

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 09AP-46
v.	:	(C.P.C. No. 05CR01-0600)
	:	
Robert L. Smith,	:	(ACCELERATED CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on June 30, 2009

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*Ron O'Brien*, Prosecuting Attorney, and *Sheryl L. Prichard*,  
for appellee.

*Robert L. Smith*, pro se.

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APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, Robert L. Smith ("appellant"), appeals from the decision and judgment of the Franklin County Court of Common Pleas denying his motion to void judgment. For the reasons that follow, we affirm.

{¶2} On January 28, 2005, appellant was indicted by a Franklin County Grand Jury on 21 counts of second-degree felony robbery under R.C. 2911.02(A)(2), and 21

counts of third-degree felony robbery under R.C. 2911.02(A)(3). On September 12, 2005, appellant pled guilty to the 21 counts of third-degree felony robbery, and the remaining counts were dismissed. The court followed the joint sentencing recommendation of the parties, imposing a total sentence of 20 years.

{¶3} On July 16, 2008, appellant filed a motion for delayed appeal to appeal his conviction and sentence based upon *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"). On August 28, 2008, this court denied leave to appeal. *State v. Smith*, 10th Dist. No. 08AP-598, 2008-Ohio-4375.

{¶4} On August 11, 2008, appellant filed a motion to void his judgment pursuant to Civ.R. 60(B). The trial court considered the motion as a post-conviction petition and, on August 18, 2008, denied the petition as untimely and barred by the doctrine of res judicata.

{¶5} Appellant timely appealed asserting the following assignment of error:

BY FAILING TO CHARGE ANY LEVEL OF MENS REA FOR THE SERIOUS PHYSICAL INJURY ELEMENT OF ROB[B]ERY, UNDER [R.C.] 2911.02(A)(3), THE INDICTMENT FAILED TO PROPERLY CHARGE MR. SMITH AND FAILED TO GIVE HIM NOTICE OF THE CHARGES AGAINST HIM. THIS ERROR VIOLATED MR. SMITH'S CONSTITUTIONAL RIGHT OF INDICTMENT BY A GRAND JURY AND TO DUE PROCESS THEREFORE, THE COURT ABUSED [ITS] DISCRETION WHEN IT DENIED THE MOTION TO ARREST OR VOID JUDGMENT THAT ASSERTED THAT THE TRIAL COURT LACKED JURISDICTION.

{¶6} Initially, we note that appellant sought relief under Civ.R. 60(B). However, the trial court properly considered the motion as a petition for post-conviction relief. See *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545.

{¶7} R.C. 2953.21(A)(2) provides that such a post-conviction petition must be filed no later than 180 days after the expiration of the time for filing an appeal. In this case, there is no question that appellant's motion was filed more than 180 days after the expiration of the time for filing appeal. R.C. 2953.23(A) includes narrow exceptions that allow a trial court to entertain an untimely filed petition. R.C. 2953.23(A)(1)(a) permits consideration of an untimely filed petition where:

Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

{¶8} Appellant cannot satisfy either of these requirements for filing an untimely post-conviction relief petition. In support of his claim for post-conviction relief, appellant relied on the Supreme Court of Ohio's decision in *Colon I*, in which the court held that failure to include a mental state in an indictment charging robbery in violation of R.C. 2911.02(A)(2) constitutes structural error that cannot be waived by a defendant's failure to raise any objection to the indictment at the trial court level.

{¶9} Appellant cannot establish that he was unavoidably prevented from discovering the factual basis for his claim that the indictment was defective because any defect existed on the face of the indictment. Although appellant may not have been aware until the Supreme Court of Ohio decided *Colon I* that there may have been a legal basis to challenge the indictment, the factual basis nevertheless existed at the time the

indictment was issued, and appellant cannot claim he was unaware of the indictment. See *State v. Berry*, 10th Dist. No. 08AP-762, 2009-Ohio-1557.

{¶10} Nor can appellant establish the alternative means for satisfying R.C. 2953.23(A)(1)(a). *Colon I* was not a decision by the United States Supreme Court, and, therefore, did not constitute recognition by the United States Supreme Court of a new federal or state right that applies retroactively to persons in appellant's situation. *Berry* at ¶19. Because appellant's petition for post-conviction relief was untimely filed under R.C. 2953.21(A)(2) and fails to meet the narrow exceptions allowing for untimely filing provided by R.C. 2953.23(A), dismissal of the petition was appropriate. *State v. Reynolds*, 10th Dist. No. 08AP-1052, 2009-Ohio-2147, ¶10.

{¶11} Furthermore, even if appellant had filed a timely post-conviction petition based on *Colon I*, such a petition would have failed on the merits. In a decision on an application for reconsideration of its decision in *Colon I*, the Supreme Court of Ohio made it clear that the decision in *Colon I* would not apply retroactively. *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II*"). Thus, even if the reasoning behind *Colon I* applied to the indictments in appellant's case, that reasoning would not apply retroactively to appellant's indictment.

{¶12} Moreover, appellant entered a plea of guilty, and, therefore, was not tried under the indictment. We have held, as have a number of courts, that *Colon I* does not apply to cases in which the defendant has entered a guilty plea. See *State v. Tabor*, 10th Dist. No. 08AP-1066, 2009-Ohio-2657, ¶8.

{¶13} Finally, we agree with the trial court's conclusion that appellant's post-conviction petition was barred by res judicata. A trial court may also dismiss a petition

seeking post-conviction relief without holding a hearing if it determines that the doctrine of res judicata applies. *State v. Szefcyk*, 77 Ohio St.3d 93, 1996-Ohio-337. Res judicata bars a defendant who was represented by counsel from raising an issue in a petition seeking post-conviction relief if the defendant raised or could have raised the issue at trial or on direct appeal. *Id.* at syllabus. In this case, appellant could have challenged the sufficiency of the indictment before the trial court or on direct appeal, and, therefore, res judicata acts to bar further litigation regarding the sufficiency of the indictment.

{¶14} The trial court properly dismissed appellant's petition seeking post-conviction relief. Accordingly, appellant's assignment of error is overruled.

{¶15} Having overruled appellant's assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

FRENCH, P.J., and McGRATH, J., concur.

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