

[Cite as *State v. McCuller*, 2011-Ohio-610.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94793

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHARLES MCCULLER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-455941

BEFORE: Rocco, J., Kilbane, A.J., and Jones, J.

RELEASED AND JOURNALIZED: February 10, 2011

ATTORNEYS FOR APPELLANT

Timothy Young
Ohio Public Defender

BY: Jeremy J. Masters
Assistant State Public Defender
Office of Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Mary McGrath
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

KENNETH A. ROCCO, J.:

{¶ 1} McCuller’s assignment of error is overruled.

{¶ 2} Affirmed. Defendant-appellant Charles McCuller appeals from the trial court order of resentencing after he was returned to court for notification of the postrelease control sanctions applicable to his 2005 conviction for robbery, with notices of prior conviction.¹

{¶ 3} McCuller presents one assignment of error. He argues that since his original sentence was void, his original conviction also was void, and thus, this “is his first valid opportunity to appeal his convictions [sic].” On this basis, he complains that his indictment for the offense of robbery in this case was defective, the defect permeated the entire trial, and his conviction should be reversed due to “structural error,” as set forth in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169 (“*Colon II*”).

{¶ 4} McCuller’s argument is rejected on the authority of *State v. Fischer*, Slip Opinion No. 2010-Ohio-6238. His assignment of error, accordingly, is overruled. Since he raises no claim that the trial court committed error during the resentencing hearing, his sentence is affirmed.

{¶ 5} This court first addressed McCuller’s underlying convictions in *State v. McCuller*, Cuyahoga App. No. 86592, 2006-Ohio-302 (“*McCuller I*”). Therein, he claimed

¹McCuller also was convicted of possession of crack cocaine, but he has served his sentence for that offense and raises no challenge to that conviction in this appeal.

the following errors occurred during trial: 1) the prosecutor engaged in misconduct; 2) the trial court admitted improper “other acts” evidence; 3) his counsel rendered ineffective assistance; and, 4) his convictions were against the manifest weight of the evidence. While his appeal was pending, McCuller also filed a petition for postconviction relief, which the trial court denied.

{¶ 6} In *McCuller I*, this court reviewed the record of his trial and found none of McCuller’s claims had merit; therefore, on January 26, 2006, his convictions were affirmed. The following year, this court additionally affirmed the trial court’s denial of his petition for postconviction relief. *State v. McCuller*, Cuyahoga App. No. 89834, 2007-Ohio-6301 (“*McCuller II*”).

{¶ 7} McCuller’s subsequent attempt to appeal the decision in *McCuller II* to the supreme court proved unsuccessful. *State v. McCuller*, 117 Ohio St.3d 1478, 2008-Ohio-1841, 884 N.E.2d 1110 (Table).

{¶ 8} In April 2008, the Ohio Supreme Court issued its decision in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 (“*Colon I*”). In June 2008, McCuller filed in this court an application to reopen his appeal. *State v. McCuller*, Cuyahoga App. No. 86592, 2009-Ohio-2485 (“*McCuller III*”).

{¶ 9} He argued in *McCuller III* that his application should be granted on the basis that his appellate counsel “was ineffective because he did not argue that the indictment was defective for not stating a mens rea element.” This court dismissed his application as untimely, but further noted that “[a]ppellate counsel is not deficient for failing to anticipate developments in the law * * * .”

{¶ 10} McCuller’s subsequent attempt to appeal that decision to the supreme court also proved unsuccessful. *State v. McCuller*, 122 Ohio St.3d 1507, 2009-Ohio-4233, 912 N.E.2d 110 (Table).

{¶ 11} In December 2009, McCuller filed a pro se motion in the trial court “to vacate a void sentence.” McCuller pointed out that the journal entry of his convictions in this case did not include postrelease control, as required by R.C. 2967.28. The trial court acted promptly in ordering McCuller returned from prison for a resentencing hearing.

{¶ 12} The trial court conducted the resentencing hearing on February 4, 2010. After permitting the parties to speak, the trial court noted that McCuller already had served his sentence on the conviction for drug possession, but that the court continued to believe a six-year term for the robbery conviction was appropriate.

{¶ 13} The trial court thus imposed a six-year term for his robbery conviction and notified McCuller of the mandatory three-year period of postrelease control. Although

McCuller orally raised the argument that his conviction was void based upon *Colon II*, the trial court declined to address it.

{¶ 14} McCuller filed a timely appeal from the order of resentencing, but presents only the following assignment of error.

{¶ 15} “I. The trial court allowed structural error to develop in Mr. McCuller’s case when[:] (1) it proceeded on an indictment that included no mens rea for the physical harm element of robbery; (2) the State did not attempt to prove the element of recklessness; (3) the trial court failed to instruct the jury on the element of recklessness regarding the robbery; and (4) the State treated the physical harm element of robbery as strict liability. (August 26, 2004 Indictment; March 21, 2005 Transcript, p. 130-132; March 23, 2005 Transcript, p. 235, 255-256.)”

{¶ 16} McCuller argues that, because the trial court failed to include postrelease control in his original sentence, his sentence was void. He extends this argument to claim that his original conviction for robbery was thus a “nullity,” his original appeal of that conviction was “void,” and, therefore, he may treat the instant appeal as his “first valid opportunity to appeal.”

{¶ 17} On that premise, and based upon the decisions in *Colon I* and *Colon II*, McCuller argues the indictment against him omitted a mens rea for the offense of robbery,

creating “structural error” that permeated his entire trial, requiring reversal of that conviction. McCuller’s arguments, however, are rejected on the authority of *Fischer* and *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26.

{¶ 18} In *Fischer*, the Ohio Supreme Court stated the following at paragraphs two, three, and four of the syllabus:

{¶ 19} “2. The new sentencing hearing to which an offender is entitled * * * *is limited to proper imposition of postrelease control.* * * *

{¶ 20} “3. Although the doctrine of res judicata does not preclude review of a void

{¶ 21} sentence, res judicata *still applies to other aspects of the merits of a conviction*, including the *determination of guilt and the lawful elements of the ensuing sentence.*

{¶ 22} “4. *The scope of an appeal from a resentencing hearing in which a mandatory term of postrelease control is imposed is limited to issues arising at the resentencing hearing.*”

(Emphasis added)

{¶ 23} McCuller’s appeals from his convictions previously were determined. “[R]emaining claims, which [do] not involve a void sentence or judgment, [are] barred by res judicata.” *Id.*, ¶136. The trial court in this case, therefore, properly limited the scope of McCuller’s resentencing hearing. Since McCuller presents no argument in this appeal

relating to the appropriateness of the trial court’s actions at his resentencing hearing, the trial court’s order must be affirmed pursuant to paragraph four of the syllabus in *Fischer*.

{¶ 24} Moreover, in *Horner*, the supreme court overruled *Colon I* and also, to a great extent, *Colon II*. The supreme court’s analysis in *Horner* leads to the conclusion that the offense of robbery under R.C. 2911.02(A)(2) is a “strict liability” offense. The indictment against McCuller in this case, therefore, was not defective. *Id.*, ¶151-55.

For the foregoing reasons, M

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. The defendant’s conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

KENNETH A. ROCCO, JUDGE

MARY EILEEN KILBANE, A.J., and

LARRY A. JONES, J., CONCUR