

[Cite as *State v. Aitken*, 2009-Ohio-3757.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2008 CA 75
v.	:	T.C. NO. 2005 CR 677
GREGORY D. AITKEN	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

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**OPINION**

Rendered on the 31<sup>st</sup> day of July, 2009.

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FROELICH, J.

{¶ 1} In 2006, Gregory D. Aitken entered a negotiated plea of guilty to one count of rape of a child less than ten years of age, in violation of R.C. 2907.02(A)(1)(b). In exchange for the plea, the State dismissed a second count of rape, one count of attempted rape, and two counts of gross sexual imposition. The trial court sentenced Aitken to life in prison. Aitken did not file a direct appeal of

his conviction.

{¶ 2} Relying on *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 (“*Colon I*”), Aitken subsequently moved to “dismiss” his conviction, claiming that the indictment was defective because it failed to include the culpable mental state. *Colon I* held that a robbery indictment for a violation of R.C. 2911.02(A)(2) is defective if it fails to state that the physical harm was *recklessly* inflicted, threatened, or attempted because, in omitting the mens rea, the indictment omits one of the essential elements of the crime. *Colon I* at ¶10. *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 (“*Colon II*”) narrowly limited the holding in *Colon I* and held that the holding in *Colon I* is prospective in nature. The trial court summarily denied Aitken’s motion without a hearing.

{¶ 3} Aitken appeals from the denial of his motion to dismiss, raising one assignment of error, which states:

{¶ 4} “THE TRIAL COURT ERRED WHEN IT FAILED TO SUSTAIN THE MOTION TO DISMISS BECAUSE THE INDICTMENT FAILED TO SPECIFY A MENTAL STATE.”

{¶ 5} On appeal, Aitken acknowledges that, under *Colon II*, the holding of *Colon I* does not apply retroactively and, because he did not have an appeal pending when *Colon I* was decided, *Colon I* is inapplicable to his case. He asserts, however, that *Colon II* was wrongly decided and that he has a constitutional due process right to be charged by an indictment that includes the culpable mental state. Aitken thus “believes that under the federal constitution the trial court was required to dismiss his conviction.” Despite this belief, Aitken recognizes that we are bound by Supreme Court of Ohio authority, and he has indicated that he has pursued this appeal “in the hope that the Supreme Court will change its thinking on this.”

{¶ 6} We find no error in the trial court’s denial of Aitken’s motion to dismiss. As Aitken

acknowledges, the Supreme Court of Ohio has held that its holding in *Colon I* applies prospectively only. *Colon II* at ¶3. Because Aitken did not appeal from his conviction, *Colon I* is inapplicable to his case.

{¶ 7} Even if *Colon I* applied retroactively, Aitken’s argument would be without merit. A violation of R.C. 2907.02(A)(1)(b) is a strict liability offense. *State v. O’Dell*, Montgomery App. No. 22691, 2009-Ohio-1040. Thus, the State was not required to prove a culpable mental state in connection with any element of the offense, and the omission of a culpable mental state from the indictment was not error. *Id.* at ¶27.

{¶ 8} Finally, to the extent that Aitken argues that *Colon II* was wrongly decided, that issue is not cognizable in this Court. “The appellate jurisdiction of this court is limited to review of ‘judgments or final orders of courts of record inferior to the court of appeals within the district’ and to ‘final orders or actions of administrative agencies.’” *State v. Martin*, Greene App. No. 06CA78, 2007-Ohio-3588, at ¶6, quoting Article IV, Section 3(B)(2), Ohio Constitution. The Supreme Court of Ohio is neither an inferior court nor an administrative agency. Accordingly, we lack jurisdiction to review whether its holding in *Colon II* is contrary to the United States Constitution.

{¶ 9} The assignment of error is overruled.

{¶ 10} The judgment of the trial court will be affirmed.

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FAIN, J. and HARSHA, J., concur.

(Hon. William H. Harsha, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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