

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-10
Andre W. Easley,	:	(C.P.C. No. 07CR-05-3667)
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on August 6, 2009

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for
appellee.

Andre W. Easley, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Andre W. Easley, appeals from a judgment of the Franklin County Court of Common Pleas denying defendant's "Motion to Void Judgment."

Defendant assigns a single error:

BY FAILING TO CHARGE ANY LEVEL OF MENS REA FOR THE SERIOUS PHYSICAL INJURY ELEMENT OF ROBBERY UNDER 2911.02(A)(3), THE INDICTMENT FAILED TO PROPERLY CHARGE [DEFENDANT] AND FAILED TO GIVE HIM NOTICE OF THE CHARGES AGAINST HIM. THIS ERROR VIOLATES [DEFENDANT'S] CONSTITUTIONAL RIGHT OF INDICTMENT BY A GRAND JURY AND TO DUE

PROCESS[.] THEREFORE, THE COURT ABUSED IT'S [sic] DISCRETION WHEN IT DENIED THE MOTION TO ARREST OR VOID JUDGMENT THAT ASSERTED THAT THE TRIAL COURT LACKED JURISDICTION.

Because the trial court properly denied defendant's motion, we affirm.

I. Procedural History

{¶2} Through an indictment filed on May 22, 2007, defendant was charged with (1) two counts of aggravated robbery, first-degree felonies in violation of R.C. 2911.01, (2) two counts of robbery, second-degree felonies in violation of R.C. 2911.02, (3) two counts of robbery, third-degree felonies in violation of R.C. 2911.02, and (4) one count of felonious assault in violation of R.C. 2903.11. A repeat violent offender specification under R.C. 2941.149 accompanied all the counts except the two counts of robbery charged as third-degree felonies.

{¶3} Pursuant to plea negotiations with the prosecution, defendant agreed to plead guilty to two counts of robbery, charged as second-degree felonies, without the specifications; in exchange the prosecution agreed to request that the remaining charges be dismissed. On July 18, 2007, defendant entered a guilty plea to the agreed charges, the trial court dismissed the other counts of the indictment, and the trial court sentenced defendant in accord with the sentence defendant and the prosecution jointly recommended. By judgment entry filed the next day, the trial court journalized the proceedings. Due to an error in the judgment entry, the court filed a Corrected Judgment Entry on July 24, 2007. Defendant did not appeal.

{¶4} On May 8, 2008, defendant filed a motion for judicial release, seeking that the trial court suspend the remainder of his sentence. The trial court denied the motion on May 30, 2008.

{¶5} On October 15, 2008, defendant filed a motion to void the trial court's judgment. Defendant asserted his indictment was fatally defective because it omitted "an essential mens rea element," rendering his subsequent conviction and sentence void. (Motion to Void Judgment, 2.) The common pleas court, by decision and entry filed December 9, 2008, overruled defendant's motion as lacking merit. Defendant appeals, contending the trial court wrongly denied his motion.

II. Assignment of Error

{¶6} Defendant's motion before the trial court suffers at least two fatal deficiencies: it is untimely and *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*") does not apply to defendant's case.

A. Timeliness

{¶7} To the extent defendant intended his motion to invoke the provisions of Civ.R. 60(B) that allow a trial court to grant relief from judgment, his motion fails. The Supreme Court of Ohio clarified that Civ.R. 60(B) does not apply in these circumstances. See *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, ¶12. Rather than dismiss the motion as wrongly filed, a trial court appropriately considers such motion to be a petition for post-conviction relief under R.C. 2953.21. *Id.* at syllabus (stating "[t]he trial court may recast an appellant's motion for relief from judgment as a petition for postconviction relief when the motion has been unambiguously presented as a Civ.R. 60(B) motion").

{¶8} Even if defendant did not intend his motion to invoke Civ.R. 60(B), the motion nonetheless is properly analyzed as a petition for post-conviction relief under R.C. 2953.21, as such a petition is generally the remedy for post-appeal challenges to a defendant's conviction and sentence. *Schlee*, supra, ¶12 (concluding "that a motion styled 'Motion to Correct or Vacate Sentence' met the definition of a petition for postconviction relief pursuant to R.C. 2953.21(A)(1), because it was '(1) filed subsequent to [the defendant's] direct appeal, (2) claimed a denial of constitutional rights, (3) sought to render the judgment void, and (4) asked for vacation of the judgment and sentence' "). Because defendant's motion fits within the parameters *Schlee* delineated, it properly is reviewed as a denied petition for post-conviction relief.

{¶9} A petition for post-conviction relief is a collateral civil attack on a criminal judgment, not an appeal of the judgment. *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111. "It is a means to reach constitutional issues which would otherwise be impossible to reach because the evidence supporting those issues is not contained in the record." *State v. Murphy* (Dec. 26, 2000), 10th Dist. No. 00AP-233, discretionary appeal not allowed (2001), 92 Ohio St.3d 1441. R.C. 2953.21 affords a prisoner post-conviction relief "only if the court can find that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Ohio Constitution or the United States Constitution." *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph four of the syllabus. A post-conviction petition does not provide a petitioner a second opportunity to litigate his or her conviction. *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321, ¶32; *Murphy*, supra.

{¶10} Effective September 21, 1995, R.C. 2953.21 was amended to require that a petition under R.C. 2953.21(A)(1) be filed "no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication." R.C. 2953.21(A)(2). The amendment further provides that "[i]f no appeal is taken * * * the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal." *Id.*

{¶11} Because defendant's sentence was journalized in July 2007, after the effective date of amended R.C. 2953.21, defendant, who did not appeal his conviction, was required to file his petition within 180 days after the expiration of the time for filing an appeal. Defendant filed his motion on October 15, 2008, making it untimely and leaving the trial court without jurisdiction to consider it. *State v. Rippey*, 10th Dist. No. 06AP-1229, 2007-Ohio-4521; *State v. Robinson*, 10th Dist. No. 06AP-368, 2006-Ohio-6649; *State v. Bivens*, 10th Dist. No. 05AP-1270, 2006-Ohio-4340.

{¶12} Pursuant to R.C. 2953.23(A), a court may not entertain an untimely petition unless defendant initially demonstrates either (1) he is unavoidably prevented from discovering facts necessary for the claim for relief, or (2) the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in defendant's situation. R.C. 2953.23(A)(1)(a). If defendant were able to satisfy one of those two conditions, R.C. 2953.23(A) requires he also demonstrate that but for the constitutional error at trial, no reasonable fact finder would have found him guilty of the offenses of which he was convicted. R.C. 2953.23(A)(1)(b). Although defendant's reply brief notes the Ohio Supreme Court's decision in *Colon I*, that case does not assist defendant in meeting the timeliness requirement.

{¶13} Apart from the other difficulties defendant may have in attempting to fall within the provisions of R.C. 2953.23(A)(1)(a) that address whether the United States Supreme Court recognized a new federal or state right to be applied retroactively to persons in defendant's situation, he cannot meet the retroactivity requirement. In *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II*"), the Supreme Court of Ohio reconsidered *Colon I* and specifically stated that its decision in *Colon I* set forth a holding that "is only prospective in nature"; it therefore does not apply retroactively. *Colon II*, at ¶3.

{¶14} Accordingly, the common pleas court was without jurisdiction to consider defendant's motion to vacate.

B. *Colon*

{¶15} Even if defendant had met the procedural requirements of R.C. 2953.21, his petition would have to be denied.

{¶16} Defendant's petition seeking to apply *Colon I* to his case fails because the Supreme Court of Ohio in *Colon II* made clear that its decision in *Colon I* applies only prospectively. As the Supreme Court explained in *Colon II*, to apply *Colon I* prospectively is "in accordance with our general policy that newly declared constitutional rules in criminal cases are applied prospectively, not retrospectively." *Id.* ¶3. As a result, "the new rule applie[s] to the cases pending on the announcement date" of *Colon I*. *Id.*, quoting *State v. Evans* (1972), 32 Ohio St.2d 185, 186. "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." *Id.* ¶4, quoting *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, ¶6.

{¶17} Defendant's case became final when defendant did not appeal his conviction. Because his judgment was final, at the latest, in July 2007 and *Colon I* was announced on April 9, 2008, *Colon I* does not apply to defendant's conviction.

{¶18} For the foregoing reasons, the trial court properly denied defendant's motion to vacate. We overrule defendant's single assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

BROWN and TYACK, JJ., concur.
