

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Julie A. Edwards, P.J.
	:	W. Scott Gwin, J.
Plaintiff-Appellee	:	Sheila G. Farmer, J.
	:	
-vs-	:	Case No. 2009 AP 07 0038
	:	
	:	
RUSSELL J. RENICKER, JR.	:	<u>OPINION</u>
	:	
Defendant-Appellant	:	

CHARACTER OF PROCEEDING:	Criminal Appeal from Tuscarawas County Court of Common Pleas Case No. 2006 CR 06 0168
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	May 5, 2010
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APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
RYAN STYER Tuscarawas County Prosecuting Attorney	GARY L. GREIG 153 N. Broadway New Philadelphia, Ohio 44663

BY: ROBERT C. URBAN, JR.
Assistant Prosecuting Attorney
125 E. High Avenue
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Edwards, P.J.

{¶1} Appellant, Russell Renicker, appeals a judgment of the Tuscarawas County Common Pleas Court overruling his motion to vacate his sentence. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On June 6, 2006, appellant was indicted by the Tuscarawas County Grand Jury with one count of aggravated robbery in violation of R.C. 2911.01(A)(3). Following jury trial, he was convicted as charged and sentenced to 10 years incarceration. Appellant was convicted of mugging an 81-year-old woman in a mall parking lot.

{¶3} Appellant appealed his conviction and sentence to this court. On direct appeal, appellant argued that the culpable mental state for the “causing serious physical harm” element of aggravated robbery under R.C. 2911.01(A)(3) is recklessness, and the trial court erred by failing to instruct the jury that the requisite mental state for “causing serious physical harm” is recklessness. We agreed, but found the error to be harmless. Our opinion affirming his conviction and sentence was filed on January 22, 2008.

{¶4} Appellant filed a notice of appeal to the Ohio Supreme Court on March 5, 2008. In his notice of appeal, appellant argued in pertinent part:

{¶5} “This case involves a substantial constitutional issue in regards to the Court of Appeals finding that the trial court decision to not instruct on all elements of an offense was not a constitutional structural error violation under the 14th Amendment and Article I, Section 14 of the Ohio Constitution.”

{¶6} On April 9, 2008, the Ohio Supreme Court decided *State v. Colon*, 118 Ohio St.3d 26, 885 N.E.2d 917, 2008-Ohio-1624 (*Colon I*). In *Colon I* the court determined that an indictment for robbery in violation of R.C. 2911.02(A)(2) omitted an essential element of the crime by failing to charge a mens rea, i.e., that the defendant recklessly inflicted, attempted to inflict, or threatened to inflict physical harm. *Id.* The court determined that the indictment failed to charge an offense, which was a constitutional, structural error not waived by failing to raise that issue in the trial court. *Id.*

{¶7} The Ohio Supreme Court dismissed appellant's appeal as not involving any substantial constitutional question on July 7, 2008. On July 31, 2008, the Ohio Supreme Court decided *Colon II*, in which the court held that *Colon I* is only prospective in nature, and applied only to cases pending on appeal on the date *Colon I* was decided. *State v. Colon*, 119 Ohio St.3d 204, 893 N.E.2d 169, 2008-Ohio-3749.

{¶8} On July 2, 2009, appellant filed a motion captioned, "Motion To Return Defendant From Prison." In his motion, appellant argued that his indictment was defective and therefore void under *Colon I*, and because his direct appeal was pending on the date *Colon I* was decided, the rule of law announced in *Colon I* applied to him and he should be "returned" from prison. The state responded that appellant had waived the issue by not raising it on direct appeal, and further, the vehicle to challenge the legality of his incarceration is a writ of habeas corpus, not a motion to "return" from prison.

{¶9} The trial court held an oral hearing, but not an evidentiary hearing, on the motion. Following the hearing, the court overruled the motion, treating the motion as a motion to vacate appellant's conviction and sentence.

{¶10} Appellant assigns a single error to this court on appeal:

{¶11} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO VACATE SENTENCE IMPOSED UPON DEFENDANT APPELLANT, BASED UPON THE OHIO STATE SUPREME COURT DECISIONS IN THE CASES OF *STATE V. COLON* (APRIL 9, 2008) 118 OHIO ST.3d 26, 885 N.E.2D 917 (*COLON I*) AND *STATE V. COLON* (JULY 31, 2008), OHIO ST. APP. NOS. 2006-2139, 2006-2250, 2008 WL 2951211 (OHIO) (*COLON II*)."

{¶12} A motion to vacate a conviction and sentence is governed by R.C. 2953.21, which provides in pertinent part:

{¶13} "(A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States . . . may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

{¶14} "(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall 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 or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.”

{¶15} The transcript was filed in this Court on direct appeal on February 13, 2007. Appellant’s petition was filed on July 2, 2009. Therefore, appellant’s petition is untimely under R.C. 2953.21(A)(2).

{¶16} However, R.C. 2953.23 provides for an exception to the time requirements found in R.C. 2953.21(A)(2):

{¶17} “(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

{¶18} “(1) Both of the following apply:

{¶19} “(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner’s situation, and the petition asserts a claim based on that right.

{¶20} “(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.”

{¶21} In the instant case, the Ohio Supreme Court’s *Colon I* decision was announced after the expiration of the time in which appellant was required to file his motion to vacate his conviction, and under the clarification in *Colon II*, the new right applied to appellant’s situation because his case was on direct appeal when *Colon I* was decided. However, appellant failed to demonstrate under 2953.21(A)(1)(b) that but for constitutional error at trial, no reasonable factfinder would have found him guilty of the offense of which he was convicted.

{¶22} Appellant’s petition does not claim or argue based on the evidence at trial that but for constitutional error at trial, no reasonable factfinder would have found him guilty. Rather, appellant makes a general statement that his “indictment was defective and Mr. Renicker did not waive the defect by failing to raise the issue at trial.”

{¶23} The defect in the indictment is not enough in and of itself to demonstrate a *Colon* claim; the defendant must show that the error was structural error or plain error if he failed to object to the indictment at trial. Appellant makes no effort in his appellate brief to demonstrate that the error was structural error as the Ohio Supreme Court found in *Colon I*, in which the error in the indictment led to errors that permeated the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence. *Colon I*, supra, at ¶23. In

Colon II, the Ohio Supreme Court held that seldom will a defective indictment cause structural error, and therefore in most defective indictment cases, the court may analyze the error pursuant to a Crim. R. 52(B) plain-error analysis. *Colon II*, supra, at ¶8. Appellant also makes no attempt to demonstrate that the error was plain error. In fact, the transcripts of the trial were not transmitted with the record on appeal, and in no place in his petition before the trial court or in his brief does appellant cite to the transcript to demonstrate that the error in the indictment affected the trial.

{¶24} Further, in our opinion on direct appeal, we agreed with appellant that the trial court erred in not instructing the jury on “recklessly” as the appropriate mental state, but found such error to be harmless:

{¶25} “We find that the trial court committed error in refusing to give appellant’s requested instruction on recklessly as the trial court’s instruction on the harm element was incomplete. But we find that the failure to give said instruction was harmless error under Crim. R. 52(A). Crim. R. 52(A) provides: “Any error, defects, irregularity, or variance which does not affect substantial rights shall be disregarded.” Thus, we must apply the federal test of harmless error, which is stated in *Chapman v. California* (1967), 386 U.S. 18. *Chapman* requires that” * * * before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. * * *” *Chapman*, supra, at 24. Therefore, applying the *Chapman* test, we must examine the entire record to determine if the evidence clearly supports a guilty verdict beyond a reasonable doubt. See *State v. Mitchell* (1989), 60 Ohio App.3d 106, 109, 574 N.E.2d 573.

{¶26} “Based on the eyewitness testimony at trial, in particular the identification of the appellant as the perpetrator of a purse-snatching from an elderly woman, we cannot say that, but for the failure to give the alleged jury instruction the jury was misled or the outcome of the trial would have been different. The evidence, if believed, demonstrates beyond a reasonable doubt, the acts of appellant were done at least recklessly. Accordingly, the trial court's failure to give appellant's requested jury instruction on the reckless culpable mental state constitutes harmless error.” *State v. Renicker*, Tuscarawas App. No. 2006 AP 10 0059, 2008-Ohio-288, ¶21-22.

{¶27} Because appellant's petition was not timely filed and he failed to demonstrate grounds for the untimely filing under R.C. 2953.23, and because appellant did not show by clear and convincing evidence that, but for the failure to include the culpable mental state of recklessly in the indictment and/or the failure to instruct the jury on the required element of recklessly, no reasonable factfinder would have found appellant guilty, the court did not err in summarily overruling his motion.

{¶28} The assignment of error is overruled.

{¶29} The judgment of the Tuscarawas County Common Pleas Court is affirmed.

By: Edwards, P.J.

Gwin, J. and

Farmer, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/Sheila G. Farmer

JUDGES

JAE/r0223

