

[Cite as *State v. Smith*, 2009-Ohio-6597.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY**

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|---------------------|---|-----------------------------------|
| STATE OF OHIO | : | |
| | : | Appellate Case No. 2008-CA-104 |
| Plaintiff-Appellee | : | |
| | : | Trial Court Case No. 2002-CR-0765 |
| v. | : | |
| | : | |
| HAKEEM D. SMITH | : | (Criminal Appeal from |
| | : | Common Pleas Court) |
| Defendant-Appellant | : | |

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OPINION

Rendered on the 11th day of December, 2009.

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Attorney for Plaintiff-Appellee

HAKEEM D. SMITH, #459-050, Madison Correctional Institution, P.O. Box 740, London, Ohio 43140-0740
Defendant-Appellant, *pro se*

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BROGAN, J.

{¶ 1} Hakeem Smith appeals from the trial court’s denial of his motion for relief from judgment on the basis that his indictment lacked a mens rea for aggravated robbery.

{¶ 2} Smith advances three assignments of error on appeal. First, he

contends the trial court erred in finding that his case was not pending when the Ohio Supreme Court decided *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 (“*Colon I*”). Second, he claims the trial court erred in distinguishing *Colon I* because it was based on unique facts. Third, he contends the trial court erred in not finding that the alleged defect in his indictment permeated the proceedings below.

{¶ 3} Upon review, we find Smith’s assignments of error to be unpersuasive. The record reflects that Smith pled no-contest in November 2003 to several charges, including aggravated robbery. He filed a direct appeal, and we affirmed on November 12, 2004. See *State v. Smith*, Clark App. No. 2003 CA 93, 2004-Ohio-6062. The Ohio Supreme Court denied discretionary review. See *State v. Smith*, 110 Ohio St.3d 1468, 2006-Ohio-4288.

{¶ 4} On April 9, 2008, the Ohio Supreme Court decided *Colon I*, holding that “[w]hen an indictment fails to charge a mens rea element of a crime and the defendant fails to raise that defect in the trial court, the defendant has not waived the defect in the indictment.” *Colon I*, supra, at syllabus. On reconsideration, the Ohio Supreme Court subsequently held in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 (“*Colon II*”), that the rule announced in *Colon I* was prospective and applied “only to those cases pending on the date *Colon I* was decided.” *Colon II* also limited the syllabus of *Colon I* to its facts and emphasized that structural-error analysis was appropriate only in rare cases where multiple errors linked to the defective indictment permeated the proceeding. In the present case, the trial court noted the foregoing limitations and concluded that “the rule of law set forth in the *Colon* decision does not apply” to Smith. As a result, the trial court denied his motion

to vacate his aggravated robbery conviction.

{¶ 5} In his first assignment of error, Smith insists that his case was pending when the Ohio Supreme Court decided *Colon I*. In support, he points out that he had an appeal pending in the U.S. Sixth Circuit Court of Appeals from the federal district court's denial of his petition for a writ of habeas corpus. The rule set forth in *Colon I* only applies, however, to cases that are pending on direct appeal. *State v. Mitchell*, Montgomery App. No. 22814, 2009-Ohio-3124, ¶9. Where a defendant has exhausted his appellate remedies and his conviction has become final, the rule announced in *Colon I* does not apply. *Colon II*, supra, at ¶4-5. Smith's convictions became final no later than August 23, 2006, when the Ohio Supreme Court declined to review his direct appeal. "A proceeding in habeas corpus is not an appeal from a criminal conviction; it is a distinct collateral attack on the petitioner's continued confinement." *Bar Ass'n of Greater Cleveland v. Steele* (1981), 65 Ohio St.2d 1. As a result, Smith's pending habeas corpus petition did not affect the finality of his convictions. Therefore, *Colon I* did not apply to his case, which was not pending when *Colon I* was decided. The first assignment of error is overruled.

{¶ 6} Our resolution of Smith's first assignment of error disposes of his remaining assignments of error. Smith's second and third assignments of error depend on him being able to avail himself of the rule articulated in *Colon I*. In both assignments of error, Smith asserts that the trial court erred in failing to find his indictment fatally defective under *Colon I*. These assignments of error lack merit because *Colon I* does not apply to Smith, whose convictions became final before *Colon I* was decided. Also, the Ohio Supreme Court recently resolved the issue of

the mens rea needed to commit aggravated robbery pursuant to R.C. 2911.02(A)(1). See *State v. Lester*, 2009-Ohio-4225. Accordingly, Smith's second and third assignments of error are overruled.

{¶ 7} The judgment of the Clark County Common Pleas Court is affirmed.

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FAIN and FROELICH, JJ., concur.

Copies mailed to:

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Hon. Richard J. O'Neill