

**THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	<b>OPINION</b>
Plaintiff-Appellee,	:	
- vs -	:	<b>CASE NOS. 2008-P-0080 and 2008-P-0082</b>
RONALD D. NICHOLAS,	:	
Defendant-Appellant.	:	

Criminal Appeals from the Portage County Court of Common Pleas, Case Nos. 05 CR 292 and 05 CR 524.

Judgment: Affirmed.

*Victor V. Vigluicci*, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

*Ronald D. Nicholas*, pro se, PID# 494-947, Mansfield Correctional Institution, P.O. Box 788, Mansfield, OH 44901 (Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Ronald D. Nicholas, appeals the judgment of the Portage County Court of Common Pleas, overruling his Motion for Leave to Dismiss/Defective Indictment. For the following reasons, we affirm the decision of the court below.

{¶2} On June 9, 2005, in Portage County Court of Common Pleas Case No. 2005 CR 0292, Nicholas was indicted for three counts of Robbery, felonies of the second degree in violation of R.C. 2911.02(A)(2) and (B).

{¶3} On September 26, 2005, in Portage County Court of Common Pleas Case No. 2005 CR 0524, Nicholas was charged by way of Information with Breaking and Entering, a felony of the fifth degree in violation of R.C. 2911.13(A) and (C), and Robbery, a felony of the second degree in violation of R.C. 2911.02.

{¶4} On September 26, 2005, in Case No. 2005 CR 0292, Nicholas entered a Written Plea of Guilty to three counts of Robbery as charged in the Indictment. On the same date, in Case No. 2005 CR 0524, Nicholas entered a Written Plea of Guilty to Breaking and Entering and Robbery as charged in the Information.

{¶5} On December 15, 2005, the trial court sentenced Nicholas to seven years imprisonment for each count of Robbery in Case No. 2005 CR 0292, to be served consecutively with each other. The court sentenced Nicholas to seven years imprisonment for Robbery and eleven months imprisonment for Breaking and Entering in Case No. 2005 CR 0524, to be served concurrently with each other and with the sentence in Case No. 2005 CR 0292. Thus, Nicholas received an aggregate prison sentence of twenty-one years.

{¶6} On May 30, 2008, Nicholas filed Motions for Leave to Dismiss/Defective Indictment in Case Nos. 2005 CR 0292 and 2005 CR 0524, in which he claimed the June 9, 2005 Indictment for three counts of second degree Robbery were structurally defective for failing to charge the mens rea element of the crime. Nicholas relied on the Ohio Supreme Court's decision in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, holding

that is was “structural error” when an Indictment for Robbery “failed to charge all the essential elements of the offense of robbery and resulted in a lack of notice to the defendant of the mens rea required to commit the offense.” Id. at ¶32.

{¶7} On August 28, 2008, the trial court denied Nicholas’ Motions.

{¶8} On September 8, 2008, Nicholas filed his Notice of Appeal. Nicholas raises the following assignments of error:

{¶9} “[1.] Defective indictment/denial of due process under the 14th Amendment.”

{¶10} “[2.] Ineffective assistance of counsel.”

{¶11} “[3.] Perjury of oath of office/fraud.”

{¶12} We construe Nicholas’ Motion as one for postconviction relief and, accordingly, review it under an abuse of discretion standard. “[I]n a postconviction case involving a claim of ineffective assistance of trial counsel \*\*\*[,] ‘[a]bsent a showing of abuse of discretion, a reviewing court will not overrule the trial court’s finding on a petition for post-conviction relief which is supported by competent and credible evidence.” *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, at ¶50, quoting *State v. Mitchell* (1988), 53 Ohio App.3d 117, 119.

{¶13} In his first assignment of error, Nicholas argues that his Indictment for Robbery was defective, under *Colon*, 2008-Ohio-1624, for failing to charge the reckless infliction of physical harm, an essential element of the crime of Robbery. Id. at ¶15.

{¶14} In *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, the Ohio Supreme Court announced that its holding in *Colon*, 2008-Ohio-1624, “is only prospective in nature, in accordance with our general policy that newly declared constitutional rules in

criminal cases are applied prospectively, not retrospectively.” *Id.* at ¶3. Thus, the holding of *Colon*, 2008-Ohio-1624, cannot be applied retroactively to Nicholas’ conviction, since a “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, at ¶6.

{¶15} The first assignment of error is without merit.

{¶16} In the second assignment of error, Nicholas contends that trial counsel was constitutionally ineffective for failing to advise him of the recklessness element in the crime of Robbery and for coercing him into entering guilty pleas.

{¶17} The Ohio Supreme Court has adopted a two-part test to determine whether an attorney’s performance has fallen below the constitutional standard for effective assistance. To reverse a conviction for ineffective assistance of counsel, the defendant must prove “(1) that counsel’s performance fell below an objective standard of reasonableness, and (2) that counsel’s deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding.” *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 2000-Ohio-448, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688.

{¶18} We do not find Nicholas’ trial counsel to have been constitutionally ineffective for failing to anticipate the Supreme Court’s ruling in *Colon*, 2008-Ohio-1624. As the Court acknowledged in its reconsideration of *Colon*, this decision was a “new judicial ruling” and a “newly declared constitutional rule[,]” which could only be applied prospectively. 2008-Ohio-3749, at ¶4 and ¶3 (citations omitted). Moreover, the Court stated that the facts leading to the *Colon* decision were “unique.” *Id.* at ¶6. See, also

*State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, at ¶9 (“[c]ounsel cannot be faulted for failing to predict that the law would change”); *State v. Palacios*, 10th Dist. No. 08AP-669, 2009-Ohio-1187, at ¶23 (holding that counsel was not ineffective for advising appellant about the deficiency of the indictment under *Colon* prior to the decision being rendered: “[a]ppellant’s counsel could not have informed appellant of an opinion that did not yet exist”).

{¶19} In Nicholas’ case, the Robbery Indictment tracked the wording of the statute and the defense counsel sought a Bill of Particulars. In decisions prior to *Colon*, the Ohio Supreme Court upheld convictions based on allegedly deficient Indictments, where the Indictment tracked the words of the statute and a Bill of Particulars was sought. *State v. Landrum* (1990), 53 Ohio St.3d 107, 119 (rejecting appellant’s claim that an Aggravated Murder Indictment was deficient for failing to set forth the elements of the underlying crimes of Burglary and Larceny where “the indictment followed the statutory language and the bill of particulars provided further clarification”); *State v. Murphy*, 65 Ohio St.3d 554, 583 (citations omitted). Therefore, we find no deficiency in trial counsel’s performance.

{¶20} As to the argument that trial counsel coerced Nicholas to enter guilty pleas, this argument could have been raised in a direct appeal of his convictions. Accordingly, Nicholas is barred from raising this argument in the present appeal. *State v. Perry* (1967), 10 Ohio St.2d 175, at paragraph nine of the syllabus (“Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have*

*been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment.”) (emphasis sic).*

{¶21} The second assignment of error is without merit.

{¶22} In his third assignment of error, Nicholas asserts that the trial judge and county prosecutor violated their oaths of office to support the state and federal constitutions by allowing him to be convicted and sentenced under constitutionally defective Indictments and for failing to vacate such convictions, among other improprieties.

{¶23} For the reasons stated in the first two assignments of error, these arguments are without merit. Furthermore, Nicholas did not raise this argument in his Motion for Leave to Dismiss/Defective Indictment.

{¶24} The third assignment of error is without merit.

{¶25} For the foregoing reasons, the judgment of the Portage County Court of Common Pleas, overruling Nicholas’ Motion for Leave to Dismiss/Defective Indictment, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.