

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22889
v.	:	T.C. NO. 08 CR 1448
TIMOTHY B. MOXLEY	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

.....

OPINION

Rendered on the 31st day of July, 2009.

.....

JOHNNA M. SHIA, Atty. Reg. No. 0067685, Assistant Prosecuting Attorney, 301 W. Third Street,
5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

WILLIAM T. DALY, Atty. Reg. No. 0069300, 1250 West Dorothy Lane, Suite 105, Kettering, Ohio
45409
Attorney for Defendant-Appellant

.....

HARSHA, J. (by assignment)

{¶ 1} On July 18, 2008, Timothy B. Moxley, who was convicted of corruption of a minor in 1997, pled guilty to one count of failure to notify in violation of R.C. 2950.05(A) and (F)(1). Moxley now argues that his indictment for failure to notify was deficient because it lacked any mens rea element for the offense. However, his guilty plea acted as

a waiver of any deficiency in the indictment.

{¶ 2} Moxley also contends that he received ineffective assistance of counsel. He claims that trial counsel was deficient by failing to: (1) adequately investigate discovery information the State provided; (2) challenge Moxley's duty to register; (3) fully explain the maximum and minimum sentence to him; (4) sufficiently communicate with him; and (5) completely understand his case before pressing him to accept a plea agreement. Because these arguments rely on evidence outside the record, they cannot be adjudicated on direct appeal, and the proper vehicle to raise them is in a petition for post-conviction relief under R.C. 2953.21.

{¶ 3} Accordingly, we affirm the trial court's judgment.

I. Facts

{¶ 4} In 1997, the Montgomery County Common Pleas Court convicted Moxley of corruption of a minor and ordered him to register as a sexually oriented offender. In 2008, Moxley was indicted for two counts of failing to notify the Montgomery County Sheriff of various changes in his registration information under R.C. 2950.05. Moxley pled guilty to one count of failure to notify in violation of R.C. 2950.05(A) and (F)(1). After the trial court sentenced him to a three-year prison term, Moxley filed this appeal.

II. Assignments of Error

{¶ 5} Moxley assigns the following errors for our review:

{¶ 6} "THE INDICTMENT FAILED TO CHARGE MENS REA AND THEREFORE IS STRUCTURALLY DEFICIENT.

{¶ 7} “APPELLANT ASSERTS INEFFECTIVE ASSISTANCE OF COUNSEL.”

III. Mens Rea Defect in Indictment - Waiver

{¶ 8} In his first assignment of error, Moxley contends that his indictment for failure to notify was defective because it lacked any mens rea element for the offense. Although Moxley failed to raise this argument in the trial court, he claims that under *State v. Colon* (“*Colon I*”), 118 Ohio St.3d 26, 2008-Ohio-1624, he did not waive the right to make this argument on appeal. The State argues that failure to notify is a strict liability offense, so proof of any culpable mental state is not required, and that in any event, Moxley waived his right to raise this issue by pleading guilty to the charge.

{¶ 9} In *Colon I*, the court found that “when an indictment fails to charge a mens rea element of a crime and the defendant fails to raise that defect in the trial court, the defendant has not waived the defect in the indictment.” *Id.* at ¶45. However, we have determined *Colon I* is not applicable to cases where the defendant entered a plea of guilty rather than proceeding to trial. See *State v. Edwards*, Montgomery App. No. 22548, 2009-Ohio-1408, at ¶34. In *State v. Easter*, Montgomery App. No. 22487, 2008-Ohio-6038, at ¶¶26-28, we cited the Third District's decision in *State v. Gant*, Allen App. No. 1-08-22, 2008-Ohio-5406, at ¶13, where the court found that by entering a guilty plea, an accused admits guilt of a substantive crime and waives any alleged indictment defects for purposes of appeal. See, also, *State v. Morgan*, Hamilton App. No. C-080011, 2009-Ohio-1370; *State v. Smith*, Lucas App. No. L-07-1346, 2009-Ohio-48; *State v. Kovach*, Mahoning App. No. 08-MA-125, 2009-Ohio-2892. Therefore, we overrule Moxley's first assignment of error.

IV. Ineffective Assistance of Counsel

{¶ 10} In his second assignment of error, Moxley contends that his trial counsel rendered ineffective assistance of counsel. In order to prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced his defense so as to deprive him of a fair trial. *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, at ¶205, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. To establish deficient performance, an appellant must show that trial counsel's performance fell below an objective level of reasonable representation. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, at ¶95. To establish prejudice, an appellant must show a reasonable probability exists that, but for the alleged errors, the result of the proceeding would have been different. *Id.* The appellant has the burden of proof on the issue of counsel's ineffectiveness because a properly licensed attorney is presumed competent. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, at ¶62.

{¶ 11} Moxley contends that his trial counsel failed to: (1) adequately investigate discovery information the State provided; (2) challenge Moxley's duty to register; (3) fully explain the maximum and minimum sentence to him; (4) sufficiently communicate with him; and (5) completely understand his case before pressing him to accept a plea agreement. The only evidence Moxley offers to support these claims is an affidavit which is attached to his appellate brief and which is not part of the trial record. *State v. Mathers*, Clark App. No. 2000-CA-92, 2002-Ohio-4117, at ¶8, citing *State v. Dyer* (1996), 117 Ohio App.3d 92, 96 (“[A] document which is presented for the first time on appeal and therefore

is not part of the record may not be considered by an appellate court.”). Because all these claims depend upon evidence outside the record, they cannot be adjudicated on direct appeal, and the proper vehicle to raise them is in a petition for post-conviction relief under R.C. 2953.21. *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 228.

{¶ 12} Although it is not clear from his brief, Moxley also may be contending that trial counsel was deficient for failing to challenge his duty to register in the 1997 conviction. However, the doctrine of res judicata “bars any claim that was or could have been raised at trial or on direct appeal.” *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111. If Moxley wanted to challenge his original obligation to register as a sex offender, he could have filed a direct appeal from his 1997 judgment of conviction and sentence for corruption of a minor that contained this requirement. Therefore, res judicata would have barred Moxley's trial counsel from challenging his obligation to register as a sex offender in this case.¹ Counsel's failure to take a futile act cannot be deemed a deficient performance.

{¶ 13} Accordingly, we overrule Moxley's second assignment of error and affirm the trial court's judgment.

¹We note that Moxley only vaguely argues that trial counsel should have challenged his duty to register and does not argue that his 1997 sentence requiring that he register as a sex offender is void. In *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at ¶30, the Supreme Court of Ohio stated: “Although res judicata applies to a voidable sentence and may operate to prevent consideration of a collateral attack based on a claim that could have been raised on direct appeal from the voidable sentence, * * * we have not applied res judicata to cases in which the sentence was void. We decline to do so now.” It is more likely that Moxley's argument is that his obligation to register has expired and thus counsel could have raised this issue rather than allowing him to plead guilty. However, as we noted in ¶9, we would have to examine evidence outside the record in this case to decide that issue.

JUDGMENT AFFIRMED.

.....

FAIN, J. and FROELICH, J., concur.

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

Copies mailed to:

Johnna M. Shia
William T. Daly
Hon. Mary Katherine Huffman