

[Cite as *State v. DiCarlo*, 2009-Ohio-2648.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 08 MA 267
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
JACOB DICARLO,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 2002 CR 359.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Attorney Paul J. Gains
Prosecuting Attorney
Attorney Gabriel Wildman
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For Defendant-Appellant: Jacob DiCarlo, Pro-se
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Ohio State Penitentiary
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JUDGES:
Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: June 3, 2009

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DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court and the parties' briefs. Pro-se Appellant, Jacob DiCarlo, appeals the decision of the Mahoning County Court of Common Pleas that dismissed his Motion Seeking Notice of Plain Error. DiCarlo's motion had requested the application of recent Ohio Supreme Court decisions to his 2002 indictment for aggravated robbery and felonious assault. *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 (*Colon I*); *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169 (*Colon II*). DiCarlo argues that, pursuant to *Colon I*, the failure to specify a mens rea to an element in the 2002 indictment amounted to reversible structural error. DiCarlo further argues that the factual limitations of *Colon II* still apply to his case, because the State's failure to provide notice of the mens rea requirement resulted in errors throughout his trial.

{¶2} DiCarlo's motion, treated by the trial court as a petition for post-conviction relief, was untimely and did not satisfy any of the prerequisites for consideration of untimely post-conviction petitions pursuant to R.C. 2953.23(A). Additionally, because the *Colon* cases are restricted to prospective application, they cannot be considered in reference to DiCarlo's 2002 case. Accordingly, the trial court properly overruled DiCarlo's motion, and the decision is affirmed.

Facts

{¶3} In 2002, DiCarlo was convicted of aggravated robbery, in violation of R.C. 2911.01, and felonious assault, in violation of R.C. 2903.11. DiCarlo appealed the conviction, which was affirmed by this court in *State v. DiCarlo*, 7th Dist. No. 02 CA 228, 2004-Ohio-5118. Subsequent to an application for reopening, this court conducted a limited review of the imposition of DiCarlo's sentence, and again affirmed the decision of the trial court. *State v. DiCarlo*, 7th Dist. No. 02 CA 228, 2006-Ohio-7080.

{¶4} On October 27, 2008, DiCarlo filed a Motion Seeking Notice of Plain Error Pursuant to Crim. Rule 52(B), stating that the Supreme Court's decision in *Colon* indicated that the indictment under which he had been tried had failed to include the mens rea. The State filed a Memorandum in Opposition to Defendant's Petition for Post-Conviction Relief, stating that *Colon* only has prospective application, and cannot be

applied to DiCarlo's case. The trial court overruled DiCarlo's motion without explanation.

Failure to Charge Mens Rea

{¶15} In his first of two assignments of error, DiCarlo argues:

{¶16} "By failing to charge any level of mens rea for the serious physical-injury element for Agg. Robbery under 2911.01(A)(3)(C)." [sic]

{¶17} DiCarlo first asserts that the trial court erroneously decided that his motion was a petition for post conviction relief, and implies that his motion to the trial court was a delayed appeal. Although DiCarlo did not caption his motion as a petition for post conviction relief, a motion that seeks the vacation of a sentence on the basis of violation of constitutional rights, filed later than a direct appeal, is considered to be a petition for post-conviction relief. *State v. Reynolds*, 79 Ohio St.3d 158, 1997-Ohio-304, 679 N.E.2d 1131, syllabus. Turning to DiCarlo's merit argument, he asserts that his constitutional rights were violated because he was convicted pursuant to a constitutionally defective indictment. DiCarlo relies on the *Colon* decisions to support his claim.

{¶18} An appellate court applies a de novo standard when reviewing a trial court's decision to deny a petition for post-conviction relief without a hearing. *State v. Herring*, 7th Dist. No. 06-JE-8, 2007-Ohio-3174, at ¶14. A post-conviction petition is a special civil action governed exclusively by statute, thus "a petitioner receives no more rights than those granted by the statute." *State v. Calhoun*, 86 Ohio St.3d 279, 281, 1999-Ohio-102, 714 N.E.2d 905. A trial court has the discretion to summarily dismiss a petition for post-conviction relief if "the petition fails to set forth any substantive ground upon which relief can be granted." *In re J.B.*, 12th Dist. Nos. CA2005-06-176, CA2005-07-193, CA2005-08-377, 2006-Ohio-2715, at ¶48.

{¶19} Pursuant to R.C. 2953.21(A)(2), a petition for post-conviction relief must be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals when there is a direct appeal of the conviction. In cases where the petition was filed in an untimely manner, the trial court will not consider the petition unless the petitioner shows that he was unavoidably prevented from discovering the facts upon which his claim for relief is based, or alternatively, after the 180-day time

period expired, the United States Supreme Court recognized a new federal or state right that applies retroactively to the petitioner and is the basis of his claim for relief. R.C. 2953.23(A)(1)(a). The petitioner then must also show "by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found [him] guilty of the offense of which [he] was convicted." R.C. 2953.23(A)(1)(b). Unless the appellant satisfies these requirements, the trial court lacks jurisdiction to consider the untimely petition for post-conviction relief. *State ex rel. Kimbrough v. Greene*, 98 Ohio St.3d 116, 2002-Ohio-7042, 781 N.E.2d 155; *State v. Johnson*, 144 Ohio App.3d 222, 226, 2001-Ohio-3301, 759 N.E.2d 889.

{¶10} DiCarlo asserts that his defective indictment claim can be argued for the first time on appeal pursuant to *Colon*. But because the current action is in the form of a post-conviction petition, not a direct appeal, his argument fails. Moreover, the Ohio Supreme Court explained that its ruling in *Colon I* was prospective in nature, and thus could only apply to cases pending during or filed after its April 9, 2008 pronouncement. *Colon II*, at ¶5. Because DiCarlo's original case and appeal were completed prior to the pronouncement of *Colon*, it is inapplicable to his case.

{¶11} DiCarlo did not indicate that he was unavoidably prevented from discovering any factual issues upon which relief could be based. DiCarlo thus has not satisfied the first alternative prong of R.C. 2953.23(A)(1)(a). DiCarlo did not demonstrate that the United States Supreme Court has recognized a new federal or state right which would retroactively apply to him and entitle him to relief. The Ohio Supreme Court's decision in *Colon* would not have satisfied this requirement even if it had applied to DiCarlo's case, as it did not constitute recognition of a new right by the United States Supreme Court. DiCarlo thus has not satisfied the second alternative prong of R.C. 2953.23(A)(1)(a).

{¶12} Because DiCarlo did not satisfy the criteria set forth in R.C. 2953.23 governing untimely post-conviction relief petitions, the trial court lacked jurisdiction to consider the merits of the petition. DiCarlo's first assignment of error is meritless.

Application of *Colon II*

{¶13} In his second of two assignments of error, DiCarlo argues:

{¶14} "Appellant DiCarlo meets *Colon II* criteria for the *Colon I* reversal due to the defendant lacking notice that the mens rea element of Robbery was "Reckless."

{¶15} DiCarlo explains the many errors at trial caused by his defective indictment, and asserts that his case merits the structural-error analysis of *Colon I*, even as limited by *Colon II*. As discussed above, the *Colon* decisions were exclusively prospective in nature, and do not apply to the case at hand. DiCarlo's second assignment of error is also meritless.

{¶16} DiCarlo did not satisfy any of the prerequisites for consideration of an untimely petition for post-conviction relief. The Supreme Court decisions in *Colon I* and *II* are prospective and do not apply to DiCarlo's antecedent case. Accordingly, the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Waite, J., concurs.