

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-268 (C.P.C. No. 96CR-06-3350)
Frederick A. Gadson,	:	(ACCELERATED CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on October 29, 2009

Ron O'Brien, Prosecuting Attorney, and *Sarah W. Creedon*,
for appellee.

Frederick A. Gadson, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Frederick A. Gadson, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court denied his motion to vacate judgment for lack of jurisdiction.

{¶2} On June 7, 1996, appellant was indicted on one count of aggravated murder with one aggravating circumstance specification and one firearm specification,

and one count of aggravated robbery with a firearm specification. On November 25, 1996, the trial court entered judgment, pursuant to a plea of guilty, finding appellant guilty of aggravated murder with a firearm specification. The trial court sentenced appellant to a total prison sentence of 20 years to life, with three years actual incarceration on the firearm specification. Appellant did not file an appeal from that judgment.

{¶3} On December 11, 2008, appellant filed a motion to vacate judgment for lack of jurisdiction, based upon *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"), claiming his indictment was defective for omitting the mens rea element. On February 18, 2009, the trial court, construing the motion as one for post-conviction relief, denied the motion to vacate judgment for lack of jurisdiction, concluding: (1) the motion for post-conviction relief was untimely; (2) res judicata barred his motion; and (3) *Colon I* was only prospective in nature. Appellant appeals the judgment of the trial court, asserting the following assignment of error:

The trial Court erred when it did not let the Appellant have a hearing once it was made aware of the Violation of the appellant's Due Process, when the State Convicted the defendant via an Indictment that Omitted Essential "mens rea" for the offences which was a Structural Error. [Sic Passim.]

{¶4} In appellant's sole assignment of error, he argues that the trial court erred when it denied his motion to vacate judgment for lack of jurisdiction. Although appellant did not specify the procedural basis for his motion to vacate, except to claim it was a common-law motion to vacate, an argument based upon a claimed lack of subject-matter jurisdiction as a result of a defective indictment should be advanced pursuant to a petition for post-conviction relief under R.C. 2953.21. See *State v. Reynolds*, 10th Dist. No. 08AP-1052, 2009-Ohio-2147, ¶7, citing *State v. Wooden*, 10th Dist. No. 02AP-473, 2002-Ohio-

7363, ¶9, citing *State v. Malone* (Jan. 30, 1997), 8th Dist. No. 71094; *State v. Morgan* (Sept. 5, 1996), 8th Dist. No. 70407. See also *State v. Reynolds* (1997), 79 Ohio St.3d 158, 160 (motion to vacate sentence met the definition of a petition for post-conviction 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).

{¶5} Analyzing appellant's motion as a petition for post-conviction relief, R.C. 2953.21(A)(2) provides that, if no appeal is taken, as in the present case, the petition shall be filed no later than 180 days after the expiration of the time for filing the appeal. Here, the judgment was filed November 25, 1996, and appellant filed his motion to vacate judgment for lack of jurisdiction December 11, 2008. Therefore, appellant clearly failed to file his petition for post-conviction relief within the applicable period.

{¶6} Pursuant to R.C. 2953.23(A), a court may entertain an untimely petition if the defendant demonstrates either: (1) he was 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 the appellant is able to satisfy one of these 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).

{¶7} Here, appellant has not, and cannot, demonstrate either of the first two prerequisites for entertaining an untimely petition for post-conviction relief. Appellant has not claimed that he was unavoidably prevented from discovering facts necessary for his

claim for relief. Rather, appellant's claim in his motion was based upon new case law that had developed since his sentencing. Furthermore, appellant does not claim any new federal or state right recognized by the United State Supreme Court that applies retroactively to persons in appellant's situation. The new case relied upon by appellant, *Colon I*, is an Ohio Supreme Court case. Therefore, appellant has not met the requirements necessary to entertain an untimely petition for post-conviction relief. Accordingly, appellant's petition was untimely.

{¶8} Notwithstanding, even if appellant had met the procedural requirements of R.C. 2953.21, and regardless of which procedural basis appellant's motion was founded upon, appellant's motion/petition would be denied on the merits. 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"; therefore, it does not apply retroactively. *Colon II*, ¶3. As a result, "the new rule applie[s] to 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. Here, appellant's case was no longer pending at the time of *Colon I*, and the time for appealing any judgment had long expired. Because his judgment was final before *Colon I* was announced, *Colon I* does not apply to appellant's conviction and sentencing. Therefore, regardless of how we label appellant's motion, the trial court properly denied it.

{¶9} We also note that appellant seems to make an argument that he was denied effective assistance of counsel at the trial court level. Appellant does not specify the basis of his claim. Nevertheless, this claim was not raised at the trial court level, and we will not address it for the first time on appeal. See *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 360 (issues not raised and tried in the trial court cannot be raised for the first time on appeal); see also *State v. Zamora*, 3d Dist. No. 11-08-04, 2008-Ohio-4410, ¶26 (an appellate court can only address those arguments presented to the trial court in the original petition for post-conviction relief; therefore, any new arguments cannot be considered for the first time on appeal). For all the above reasons, appellant's assignment of error is overruled.

{¶10} Accordingly, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and TYACK, JJ., concur.
