

[Cite as *State v. Dixon*, 2010-Ohio-2635.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
 Plaintiff-Appellee : C.A. CASE NO. 23592
 vs. : T.C. CASE NO. 05CR4213/4
 WILLIAM R. DIXON :
 Defendant-Appellant :

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O P I N I O N

Rendered on the 11th day of June, 2010.

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GRADY, J.:

{¶ 1} Defendant, William Dixon, appeals from a judgment of
 the common pleas court that denied Defendant's R.C. 2953.21
 petition for post-conviction relief.

{¶ 2} Shoshana Harbor lived at 5935 Lynnaway Drive in Dayton,

with her husband and one of her sons in June 2005. Defendant was one of four people who acted in concert to gain entry into the Harbor residence for the purpose of robbing the Harbor family on the afternoon of June 24, 2005. When Shoshana Harbor heard her front doorbell ring, she answered the door and discovered a young white female who was in her twenties, wearing a long black skirt and white blouse. The young woman, later identified as Devon Schultz, told Harbor she had run out of gas and needed to use a telephone. Harbor closed the door, without inviting Schultz inside the home, and went to get a telephone.

{¶ 3} When Harbor returned to the front door with a phone she discovered Schultz, who was standing inside her hallway. Schultz asked for the phone, and when Harbor gave it to her, Schultz produced a gun and pointed it at Harbor's head. When Harbor tried to get the gun, Schultz shot Harbor in the leg and chest.

{¶ 4} Harbor was able to push Schultz out the front door, and Schultz ran away. Harbor ran outside screaming for help. Harbor observed two young white men outside her home, and when she told them she had been shot and to chase Schultz, the two men followed Schultz. The two young males Harbor encountered outside her home were Defendant and Peter Roach. Along with Schultz and Angela Walton, the driver, they had planned to rob the Harbors.

{¶ 5} Evidence presented at his trial showed that Defendant planned the robbery, purchased the clothing Schultz wore when she

approached the Harbor residence, provided the weapon Schultz used, drew a map of the area around the Harbor home, purchased ammunition, and led the participants to the Harbor home. After the botched robbery attempt, Defendant, Schultz, and Walton fled to Arkansas.

Schultz and Walton later went to Maryland, where they were arrested. Roach was arrested in Springfield, Ohio. Defendant was arrested in March 2006 in Arkansas.

{¶ 6} Defendant was found guilty in 2006 following a jury trial of complicity to commit aggravated robbery, complicity to commit aggravated burglary, and complicity to commit felonious assault, all with firearm specifications. The trial court sentenced Defendant to prison terms totaling twenty-one years.

{¶ 7} We affirmed Defendant's conviction and sentence on direct appeal. *State v. Dixon*, Montgomery App. No. 21823, 2008-Ohio-755. While his direct appeal was pending, Defendant filed a petition for post-conviction relief pursuant to R.C. 2953.21. On July 27, 2009, the trial court filed a Decision and Entry denying Defendant's petition for post-conviction relief. Defendant timely appealed to this court from the trial court's decision denying his petition for post-conviction relief.

FIRST ASSIGNMENT OF ERROR

{¶ 8} "THE ABSENCE OF THE ALLEGATION OF THE NECESSARY MENS REA ELEMENT FOR AGGRAVATED ROBBERY IN THE INDICTMENT CONSTITUTES A STRUCTURAL DEFECT AND RENDERS THE RESULTING CONVICTION AND

SENTENCE THEREFOR VOID AB INITIO.”

{¶ 9} Citing *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 (Colon I), Defendant argues that because his indictment omitted the necessary mens rea element for aggravated robbery, that defect constitutes a structural error that renders his conviction and sentence for aggravated robbery void.

{¶ 10} “Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment.” *State v. Perry* (1967), 10 Ohio St.2d 175, at paragraph nine of the syllabus.

{¶ 11} Because Defendant clearly could have raised on direct appeal any defects in his indictment, res judicata now bars him from raising that issue as grounds for post-conviction relief. *Perry*. Furthermore, the rule announced in *Colon I* is prospective only, and is limited to those cases pending on the date *Colon I* was announced, April 9, 2008. *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 (*Colon II*), at ¶5. Defendant’s direct appeal was decided on February 22, 2008, and was not pending when *Colon I* was decided. Accordingly, *Colon* could not apply in this case.

{¶ 12} Defendant’s first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 13} "THE REFUSAL OF THE TRIAL COURT TO PERMIT SUBSTITUTION OF COUNSEL UPON NOTIFICATION BY THE DEFENDANT THAT COUNSEL HAD NOT PREPARED FOR TRIAL DEPRIVED APPELLANT OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL AND OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW AND CONSTITUTED GROUNDS TO GRANT A NEW TRIAL UPON MOTION THEREFOR."

{¶ 14} Defendant argues that the trial court abused its discretion when it denied his last minute request, made on the first day of trial, for a continuance in order to replace his retained counsel and obtain new counsel. This issue was raised by Defendant and rejected by this court in Defendant's direct appeal. *State v. Dixon, supra*, at ¶31-36. Accordingly, Defendant is barred by res judicata from relitigating that issue as a ground for post-conviction relief. *Perry*.

{¶ 15} Defendant's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 16} "THE REFUSAL OF THE TRIAL COURT TO GRANT THE MOTION FOR NEW TRIAL BASED UPON THE NEW EVIDENCE SET FORTH IN THE MOTION THEREFOR WAS CLEARLY ERRONEOUS AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW."

{¶ 17} Defendant argues that the trial court abused its discretion by denying a motion for a new trial that he filed. The notice of appeal that Defendant filed on August 19, 2009,

indicates that Defendant exercised his right of appeal from the trial court's July 27, 2009, decision and entry denying his petition for post-conviction relief. That notice of appeal does not identify the trial court's decision denying Defendant's motion for a new trial as the final order from which the appeal is taken.

App.R. 3(D) requires the notice to "designate the judgment, order, or part thereof appealed from." Accordingly, the issue of whether the trial court abused its discretion in denying Defendant's motion for a new trial is not properly before this court. *Baur v. Co-Ax Technology, Inc.*, Cuyahoga App. No. 88692, 2007-Ohio-3910.

{¶ 18} Defendant's third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

{¶ 19} "APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL THROUGHOUT THE PROCEEDINGS, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS."

{¶ 20} Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arose from counsel's performance. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must affirmatively demonstrate to a reasonable probability that were it not for counsel's errors, the result of the trial would have been different.

Id.; *State v. Bradley* (1989), 42 Ohio St.3d 136. Further, the threshold inquiry should be whether a defendant was prejudiced, not whether counsel's performance was deficient. *Strickland*.

{¶ 21} Defendant argues that he was deprived of the effective assistance of counsel at trial because his counsel failed to adequately prepare for trial and failed to present witnesses and evidence that Defendant wanted presented at trial.

{¶ 22} This same issue was raised by Defendant and rejected by this court in Defendant's direct appeal. *State v. Dixon, supra*, at ¶20-29. To that extent, this claim is now barred by res judicata as a ground for post-conviction relief. *Perry, supra*.

{¶ 23} Defendant's fourth assignment of error is overruled.

FIFTH ASSIGNMENT OF ERROR

{¶ 24} "THE APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE KNOWING PRESENTATION OF FALSE TESTIMONY AND THE WITHHOLDING OF EXCULPATORY EVIDENCE BY THE PROSECUTION."

{¶ 25} Defendant argues that the State engaged in misconduct in this case by presenting testimony it knew to be false, *Napue v. Illinois* (1959), 360 U.S.264, 79 S.Ct. 1173, 3 L.Ed.2d 1217, and by withholding exculpatory evidence, *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215.

{¶ 26} Defendant's petition alleged that the prosecutor at Defendant's trial engaged in misconduct by knowingly presenting the false testimony of Angela Walton and Devon Schultz, who

implicated Defendant in the crimes of which he was convicted. Defendant contends that neither witness had even mentioned Defendant in their initial statements to police. Defendant does not contend that those initial statements, which the State was required by Mont.Loc.R. 3.03(D)(2)(d) to provide Defendant at his arraignment, were unavailable to him for purposes of his prior direct appeal. Any such variance between their prior statements and trial testimony could have been used to impeach the witnesses' credibility. Evid.R. 613. However, Defendant's contention does not demonstrate that the two witnesses' trial testimony was false, or that the prosecutor knew it was false.

{¶ 27} Defendant supported his *Brady* claim with an affidavit of Tara Summers, who stated that she was in the Montgomery County Jail and subsequently in prison with Walton and Schultz, and that they said they planned to "get" Defendant Dixon in their trial testimony. That fact, even if true, does not demonstrate that the two witnesses' trial testimony was false. More importantly, for *Brady* purposes, while it might permit an attack on the witnesses' credibility, it does not constitute evidence that had the capacity to exculpate Defendant. Neither does it demonstrate that the prosecutor was aware of the matter.

{¶ 28} Defendant's fifth assignment of error is overruled. The judgment of the trial court will be affirmed.

DONOVAN, P.J., And BROGAN, J., concur.

Copies mailed to:

R. Lynn Nothstine, Esq.

William R. Dixon

Hon. A.J. Wagner