

IN THE OHIO SUPREME COURT

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

ANGELO FELDER,

Defendant-Appellant.

:
 : SUPREME COURT NO. **10-0012**
 : [By clerk]
 : Franklin Appeals Nos. 09AP-459
 : (C.P.No. 00CR09-5692)
 : 09AP-460
 : (C.P.No. 01CR12-7551)
 : 09AP-461
 : (C.P. No. 02CR01-0153)
 :

NOTICE OF APPEAL

Notice is hereby given that a claimed appeal as of right is taken to the Ohio Supreme Court, appealing the final order of the Franklin county Court of Appeals, Tenth Appellate district of Ohio, rendered on the 19th day of November, 2009. This appeal in a felony case is of a substantial constitutional question of law.

Angelo Felder

 Angelo Felder-Appellant
 Reg. # 439-667
 Lebanon Corr. Institution
 P.O. Box 56
 Lebanon, Ohio 45036

Certificate of Service

This is to certify that a copy of the foregoing notice of appeal was served by regular mail service upon the Franklin County Court of Appeals & Ron O'Brien, Franklin County Prosecutor at 373 South high Street, 14th Floor, Columbus, Ohio 43215 this 29th day of December, 2009.

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Angelo Felder

 Defendant-Appellant

FILED
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 SUPREME COURT OF OHIO

IN THE OHIO SUPREME COURT

STATE OF OHIO, :
 : SUPREME COURT NO.
 Plaintiff-Appellee, : [By Clerk]
 -vs- : Franklin Appeals Nos. 09AP-459
 : 09AP-460
 : 09AP-461
 ANGELO FELDER, : AN APPEAL FROM THE JUDGMENT OF THE
 Defendant-Appellant. : FRANKLIN COUNTY COURTOF APPEALS

Defendant-Appellant's Memorandum In Support of
Claimed Jurisdiction

FOR PLAINTIFF-APPELLEE
STATE OF OHIO

RON O'BRIEN
Franklin County Prosecutor
373 South High Street, 14th Floor
Columbus, Ohio 43215
[614] 462-3555

FOR APPELLEE

FOR DEFENDANT-APPELLANT
ANGELO FELDER

ANGELO FELDER
Reg. # 439-667
Lebanon Correctional Institution
P.O. Box 56
Lebanon, Ohio 45036

IN PRO PER

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& AFFIDAVIT

JURISDICTIONAL STATEMENT

WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case involves a substantial constitutional question of law, because in questions the trial court's subject-matter jurisdiction to render judgment in the case. Since subject-matter jurisdictional questions may be raised at any time of litigation, Appellant's absolute right to procedural due process of law requires the Supreme Court to determine whether he has been deprived of his substantive due process right to liberty under Article I§16, Ohio Constitution as well as the Fourteenth Amendment, United States Constitution.

The Robbery count under R.C. § 2911.02 [a](1) fails to allege the mens rea of "recklessness" and the aggravated robbery count under R.C. § 2911.01[A](1) fails to allege the mens rea of "knowingly" possessing the deadly weapon.

Accordingly, and pursuant to Ohio Revised Code § 2901.21 [A] [B] and [D](1), absent the mens rea elements, neither count charges the offense. Compare: *State v. Cimpritz*, [1953], 158 Ohio St. 490.

In addition, Ohio Revised Code § 2945.75[A](1)(2) mandates that where these counts in the indictment fail to allege an essential element such as the mens rea, then these counts serve to charge only the least degree of robbery and aggravated robbery, which is fourth degree petty theft. *Id.*

Accordingly, defense counsel Brian Rigg induced Appellant to plead guilty to two generic counts of Robbery and Aggravated Robbery, charges that Appellant could not have legally been convicted of by bench or jury. Cf. *State v. Fletchinger*, [1977], 51 Ohio App. 2d 73, 366 N.E. 2d 289. Wherefore, Appellant's pleas were not entered into in an intelligent and knowing manner.

Such pleas could have only been entered into knowingly and intelligently if he was represented by competent counsel. *Tollett v. Henderson*, 411 U.S. 258 [1973]; *Hill v. Lockhart*, [1985], 474 U.S. 52, 56. *Smith v. Murray*, 477 U.S. 527 [1986]; quoting: *Jones v. Barnes*, 463 U.S. 745 [1983].

Accordingly, where the trial judge, prosecutor and defense counsel allowed Appellant to plead guilty to two counts of the indictments that failed to charge an offense, his advisors induced Appellant to plead guilty under false pretenses, thereby establishing the ineffective assistance of counsel in this case.

STATEMENT OF THE CASE AND FACTS

On or about January 31, 2003, Defendant-Appellant entered a guilty plea to one count of Receiving Stolen Property and received a 12 month sentence in Case No. 00CR09-5692. At the same time he entered a guilty plea to one count of robbery in Case No. 01CR12-755 and received a sentence of six years.

Finally and on the same date he entered a guilty plea to one count of aggravated robbery and received a consecutive sentence of nine years with a three-year firearm enhancement for a total consecutive sentence of 18 years.

On February 25, 2009, Appellant filed a motion in the trial court under Ohio Criminal rule 32.1 seeking to withdraw his guilty pleas in all three cases. The trial court summarily overruled the motion to withdraw guilty plea.

After timely appealing this decision to the Franklin County Court of Appeals, the trial court's final judgment was affirmed on November 19, 2009.

This timely appeal ensues.

PROPOSITION OF LAW NO. 1.

MANIFEST INJUSTICE OCCURRED IN THIS CASE WHERE TRIAL COUNSEL INDUCED THE GUILTY PLEAS TO AN INDICTMENT WHICH FAILS TO CHARGE THE OFFENSE OF ROBBERY AND AGGRAVATED ROBBERY THEREBY ESTABLISHING THAT DEFENDANT COULD NOT HAVE BEEN CONVICTED LEGALLY BY BENCH OR JURY THEREBY DEMONSTRATING A DEFICIENT PERFORMANCE AND PREJUDICE...

In the case sub judice, Appellant was charged with one count of robbery [force or threat of force] and one count of aggravated robbery [possession of deadly weapon].

Under the two prong test of Strickland v. Washington,[1984], 466 U.S. 668,104 S.Ct. 2052,it was a deficient performance for trial counsel to induce such guilty pleas and Appellant was prejudiced thereby where he was sentenced to a total sentence of 18 years when a legal sentence could not have exceeded more than eighteen months. Strickland v. Washington,supra.

And for these reasons,Appellant was deprived of the effective assistance of trial counsel rendering his conviction and sentence for Robbery and Aggravated Robbery void for lack of subject-matter jurisdiction.

Reversal and discharge is warranted.

PROPOSITION OF LAW NO. 2.

DEFENDANT'S GUILTY PLEAS TO GENERIC ROBBERY AND AGGRAVATED ROBBERY IS VOID UNDER OHIO CRIMINAL RULE 11[C](2)(a) AND THE DUE PROCESS CLAUSE OF THE OHIO AND UNITED STATES CONSTITUTION.

Ohio Criminal Rule 11[C](2)(a) mandates that the trial court shall not accept a plea of guilty based upon misinformation as to the elements of the offenses.Id.Such procedural is constitutionally invalid.Smith v. O'Grady,312 U.S. 329,61 S.Ct. 572 [1941];Henerson v. Morgan,426 U.S. 637,96 S.Ct. 2253 [1976].

Defendant-Appellant's conviction and sentences for these two acts that the law does not make criminal constitutes a circumstance "inherently resulting in a complete miscarriage of justice and presents circumstances that justify collateral relief***.Davis v. United States,417 U.S. 333,94 S.Ct. 2298 [1974].

Conversely, then,where the trial judge,defense counsel and prosecutor advised and misinformed Appellant as to the essential elements of Robbery and Aggravated Robbery,preventing him from receiving 'real notice'of the crimes and no understanding of

of the nature of the offenses as required under Ohio Crim.R. 11[C] (2)(a) and the 6th and 14th Amendment to the U.S. Constitution as well as Article I, Sections 10 & 16, Ohio Constitution, a complete miscarriage of justice resulted here divesting the trial court of subject-matter jurisdiction to convict and sentence Appellant accordingly. Compare: Article IV, Section 3[B], Ohio Constitution.

As a result, Appellant is being deprived of his liberty in violation of the Due Process Clause of the 14th Amendment to the United States Constitution.

Reversal and discharge is warranted.

CONCLUSION

Where this Supreme Court of Ohio accepts Appellant's initial allegations as true as required under Criminal rule 57[B] and Civil Rule 12[c], and drawing all reasonable inferences therefrom, then this Supreme Court of Ohio will invoke its appellate jurisdiction in this case involving a Void judgment.

IT IS SO PRAYED FOR

Respectfully submitted,

Angelo Felder
Angelo Felder-Appellant
Reg.# 439-667
Lebanon Correctional Institution
P.O. Box 56
Lebanon, Ohio 45036

Certificate of Service

This is to certify that a copy of the foregoing memorandum in support of claimed jurisdiction was served by regular mail service upon Ron O'Brien-Franklin County Prosecutor at 373 S. High Street, Columbus, Ohio 43215 this 29th day of December, 2009.

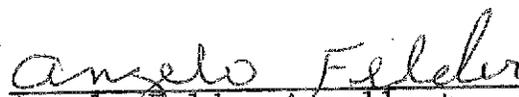
Angelo Felder
Defendant-Appellant

IN THE OHIO SUPREME COURT

STATE OF OHIO, :
 : SUPREME COURT NO.
 : [By clerk]
 Plaintiff-Appellee, : Franklin Appeals Nos. 09AP-459
 : (C.P.No. 00CR09-5692)
 -vs- : 09AP-460
 : (C.P.No. 01CR12-7551)
 ANGELO FELDER, : 09AP-461
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Reg. # 439-667
Lebanon Corr. Institution
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Lebanon, Ohio 45036

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Defendant-Appellant

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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COURT OF APPEALS
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CLERK OF COURTS

State of Ohio,	:	
	:	No. 09AP-459
Plaintiff-Appellee,	:	(C.P.C. No. 00CR09-5692)
	:	No. 09AP-460
v.	:	(C.P.C. No. 01CR12-7551)
	:	No. 09AP-461
Angelo J. Felder,	:	(C.P.C. No. 02CR01-0153)
	:	
Defendant-Appellant.	:	(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on November 19, 2009, appellant's assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

SADLER, BROWN, and CONNOR, JJ.

By 

Judge Lisa L. Sadler

1870 Court

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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FRANKLIN CO. OHIO
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CLERK OF COURTS

State of Ohio, :
 : No. 09AP-459
 : (C.P.C. No. 00CR09-5692)
 Plaintiff-Appellee, : No. 09AP-460
 : (C.P.C. No. 01CR12-7551)
 v. : No. 09AP-461
 : (C.P.C. No. 02CR01-0153)
 Angelo J. Felder, :
 : (REGULAR CALENDAR)
 Defendant-Appellant. :

D E C I S I O N

Rendered on November 19, 2009

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*,
for appellee.

Angelo J. Felder, pro se.

APPEALS from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Angelo J. Felder ("appellant"), filed these appeals seeking reversal of a decision by the Franklin County Court of Common Pleas denying his motion to withdraw his plea of guilty pursuant to Crim.R. 32.1. For the reasons that follow, we affirm.

{¶2} Appellant was indicted by the Franklin County Grand Jury in three separate cases. In case No. 00CR09-5692, appellant was indicted on two counts of receiving stolen property in violation of R.C. 2913.51 and one count of misuse of a credit card in violation of R.C. 2913.21, each a fifth-degree felony.

{¶3} In case No. 01CR12-7551, appellant was indicted on one count of aggravated robbery in violation of R.C. 2911.01, a first-degree felony; one count of robbery in violation of R.C. 2911.02, a second-degree felony; one count of robbery in violation of R.C. 2911.02, a third-degree felony; and two counts of kidnapping in violation of R.C. 2905.01, both first-degree felonies. Each of the five counts in case No. 01CR12-7551 included a gun specification.

{¶4} In case No. 02CR01-0153, appellant was indicted on two counts of aggravated robbery in violation of R.C. 2911.01, each a first-degree felony; three counts of kidnapping in violation of R.C. 2905.01, each a first-degree felony; one count of attempted murder in violation of R.C. 2923.02 and 2903.02, a first-degree felony; one count of felonious assault in violation of R.C. 2903.11, a second-degree felony. Each of the counts against appellant in case No. 02CR01-0153 included a gun specification.

{¶5} On January 31, 2003, appellant entered into an agreement whereby appellant pleaded guilty to one count of receiving stolen property in case No. 00CR09-5692; one count of robbery, without the gun specification, in case No. 01CR12-7551; and one count of aggravated robbery, with the gun specification, in case No. 02CR01-0153. The agreement included a jointly recommended sentence for appellant to serve a 12-month sentence in case No. 00CR09-5692, a six-year sentence in case No. 01CR12-7551, and a sentence of nine years, plus three years for the gun specification, in case No.

02CR01-0153. The sentences in case Nos. 01CR12-7551 and 02CR01-0153 were to be served consecutively, and the sentence in case No. 00CR09-5692 was to be served concurrently. Thus, appellant's total aggregate sentence was 18 years. The trial court accepted the guilty pleas and imposed the jointly recommended sentence.

{¶6} In 2005, appellant filed a motion seeking postconviction relief. The trial court initially scheduled a new sentencing hearing to impose a sentence in conformance with the decision by the Supreme Court of Ohio in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. On the state's motion for reconsideration, the trial court vacated the new sentencing hearing. Subsequently, the trial court dismissed appellant's postconviction petition.

{¶7} Appellant then filed a motion seeking relief from the trial court's judgment pursuant to Civ.R. 60(B). The trial court denied the motion. Appellant appealed, and we affirmed. *State v. Felder*, 10th Dist. No. 07AP-148, 2007-Ohio-4595.

{¶8} On February 25, 2009, appellant filed a motion seeking to withdraw his guilty plea. The trial court denied the motion without holding a hearing. Appellant filed this appeal, asserting three assignments of error:

ASSIGNMENT OF ERROR NO. 1.

The trial court erred and deprived the Appellant of his absolute right to procedural due process of law in not applying the principles of *State v. Cimpritz*, [1953], 158 Ohio St. 490 to Appellant's case contrary the Constitution of Ohio and the United States.

ASSIGNMENT OF ERROR NO. 2.

Defendant-Appellant's guilty plea to generic robbery and aggravated robbery is void under Ohio Criminal Rule

11[C](2)(a) and the due process clause of the Ohio and United States Constitution.

ASSIGNMENT OF ERROR NO. 3.

Defendant-Appellant was deprived of the effective assistance of trial counsel where counsel induced him to plead guilty to offenses he could not have been convicted by bench or jury in violation of the Sixth & 14th Amendment United States Constitution.

(Sic passim.)

{¶9} Appellant's assignments of error are interrelated, and will therefore be addressed together. Essentially, appellant argues that the trial court erred when it denied his motion to withdraw his plea of guilty.

{¶10} Motions to withdraw pleas of no contest are controlled by Crim.R. 32.1, which provides, in relevant part, that "[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." Because the motion in this case was made after sentencing, the issue before the trial court was whether granting the motion would correct a manifest injustice. "Manifest injustice relates to some fundamental flaw in the proceedings which result[s] in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Williams*, 10th Dist. No. 03AP-1214, 2004-Ohio-6123, ¶5. A defendant seeking to withdraw a post-sentence guilty plea bears the burden of establishing manifest injustice based on specific facts either contained in the record or supplied through affidavits attached to the motion. *State v. Orris*, 10th Dist. No. 07AP-390, 2007-Ohio-6499.

{¶11} A trial court's decision to deny a post-sentence motion to withdraw a plea of guilty, and the decision whether to hold a hearing on the motion, are subject to review for abuse of discretion. *State v. Smith* (1977), 49 Ohio St.2d 261. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶12} Appellant argues that a manifest injustice occurred in his case because the indictments charging him with aggravated robbery and robbery did not allege the mental state of recklessness. Therefore, appellant argues that the indictments were defective, and he could not have been convicted of those two offenses.

{¶13} Appellant argues that this case is controlled by the decision of the Supreme Court of Ohio in *State v. Cimpritz* (1953), 158 Ohio St. 490, in which the court held that a conviction based on a defective indictment must be reversed. However, because appellant did not raise any objection regarding the alleged defect in the indictment at the trial court level, the issue of the allegedly defective indictment and its effect on a conviction is informed by the decisions in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"), and *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II*").

{¶14} In *Colon I*, 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. In *Colon II*, the court on reconsideration of its decision in *Colon I* concluded that the decision in *Colon I* would not be applied retroactively.

{¶15} We have considered how the *Colon* decisions apply in the context of a motion to withdraw a guilty plea much like appellant's case, and concluded that no manifest injustice occurs in such instances. *State v. Straughter*, 10th Dist. No. 08AP-777, 2009-Ohio-641. In *Straughter*, we first noted that a number of appellate courts have concluded that *Colon* has no applicability to cases in which the defendant entered a guilty plea because the plea to the indictment waives any defect. *Id.* at ¶8, citing *State v. Smith*, 6th Dist. No. L-07-1346, 2009-Ohio-48; *State v. Hayden*, 8th Dist. No. 90474, 2008-Ohio-6279; *State v. McGinnis*, 3d Dist. No. 15-08-97, 2008-Ohio-5825; *State v. Ellis*, 5th Dist. No. 2007-CA-46, 2008-Ohio-7002. We also concluded in *Straughter* that no manifest injustice occurred based on the Supreme Court's decision in *Colon II* that *Colon I* would not be applied retroactively to cases that had concluded prior to those decisions. *Straughter* at ¶10.

{¶16} Here, as in *Straughter*, appellant waived any defects in the indictments against him by pleading guilty to those charges rather than proceeding to trial, and his case had concluded prior to the Supreme Court's decision in *Colon I*. Thus, the trial court did not abuse its discretion in concluding that the alleged defects in the indictments did not constitute a manifest injustice requiring that appellant be allowed to withdraw his guilty pleas.

{¶17} Appellant also argues that manifest injustice occurred because he received ineffective assistance of counsel due to his counsel's recommendation that he plead guilty to the allegedly defective indictments. Ineffective assistance of counsel can form the basis for a claim of manifest injustice to support withdrawal of a guilty plea pursuant to Crim.R. 32.1. *State v. Dalton*, 153 Ohio App.3d 286, 2003-Ohio-3813. A defendant

seeking to withdraw a guilty plea based on ineffective assistance of counsel must show first that counsel's performance was deficient, and second that there is a reasonable probability that, but for counsel's errors, the defendant would not have agreed to plead guilty. *State v. Xie* (1992), 62 Ohio St.3d 521.

{¶18} We cannot say that appellant's trial counsel was ineffective for failing to raise any defects in the indictments. If trial counsel had raised the alleged defects in the indictments prior to the entry of appellant's guilty pleas, Crim.R. 7(D) would have allowed the state to amend the indictments to allege the required mental state because the rule allows amendment of the indictment "at any time before, during, or after a trial." Thus, we cannot say that the outcome of the proceedings would have been different but for counsel's failure to raise the issue.

{¶19} Accordingly, we overrule appellant's three assignments of error and affirm the judgment by the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and CONNOR, JJ., concur.

IN THE OHIO SUPREME COURT

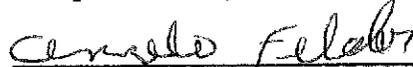
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ANGELO FELDER, : (C.P.C. No. 01CR12-7551)
: No.09AP-461
Defendant-Appellant. : (C.P.C. No. 02CR01-0153)

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now Defendant-Appellant, Angelo Felder, Pro Se and moves the Court for an Order, granting him forma pauperis status and to waive the requirement of filing 12 copies of pleadings for the reason that Appellant is indigent within the meaning of Ohio law. Further, and because of his poverty, Appellant cannot comply with all the requirements of this Court by Rule. Accordingly, Appellant seeks leave to proceed in forma pauperis without the requirement of filing the 12 copies of pleadings.

IT IS SO PRAYED FOR

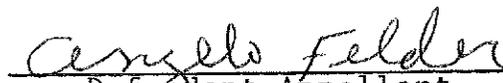
Respectfully submitted,



Angelo Felder-Appellant
Reg. # 439-667
Lebanon Corr. Institution
P.O. Box 56
Lebanon, Ohio 45036

Certificate of Service

This is to certify that a copy of the foregoing motion was served by regular mail service upon Laura Swisher, Assistant Franklin County Prosecutor at 373 South High Street, Columbus, Ohio 43215 this 29th day of December, 2009.



Defendant-Appellant

AFFIDAVIT IN SUPPORT OF FORMA PAUPERIS APPLICATION

I, Angelo Felder, after first being duly sworn according to law, do hereby
depose as follows:

1. That I am the Appellant-Affiant herein and as such stand qualified to attest to the contents herein because of personal knowledge.
2. That I am an incarcerated inmate at Lebanon Correctional Institution, Lebanon, Ohio.
3. That as such I earn a toto of \$17.00 monthly derived as State Pay from the State of Ohio.
4. That I own no other assets or property, real or otherwise.
5. That because of my poverty I cannot pre-pay filing fees, court costs, give security therefor or reproduce the required 12 copies of pleadings.
6. That I am indigent within the meaning of Ohio law.
7. That because of my poverty I should be allowed to proceed further at public expense.
8. That I have filed no civil lawsuits in any State or federal court within the past five [5] years.
9. That all of the foregoing averments are true as I verily believe.

FURTHER AFFIANT SAYETH NAUGHT

Angelo Felder
Affiant

STATE OF OHIO }
COUNTY OF WARREN } ss:

Sworn and subscribed to in my presence a notary public this
10th day of December, 2009.

Billy Dee Lewis
Notary Public

6AP-327-10