

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	No. 09AP-144
Plaintiff-Appellee,	:	(C.P.C. No. 01CR11-6776)
v.	:	No. 09AP-145
William A. Cook,	:	(C.P.C. No. 01CR08-5022)
Defendant-Appellant.	:	(ACCELERATED CALENDAR)

D E C I S I O N

Rendered on June 16, 2009

Ron O'Brien, Prosecuting Attorney, and *Richard A. Termuhlen*, for appellee.

William A. Cook, pro se.

APPEALS from the Franklin County Court of Common Pleas.

FRENCH, P.J.

{¶1} Defendant-appellant, William A. Cook ("appellant"), appeals the Franklin County Court of Common Pleas' judgment to deny his Civ.R. 60(B) motions to vacate judgment. For the following reasons, we affirm.

{¶2} In July 2002, appellant was convicted of robbery in two separate cases jointly tried. Appellant appealed and argued that his convictions were based on insufficient evidence and against the manifest weight of the evidence. In May 2003, this court affirmed appellant's convictions in *State v. Cook*, 10th Dist. No. 02AP-896, 2003-Ohio-2483. In June 2008, appellant challenged his robbery convictions in two Civ.R. 60(B) motions. Appellant argued that the indictments against him were defective. The trial court denied the motions.

{¶3} Appellant appeals asserting the following assignments of error:

First Assignment Of Error

THE APPELLANT WAS DENIED HIS RIGHTS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS WHEN THE TRIAL COURT ACTED WITHOUT SUBJECT MATTER JURISDICTION WHEN IT SUBSEQUENTLY CONVICTED AND SENTENCED HIM. THEREFORE, THE COURT ABUSED [ITS] DISCRETION WHEN IT DENIED THE MOTION TO VOID JUDGMENT WHICH SEEKED TO CORRECT THE ERROR.

Second Assignment Of Error

BY FAILING TO CHARGE ANY LEVEL OF MENS REA FOR THE SERIOUS PHYSICAL INJURY ELEMENT OF ROBBERY, UNDER 2911.02, THE INDICTMENT FAILED TO PROPERLY CHARGE MR. COOK AND FAILED TO GIVE HIM NOTICE OF THE CHARGES AGAINST HIM. THIS ERROR VIOLATED MR. COOK'S CONSTITUTIONAL RIGHT OF INDICTMENT BY A GRAND JURY AND TO DUE PROCESS[.] THEREFORE, THE COURT ABUSED [ITS] DISCRETION WHEN IT DENIED THE MOTION TO VOID JUDGMENT THAT ASSERTED THAT THE TRIAL COURT LACKED JURISDICTION.

{¶4} We address appellant's two assignments of error together. Appellant argues that the trial court erred by denying his Civ.R. 60(B) motions to vacate. We disagree.

{¶5} Civ.R. 60(B) is not the appropriate vehicle for appellant's challenges to his criminal convictions. See *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, ¶12. Appellant's motions may be treated as petitions for post-conviction relief, however. See *id.* at ¶14.

{¶6} Under the doctrine of res judicata, a defendant who was represented by counsel is barred from raising an issue in a post-conviction petition if the defendant raised or could have raised the issue at trial or on direct appeal. *State v. Palacios*, 10th Dist. No. 08AP-669, 2009-Ohio-1187, ¶15. Appellant had representation on direct appeal, and appellant could have raised the sufficiency of the indictment at that time. See *id.* at ¶16. Appellant did not do so, and res judicata bars him from raising the issue now. See *id.*

{¶7} In any event, appellant's motions fail on the merits. Appellant argues the defective indictment claim pursuant to *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"). The Supreme Court of Ohio held that *Colon I* only applies prospectively and not " 'retroactively to a conviction that has become final, i.e., where the accused has exhausted all of his appellate remedies.' " *State v. Colon*, 119 Ohio St.3d 294, 2008-Ohio-3749, ¶3-4 ("*Colon II*"), quoting *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, ¶6. The Supreme Court issued *Colon I* in April 2008. Appellant's direct appeal was resolved long before that time. Appellant filed the motions to vacate

after *Colon I*, but, as post-conviction petitions, they are collateral civil attacks on a criminal judgment and not an appeal of the judgment. *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111. Appellant's convictions became final before *Colon I*, and that case does not apply to appellant's convictions.

{¶8} Accordingly, we conclude that the trial court properly denied appellant's motions to vacate. Consequently, we overrule appellant's two assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and McGRATH, JJ., concur.
