

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 24518

Appellee

v.

MICHAEL E. COOL

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 96 07 1775(A)

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 26, 2009

CARR, Judge.

{¶1} Appellant, Michael E. Cool, appeals the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On August 28, 1996, Cool pled guilty to five counts of robbery, one count under R.C. 2911.02(A)(3) and four counts under R.C. 2911.02(A)(2). Cool was sentenced by entry dated September 25, 1996.

{¶3} On appeal, Cool raised several assignments of error relating to the performance of trial counsel. This Court affirmed Cool's conviction in *State v. Cool* (Oct. 1, 1997), 9th Dist. No. 18148. On August 20, 1998, Cool filed a petition for post-conviction relief. The trial court denied Cool's petition on the grounds that it was untimely filed and barred by res judicata. On appeal, Cool claimed the trial court erred by denying his petition for post-conviction relief for being untimely. This Court affirmed the trial court's denial in *State v. Cool* (Oct. 13, 1999), 9th

Dist. App. No. 19329. Thereafter, Cool moved the trial Court to vacate his plea and sentence on the grounds that the trial court did not substantially comply with Crim.R. 11 and that the trial court misconstrued the relevant sentencing statute. His motion was denied by the trial court on June 10, 1999. Cool again appealed the case to this Court. In *State v. Cool* (Mar. 22, 2000), 9th Dist. No. 19685, this Court affirmed the trial court's denial. In reaching its decision, this Court held that Cool was statutorily barred from bringing successive petitions for post-conviction relief and, furthermore, that his claims relating to the sentencing statute were barred by res judicata.

{¶4} Subsequently, Cool was granted judicial release by entry dated November 5, 2003. Thereafter, he violated the terms of community control and was sent back to prison by entry dated May 21, 2004.

{¶5} On September 23, 2008, Cool filed a motion to challenge the subject matter jurisdiction of the trial court on the grounds that the indictment was defective because it did not contain the mens rea element of recklessness. The State responded on September 25, 2008. The trial court denied the motion on October 27, 2008.

{¶6} Cool appeals the October 27, 2008 judgment entry. He has raised five assignments of error. This Court consolidates Cool's assignments of error to facilitate review.

II.

ASSIGNMENT OF ERROR I

“THE STATE FAILED TO INFORM APPELLANT OF THE ESSENTIAL MENS REA ELEMENT OF RECKLESSNESS IN THE INDICTMENT PRESENTED AGAINST HIM IN COUNTS 2, 3, 4, 5, OF THE INDICTMENT FOR THE CHARGES OF ROBBERY R.C. 2911.02(A)(2). MAKING HIS INDICTMENT VOID. THEREFORE, THE TRIAL COURT LACKED JURISDICTION OVER THE SUBJECT MATTER OF THE CASE. OHIO CONST. ART. I § 10; USCA CONSTITUTION AMD'S. 5, 6, 14.” (sic)

ASSIGNMENT OF ERROR II

“APPELLANT’S PLEA OF GUILTY IS VOID DUE TO HE WAS NEVER INFORMED OF THE TRUE NATURE OF THE OFFENSE IN ACCORDANCE TO CRIM. R. 11 (C)(2)(a), AS A DIRECT RESULT OF THE ELEMENT OF THE OFFENSE BEING OMITTED FROM HIS INDICTMENT. VIOLATING HIS DUE PROCESS RIGHTS: OH. CONST. ART I § 10; USCA AMD. 14.” (sic)

ASSIGNMENT OF ERROR III

“TRIAL COURT DID NOT MEET THEIR ‘BURDEN OF PROOF’ TO SHOW THAT THE TRIAL COURT DOES IN FACT HAVE JURISDICTION OVER THE APPELLANT’S INDICTMENT ONCE SUBJECT MATTER JURISDICTION IS CHALLENGED. VIOLATING THE APPELLANT’S OHIO CONST. ART. I § 10; USCA CONST. AMD’S 5, 6, 14.” (sic)

ASSIGNMENT OF ERROR IV

“STATE V. COLON 2008-OHIO-1624 [COLON I] DOES NOT ANNOUNCE A ‘NEW CRIMINAL RULE OF PROCEDURE’ TO BAR RETROACTIVE APPLICATION OF THEIR DECISION, THE OHIO SUPREME COURT ONLY MADE A ‘NEW JUDICIAL DECISION’ THAT EXTENDED THE EXISTING CRIM.R.12 (C). TO NOT ALLOW COLON’S PRECEDENCE TO BE UTILIZED BY THE APPELLANT VIOLATES HIS RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION. USCA CONST. AMD. 5 AND 14; OHIO CONST. AMD. ART. I § 10.” (sic)

ASSIGNMENT OF ERROR V

“STRUCTURAL ERROR DERIVES FROM PLAIN ERROR AND MR. COOL’S ROBBERY CHARGES UNDER RC §2911.02(A)(2) AND (A)(3) AMOUNT TO STRUCTURAL ERROR DUE TO THE FACT THAT FAILING TO STATE THE ESSENTIAL ELEMENT OF RECKLESSNESS IN THE INDICTMENT PERMEATES THE ENTIRE CRIMINAL PROCEEDING. VIOLATING APPELLANT’S RIGHTS TO DUE PROCESS OF LAW. OH. CONST. ART. I § 10; USCA CONST. AMD. 5 AND 14.” (sic)

{¶7} Cool argues his conviction is void because the indictment lacked the requisite mens rea element. This Court disagrees.

{¶8} On September 23, 2008, Cool filed a motion with the trial court which he captioned, “Motion to Challenge the Subject Matter Jurisdiction of the Trial Court in Case No. CR1996 07 1775(A).” In this motion, Cool cited to the Supreme Court of Ohio’s ruling in *State*

v. Colon, 118 Ohio St.3d 26, 2008-Ohio-1624, and argued that his due process rights had been violated because the indictment lacked the requisite mens rea element to convict him of the robbery charges. Cool claimed that a deficiency in the indictment rendered the trial court without subject matter jurisdiction over the case and, therefore, his conviction is void.

{¶9} In support of his claim that the trial court lacked subject matter jurisdiction, Cool cited to *State v. Cimpritz* (1953), 158 Ohio St. 490, paragraph six of the syllabus, for the proposition of law that a judgment of conviction based on a defective indictment is void and may be attacked in a collateral proceeding. However, the Supreme Court of Ohio has since clarified the *Cimpritz* ruling by noting that the case involved a direct appeal from a judgment of conviction and not a collateral attack on such a judgment. *Midling v. Perrini* (1968), 14 Ohio St.2d 106, 107. “Hence, it would have been sufficient to use the word ‘voidable’ instead of ‘void’ in that paragraph of the syllabus. Also, no question with respect to collateral attack was involved in the case, so that any statement with respect thereto may be disregarded.” *Id.* See, also, *State v. Wozniak* (1961), 172 Ohio St. 517, 522. The high court then went on to note that, “where a defendant while represented by counsel pleads guilty to an offense and is sentenced, the judgment of conviction cannot be collaterally attacked on the ground that the indictment fails to state one or more essential elements of the offense.” *Midling*, 14 Ohio St.2d at 107, citing *Evans v. Sacks* (1962), 173 Ohio St. 116; *Mills v. Maxwell* (1963), 174 Ohio St. 523; *Perry v. Maxwell* (1963), 175 Ohio St. 369, 370. A challenge to the sufficiency of the indictment may only be attacked directly on appeal. *Midling*, 14 Ohio St.2d at 107, citing *State v. Perry* (1967), 10 Ohio St.2d 175.

{¶10} After pleading guilty to five counts of robbery, Cool filed several appeals to this Court. Because Cool did not properly raise issues relating to the trial court’s jurisdiction over

the subject matter of this case in his first appeal, his motion must be construed as a petition for post-conviction relief. “Where a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21.” *State v. Reynolds* (1997), 79 Ohio St.3d 158, at syllabus.

{¶11} R.C. 2953.21 establishes procedures for filing a petition for post-conviction relief.

R.C. 2953.21(A)(2) provides, in part, that:

“[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.”

{¶12} As noted above, Cool has previously filed petitions for post-conviction relief in this case. Successive petitions for post-conviction relief are governed by R.C. 2953.23. Under R.C. 2953.23(A), a trial court is forbidden from entertaining a second or successive petition for post-conviction relief unless it meets two conditions. First, the petitioner must show either that he was unavoidably prevented from discovering the facts upon which he relies in the petition, or that the United States Supreme Court has, since his last petition, recognized a new federal or state right that applies retroactively to the petitioner. Second, the petitioner must show by clear and convincing evidence that a reasonable factfinder would not have found him guilty but for constitutional error at trial. See R.C. 2953.23(A)(1).

{¶13} Here, Cool has not pointed to anything in the record which would support the contention that he was denied the opportunity to discover facts that he would have relied upon in his initial petition. Nor has Cool pointed to a United States Supreme Court ruling which

recognized a new federal or state right that applied to him. Cool did not raise any issues relating to the indictment in his three previous appeals to this Court.

{¶14} Furthermore, there was no trial in this case because Cool, while represented by counsel, pled guilty to the five counts of robbery. The Supreme Court of Ohio has noted that “[t]he plea of guilty is a complete admission of the defendant’s guilt.” *State v. Barton*, 108 Ohio St.3d 402, 2006-Ohio-1324, at ¶73, quoting Crim.R. 11(B)(1). “By 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. Barnett* (1991), 73 Ohio App.3d 244, 248, quoting *United States v. Broce* (1989), 488 U.S. 563, 570. Therefore, Cool has no basis to claim that a reasonable factfinder would not have found him guilty but for constitutional error at trial. It follows that Cool’s claims relating to defects in the indictment are barred under R.C. 2953.23.

{¶15} Cool’s five assignments of error are overruled.

III.

{¶16} Cool’s five assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

MICHAEL EUGENE COOL, pro se, Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.