

[Cite as *State v. Portis*, 2009-Ohio-3770.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2008 CA 62
v.	:	T.C. NO. 08 CR 314
JARYLD PORTIS	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

**OPINION**

Rendered on the 31<sup>st</sup> day of July, 2009.

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HARSHA, J. (by assignment)

{¶ 1} In October of 2007, the Clark County Grand Jury indicted appellant, Jaryld Portis, on one count of robbery, in violation of R.C. 2911.02(A)(2). On the date Portis’s trial was originally scheduled to begin, he requested new counsel. The court granted this motion and rescheduled the trial for April 21, 2008. On that date the grand jury reindicted Portis on the same charge because the original indictment did not include the culpable

mental state. The parties then entered into an agreement wherein in exchange for an agreed six-year sentence, Portis would waive the twenty-four hour rule and enter a guilty plea that day. The trial court accepted Portis's plea and sentenced him accordingly.

{¶ 2} Portis now argues that his trial counsel provided ineffective assistance because he failed to “sufficiently prepare for trial” and “identify the defective indictment.” However, when Portis pled guilty to the subsequent indictment, he waived any issues relating to ineffective assistance of counsel because he has not alleged his attorney's actions rendered his plea invalid.

{¶ 3} To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) his attorney's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Issa* (2001), 93 Ohio St.3d 49, 67. To demonstrate prejudice, a defendant must show a reasonable probability exists that, but for the alleged errors, the result of the proceeding would have been different. *State v. White* (1998), 82 Ohio St.3d 16, 23; *State v. Bradley* (1989), 42 Ohio St.3d 136, at paragraph three of the syllabus.

{¶ 4} This court has consistently held that “a defendant waives any deficiency in the indictment by failing to object to the indictment and pleading guilty to the offense.” *State v. Edwards*, Montgomery App. No. 22648, 2009-Ohio-1408, at ¶34. See, also, *State v. Barton*, 108 Ohio St.3d 402, 2006-Ohio-1324, at ¶12; *State v. Easter*, Montgomery App. No. 22487, 2008-Ohio-6038, at ¶27. Other courts have taken a similar approach. See *State v. Morgan*, Hamilton App. No. C-080011, 2009-Ohio-1370, at ¶25; *State v. McGinnis*, Van Wert App. No. 15-08-07, 2008-Ohio-6038, at ¶26; *State v. Haney*, Athens App. No. 08CA1, 2009-Ohio-149, at ¶18; *State v. Mickens*, Franklin App. Nos. 08AP-743, 08AP-744,

and 08AP-745, 2009-Ohio-2554, at ¶59. This is true even when an indictment fails to include an essential element of the charged offense. *Edwards; Easter, Morgan; McGinnis; Haney; Mickens*. Because there is no trial after a guilty plea, structural error as identified in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 (*Colon I*) would not be implicated. See *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 (*Colon II*). See, also, *Easter*, supra, at ¶7.

{¶ 5} A defendant who pleads guilty is limited on appeal to challenging the knowing, voluntary, and intelligent nature of the plea. *Easter* at ¶27. See, also, *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, at ¶78. A guilty plea acts as waiver and cannot form the basis of any claimed error under Crim.R. 52(B). *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶23. Therefore, a defendant may not raise independent claims relating to the deprivation of constitutional rights, including ineffective assistance of counsel, that occurred prior to the entry of the plea. See, e.g., *State v. Spates*, 64 Ohio St.3d 269, 1992-Ohio-130, paragraph two of the syllabus.

{¶ 6} Portis claims that his trial attorney could not have been adequately prepared to represent him because the court appointed Portis new counsel only two months before his trial date, which did not give this attorney time to put together a defense. He further contends that his attorney's lack of preparation is demonstrated by counsel's failure to discover the deficiency in the indictment and move for a dismissal prior to the grand jury indicting him a second time, and by counsel's filing of a motion to suppress out of rule.

{¶ 7} Portis, however, does not explain how, or even if, the allegedly deficient performance affected his plea. The record shows that the only reason the State reindicted Portis was to include the applicable mens rea requirement. No additional charges were

included and no additional facts were alleged. And if his attorney had been successful in getting the first indictment dismissed, Portis has not pointed to anything in the record that would have prevented the State from presenting the case to the grand jury again. Simply put, even if we were to consider the merits of his argument, we would conclude that Portis failed to show he received ineffective assistance of counsel.<sup>1</sup>

{¶ 8} Because Portis does not claim the alleged ineffective representation affected his plea, he has waived the alleged defects in the first indictment and any claims relating to counsel's trial preparation. We overrule Portis's sole assignment of error.

JUDGMENT AFFIRMED.

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FAIN, J. and FROELICH, J., concur.

(Hon. William H. Harsha, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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<sup>1</sup>In a related case, the majority found no plain error where Zackene Portis, appellant's brother and accomplice, failed to object to the lack of a mens rea element in the indictment charging Zackene for aggravated robbery arising from the same incident. See, *State v. Portis*, Clark App. No. 2008 CA 22, 2009-Ohio-1776.