

[Cite as *State v. Gaston*, 2009-Ohio-3080.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92242

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CARL GASTON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-401570

BEFORE: McMonagle, J., Rocco, P.J., and Boyle, J.

RELEASED: June 25, 2009

JOURNALIZED:

FOR APPELLANT

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Carl Gaston, appeals the October 1, 2008 trial court judgment denying his motion for delayed postconviction relief and petition to vacate or set aside the judgment of conviction or sentence. We affirm.

{¶ 2} The record before us demonstrates that in 2001, Gaston pled guilty as indicted to aggravated robbery, kidnapping, theft, and failure to comply with the order or signal of a police officer; he was sentenced to 25 years in prison. He appealed, challenging various aspects of his sentence; the judgment was affirmed. *State v. Gaston*, Cuyahoga App. No. 79626, 2002-Ohio-506 (“*Gaston I*”). Gaston sought a delayed appeal to the Ohio Supreme Court; the leave to appeal was denied. *State v. Gaston*, 100 Ohio St.3d 1530, 2003-Ohio-6458, 800 N.E.2d 47.

{¶ 3} In September 2002, Gaston filed a motion to withdraw his plea, in which he claimed that he was unfairly coerced into entering the plea, his lawyer gave him erroneous sentencing advice, and the trial court improperly sentenced him. The court denied the motion, and Gaston again appealed. *State v. Gaston*, Cuyahoga App. No. 82628, 2003-Ohio-5825. The trial court’s judgment was affirmed. *Id.*

{¶ 4} In December 2003, Gaston filed an application with this court under App.R. 26(B) to reopen *Gaston I*. He argued that his appellate counsel was

ineffective for not arguing that: 1) his guilty plea was involuntary because the trial judge improperly injected herself into the plea bargaining process by making threats and promises, 2) trial counsel was ineffective, and 3) the trial court erred in not conducting a voir dire to determine whether the kidnapping and aggravated robbery charges were allied offenses. The application was denied. *State v. Gaston*, Cuyahoga App. No. 79626, 2007-Ohio-155. Gaston again sought a delayed appeal to the Ohio Supreme Court, and the Court again denied the application. *State v. Gaston*, 115 Ohio St.3d 1407, 2007-Ohio-4884, 873 N.E.2d 1313.

{¶ 5} In July 2008, Gaston filed a motion for delayed postconviction relief and petition to vacate or set aside judgment of conviction or sentence, contending that his aggravated robbery and kidnapping convictions should be vacated under *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, because the indictment failed to allege culpable mental states for those two crimes. The court denied Gaston's motion and petition. Gaston now challenges that judgment in a sole assignment of error.

{¶ 6} This court has declined to extend *Colon* to cases in which the defendant pleaded guilty to the indictment. See *State v. Lawrence*, Cuyahoga App. Nos. 90977 and 90978, 2009-Ohio-33, ¶29; *State v. Hayden*, Cuyahoga App. No. 90474, 2008-Ohio-6279, ¶5. The Third Appellate District has also taken the

view that a plea of guilty waives any defect in the indictment occasioned by a failure to allege a culpable mental state:

{¶ 7} “*** [the defendant] has waived any alleged errors in the indictment by pleading guilty to the offenses. The Court in *Colon* held 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.’ 118 Ohio St.3d 26, 2008-Ohio-1624, at ¶45, 885 N.E.2d 917. However, the defendant in *Colon* did not plead guilty like [the defendant] herein. ‘The plea of guilty is a complete admission of the defendant’s guilt.’ Crim.R. 11(B)(1). Accordingly, ‘[b]y entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime.’ *State v. Kitzler*, 3d Dist. No. 16-02-06, 2002-Ohio-5253, ¶12, citing *State v. Barnett* (1991), 73 Ohio App.3d 244, 248, 596 N.E.2d 1101. Therefore ‘[a] criminal defendant who pleads guilty is limited on appeal; he may only attack the voluntary, knowing, and intelligent nature of the plea and “may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.”’ *State v. Woods*, 3d Dist. No. 1-05-82, 2006-Ohio-2368, ¶14, quoting *State v. Spates*, 64 Ohio St.3d 269, 272, 1992-Ohio-130, 595 N.E.2d 351. See, also, *State v. Barton*, 108 Ohio St.3d 402, 2006-Ohio-1324, 844 N.E.2d 307, ¶73; *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶78; *Ross v. Auglaize Cty.*

Common Pleas Court (1972), 30 Ohio St.2d 323, 285 N.E.2d 25. This Court is not persuaded that the Court in *Colon* was also overruling the longstanding waiver rules with regard to guilty pleas. Accordingly, this Court finds that [the defendant] admitted guilt of the substantive crime of burglary and has, therefore, waived any alleged indictment defects for purposes of appeal.” (Some internal citations omitted.) *State v. Gant*, Allen App. No. 1-08-22, 2008-Ohio-5406, ¶13.

{¶ 8} In light of the above, because Gaston pled guilty to the indictment, *Colon* does not apply and his assignment of error is without merit.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

MARY J. BOYLE, J., CONCURS

KENNETH A. ROCCO, P.J., DISSENTS WITH OPINION

KENNETH A. ROCCO, P.J., DISSENTING:

{¶ 9} I write separately in dissent only because I believe this case should not be addressed on its merits. Instead, I would dismiss it; I do not believe Gaston properly has invoked this court's jurisdiction in this matter for the following reasons.

{¶ 10} As outlined by the majority opinion, Gaston has been involved in numerous appeals. Nevertheless, his brief fails to comply with the appellate rules, specifically, App.R. 12 and App.R. 16. Gaston has no excuse for submitting defective briefs. He is merely wasting this court's time and the judicial resources at his disposal.

{¶ 11} In the same manner, Gaston does not cite R.C. 2953.21 anywhere in his appellate brief, although his argument is obviously one for postconviction relief. Pursuant to R.C. 2953.23, his petition is untimely; therefore, the trial court lacked jurisdiction to consider it.

{¶ 12} Similarly, this court should not accept jurisdiction over this matter. The record reflects Gaston challenged the mens rea aspect of his crimes in his first appeal; therefore, his argument is barred by the doctrine of res judicata. This court should "not permit parties to so manipulate their course through the judicial system."

State v. Roberts (1982), 1 Ohio St.3d 36, 39.