

COURT OF APPEALS  
RICHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

SYLVESTER BELCHER

Plaintiff-Appellant

-vs-

STUART HUDSON, WARDEN

Defendant-Appellee

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. W. Scott Gwin, J.

Hon. Patricia A. Delaney, J.

Case No. 2008CA0330

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,  
Case No. 08CV11480

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

June 30, 2009

APPEARANCES:

For Plaintiff-Appellant

SYLVESTER BELCHER, PRO SE  
Inmate # A520-5660  
Mansfield Correctional Institution  
P.O. Box 788  
Mansfield, OH 44901

For Defendant-Appellee

THELMA THOMAS PRICE  
150 East Gay Street  
16th Floor  
Columbus, OH 43215

*Farmer, P.J.*

{¶1} Appellant, Sylvester Belcher, is incarcerated in the Mansfield Correctional Institution in Mansfield, Ohio, after having been convicted of aggravated robbery, robbery, aggravated burglary, and kidnapping in the Court of Common Pleas for Cuyahoga County, Ohio.

{¶2} On July 28, 2008, appellant filed a petition for a writ of habeas corpus with the Court of Common Pleas for Richland County, Ohio, challenging the validity of the indictment under which he was convicted and therefore the warden's custody of him. On August 28, 2008, appellee, Warden Stuart Hudson, filed a motion to dismiss, claiming appellant has or had an adequate remedy at law. By journal entry filed November 24, 2008, the trial court agreed and dismissed the petition.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶4} "CUYAHOGA COUNTY COMMON PLEAS TRIAL COURT LACKED SUBJECT-MATTER JURISDICTION TO PROCEED."

I

{¶5} Appellant claims the trial court erred in finding that the Court of Common Pleas of Cuyahoga County, Ohio had jurisdiction to proceed against him as said court lacked subject matter jurisdiction because of an invalid indictment. We disagree.

{¶6} In dismissing appellant's petition for writ of habeas corpus, the trial court found appellant had an adequate remedy at law to challenge the validity and sufficiency of the indictment. Further, the trial court found *State v. Colon*, 118 Ohio St.3d 26, 2008-

Ohio-1624 (*Colon I*), did not apply given the Supreme Court of Ohio's subsequent ruling in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 (*Colon II*).

{¶7} A writ of habeas corpus is an extraordinary writ which will lie only when an individual is without an adequate remedy at law. *Burch v. Perini* (1981), 66 Ohio St.2d 174. R.C. 2725.01, which establishes which persons are entitled to a writ of habeas corpus, states the following:

{¶8} "Whoever is unlawfully restrained of his liberty, or entitled to the custody of another, of which custody such person is unlawfully deprived, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment, restraint, or deprivation."

{¶9} For the following reasons, we find the trial court's determination was correct.

{¶10} In *Colon I* at syllabus, the Supreme Court of Ohio held that a defendant does not waive a challenge to a defect in the indictment if it was raised for the first time on appeal, thereby implicitly finding a challenge to an indictment has an adequate remedy at law via the process of direct appeal.

{¶11} Furthermore, the *Colon II* court modified *Colon I*, and found the holding in *Colon I* regarding the lack of a "mens rea" in the indictment was prospective in application:

{¶12} "Our holding in *Colon I* is only prospective in nature, in accordance with our general policy that newly declared constitutional rules in criminal cases are applied prospectively, not retrospectively. In *State v. Evans* (1972), 32 Ohio St.2d 185, 61 O.O.2d 422, 291 N.E.2d 466, we stated that ' "application of a new rule of law to a pending appeal is not retrospective," and \* \* \* the new rule applie[s] to the cases

pending on the announcement date.' *Id.* at 186, 61 O.O.2d 422, 291 N.E.2d 466, quoting *State v. Lynn* (1966), 5 Ohio St.2d 106, 108, 34 O.O.2d 226, 214 N.E.2d 226.

{¶13} "We recently restated this principle in *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, 819 N.E.2d 687, at ¶ 6: 'A new judicial ruling may be applied only to cases that are pending on the announcement date. 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.' (Citations omitted.)" *Colon II* at ¶3-4.

{¶14} Appellant was convicted on December 11, 2006, and appealed his conviction via a direct appeal. Appellant did not raise the issue of a defective indictment. Our brethren from the Eighth District affirmed appellant's convictions. See, *State v. Belcher*, Cuyahoga App. No. 89254, 2007-Ohio-6317. A discretionary appeal to the Supreme Court of Ohio was denied on April 9, 2008. See, *State v. Belcher*, 117 Ohio St.3d 1460, 2008-Ohio-1635.

{¶15} *Colon I* was decided on April 9, 2008. Appellant's direct appeal was no longer pending on the date of the *Colon I* decision. Therefore, we find appellant has failed to establish his request for habeas corpus relief.

{¶16} The sole assignment of error is denied.

{¶17} The judgment of the Court of Common Pleas of Richland County, Ohio is hereby affirmed.

By Farmer, P.J

Gwin, J. and

Delaney, J. concur.

s/ Hon. Sheila G. Farmer

s/ Hon. W. Scott Gwin

s/ Hon. Patricia A. Delaney

JUDGES

SGF/jp 0610

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO  
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-vs-

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Defendant-Appellee

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JUDGMENT ENTRY

CASE NO. 2008CA0330

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Richland County, Ohio, is affirmed. Costs to appellant.

s/ Hon. Sheila G. Farmer

s/ Hon. W. Scott Gwin

s/ Hon. Patricia A. Delaney

JUDGES