution to which the entry applies, and the defendant is no longer under any form of legal restraint with respect to that part of the indictment which is dismissed. See R.C. 2941.33; Ohio Crim. R. 48; City of Columbus v. Stires, 9 Ohio App. 2d 315, 224 N.E.2d 369 (Franklin County 1967). See also State v. Bonarrigo, 62 Ohio St. 2d 7, 402 N.E.2d 530 (1980). Accordingly, the indictment for purposes of R.C. 2951.02(F)(3) must be read as though no firearm specifications had ever been inserted in the indictment, which renders R.C. 2951.02(F)(3) inapplicable under these facts.

For the foregoing reasons, it is my opinion, and you are so advised, that R.C. 2951.02(F)(3), which provides that a criminal offender may not be placed on probation when the offense involved was committed while the offender was armed with a firearm or dangerous ordnance, is inapplicable to a criminal offender who has been indicted and convicted for aggravated robbery where the only reference in the indictment to a firearm is contained in R.C. 2929.71 specifications and such specifications are dismissed prior to conviction.