

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 08AP-937
v.	:	(C.P.C. No. 01CR-4078)
	:	
Daniel Ingram, Jr.,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 11, 2009

Ron O'Brien, Prosecuting Attorney, and *Kimberly Bond*, for appellee.

Daniel Ingram, Jr., pro se.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Daniel Ingram, Jr., appeals from a judgment of the Franklin County Court of Common Pleas denying his motion to vacate indictment and motion for new trial. Because the trial court properly denied defendant's motions, we affirm.

I. Procedural History

{¶2} By indictment filed on July 19, 2001, defendant was charged with one count of aggravated burglary, two counts of aggravated robbery, four counts of robbery and two counts of abduction, all arising out of a home invasion at 33 East 13th Avenue on July 10, 2001. A jury trial commenced on October 9, 2001 and resulted in a verdict finding defendant guilty of all charges except two counts of aggravated robbery. Through a judgment entry filed on November 2, 2001, the trial court sentenced defendant to a total of 15 years. Defendant appealed, contending preemptory challenges improperly were used to remove two African-American jurors from the jury pool in violation of *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712. On September 24, 2004, this court affirmed the trial court's judgment. See *State v. Ingram*, 10th Dist. No. 01AP-1343, 2002-Ohio-5012.

{¶3} Relying on *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, defendant on October 26, 2005 filed a motion to correct illegal sentence, seeking to have his sentences run concurrently for a total of eight years. On June 20, 2007, the court denied defendant's motion. The trial court treated his motion as a petition for post-conviction relief and concluded not only that the motion was untimely, but that res judicata barred it because the issues could have been raised on direct appeal.

{¶4} On January 14, 2008, defendant filed a motion to vacate voidable sentence pursuant to Civ.R. 60(B). Concluding defendant's reliance on Civ.R. 60(B) was misplaced, the court treated the motion as a successive petition for post-conviction relief and denied it.

{¶5} Defendant followed the trial court's ruling with a motion to vacate the indictment and a motion for new trial filed on June 25, 2008. In them, defendant contended his indictment was defective under *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"). Defendant requested that the court "review this case and remand it for a New Trial and dismiss all charges in relation to the indictment in the case forthwith." On October 17, 2008, the trial court denied defendant's motion to vacate and motion for new trial. Noting *Colon* is to be applied prospectively only, the court also concluded a petition for post-conviction relief was defendant's only avenue of relief. Because defendant previously filed a petition for post-conviction relief, the court decided defendant's most recent motion represented a successive petition that the court properly should deny. The court further noted res judicata barred defendant's motion because defendant should have raised the issue on appeal.

{¶6} Defendant appeals, assigning two errors:

ASSIGNMENT OF ERROR NO 1

THE APPELLANT WAS DENY HIS RIGHT'S TO FAIR TRIAL WHERE THE JURY WAS NOT INFORMED OF THE DEFECTIVE IN THE INDICTMENT.

ASSIGNMENT OF ERROR NO. II:

THE TRIAL COURT ERRED IN CONVICTING APPELLANT OF THE ROBBERY COUNTS IN CASE 01CR074078. [sic passim.]

II. Assignments of Error

{¶7} Because defendant's assignments of error are interrelated, we address them jointly. Together they contend the trial court should have granted defendant's motion to vacate and motion for new trial because his indictment was fatally defective under the Supreme Court of Ohio's recent decision in *Colon I*.

A. Motion to Vacate

{¶8} Defendant's motion to vacate, also referred to as a petition for post-conviction relief pursuant to R.C. 2953.21, is a collateral civil attack on a criminal judgment, not an appeal of the judgment. *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111. "It is a means to reach constitutional issues which would otherwise be impossible to reach because the evidence supporting those issues is not contained in the record." *State v. Murphy* (Dec. 26, 2000), 10th Dist. No. 00AP-233, discretionary appeal not allowed (2001), 92 Ohio St.3d 1441. R.C. 2953.21 affords a prisoner post-conviction relief "only if the court can find that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Ohio Constitution or the United States Constitution." *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph four of the syllabus. A post-conviction petition does not provide a petitioner a second opportunity to litigate his or her conviction. *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321, ¶32; *Murphy*, supra.

{¶9} Effective September 21, 1995, R.C. 2953.21 was amended to require that a petition under R.C. 2953.21(A) be filed "no later than one hundred eighty days after the date on which the trial transcript was filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication[.]" R.C. 2953.21(A)(2). Because defendant's sentence, journalized by judgment entry filed November 2, 2001, occurred after the effective date of amended R.C. 2953.21, defendant was required to file his petition within 180 days after the date on which the trial transcript was filed in the court of appeals in the direct appeal of the judgment of conviction.

{¶10} Defendant's trial transcript was filed in this court on March 14, 2002 for purposes of his direct appeal. Defendant filed his motion to vacate his indictment on June 25, 2008, making it untimely and leaving the trial court without jurisdiction to consider it. *State v. Rippey*, 10th Dist. No. 06AP-1229, 2007-Ohio-4521; *State v. Robinson*, 10th Dist. No. 06AP-368, 2006-Ohio-6649; *State v. Bivens*, 10th Dist. No. 05AP-1270, 2006-Ohio-4340.

{¶11} Pursuant to R.C. 2953.23(A), a court may not entertain an untimely petition unless defendant initially demonstrates either (1) he is unavoidably prevented from discovering facts necessary for the claim for relief, or (2) the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in defendant's situation. R.C. 2953.23(A)(1)(a). If defendant were able to satisfy one of those two conditions, R.C. 2953.23(A) requires he also demonstrate that but for the constitutional error at trial, no reasonable fact finder would have found him guilty of the offenses of which he was convicted. R.C. 2953.23(A)(1)(b). Defendant apparently attempts to circumvent the untimeliness of his motion by pointing to the Supreme Court of Ohio's opinion in *Colon I* and suggesting it creates a new right that applies to his situation.

{¶12} Apart from the other difficulties defendant may have in attempting to fall within the provisions of R.C. 2953.23(A)(1)(a), he cannot meet the retroactivity requirement. In *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II*"), the Supreme Court of Ohio reconsidered *Colon I* and specifically stated that its decision in *Colon I* set forth a holding that "is only prospective in nature."

{¶13} As the Supreme Court explained in *Colon II*, to apply *Colon I* prospectively is "in accordance with our general policy that newly declared constitutional rules in

criminal cases are applied prospectively, not retrospectively." *Id.* at ¶3. As a result, "the new rule applie[s] to the cases pending on the announcement date" of *Colon I*. *Id.*, quoting *State v. Evans* (1972), 32 Ohio St.2d 185, 186. "The new judicial ruling may not be applied retroactively to a conviction that has become final, i.e., where the accused has exhausted all of his appellate remedies." *Id.* at ¶4, quoting *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, ¶6.

{¶14} Defendant's case became final when defendant did not appeal this court's decision affirming his convictions to the Supreme Court of Ohio. Because his judgment was final long before *Colon I* was announced, *Colon I* does not apply to defendant's conviction. *Colon II*, at ¶3. Accordingly, the common pleas court was without jurisdiction to consider defendant's untimely motion.

B. Motion for New Trial

{¶15} Defendant also employed Crim.R. 33 in seeking application of *Colon I* to the charges in his indictment. Crim.R. 33 governs motions for new trial and sets forth the grounds for securing a new trial. See Crim.R. 33(A). None of the grounds specifically addresses a subsequent Supreme Court case setting forth a new constitutional principal, rule or right. While Crim.R. 33(A)(5) provides that an error of law occurring at the trial is a basis for granting a new trial, the case law applying that provision, in accordance with the language of the provision, typically deals with erroneous rulings while the case was pending in the trial court. See, e.g., *State v. Cherukuri* (1992), 79 Ohio App.3d 228 (concluding defendant not entitled to new trial because defendant failed to object to the allegedly inadmissible evidence).

{¶16} Even if defendant could fit his motion within the parameters of Crim.R. 33(A), Crim.R. 33(B) specifies the time limit for filing a motion for new trial. According to Crim.R. 33(B), application for a new trial is to be made by motion "filed within fourteen days after the verdict was rendered * * * unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial[.]" In those circumstances, "the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein."

{¶17} Defendant did not file his motion within 14 days after the verdict in his case was rendered; nor did defendant seek a trial court ruling that defendant was unavoidably prevented from filing a motion within the time limits set forth in the rule. As a result, defendant's motion for new trial fails to comply with the requirements of Crim.R. 33. The trial court thus did not err in denying the motion.

{¶18} For the foregoing reasons, defendant's two assignments of error are overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

BROWN and SADLER, JJ., concur.
