[Cite as *Starcher v. Eberlin,* 2008-Ohio-5042.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

ROCKY WAYNE STARCHER, PETITIONER, - VS - MICHELLE EBERLIN, WARDEN, BELMONT CORRECTIONAL INSTITUTE, RESPONDENT.	)	CASE NO. 08 BE 19 OPINION AND JUDGMENT ENTRY

CHARACTER OF PROCEEDINGS: Petition for Writ of Habeas Corpus.

JUDGMENT: Petition for Writ of Habeas Corpus Denied.

APPEARANCES:

For Petitioner:

Rocky Wayne Starcher, *Pro Se*
#442-217
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P.O. Box 540
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For Respondent:

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JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: September 25, 2008

PER CURIAM.

¶{1} Petitioner Rocky Wayne Starcher seeks a writ of habeas corpus in this court, alleging that he is entitled to release because he was convicted upon a defective indictment and without a jury instruction on the proper mens rea. He relies wholly on the Ohio Supreme Court's decision in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, where the court found structural error in an appeal of a robbery conviction. For the following reasons, petitioner's reliance on *Colon* is unfounded, and the writ is hereby denied.

PROCEDURAL HISTORY

¶{2} On December 31, 2001, petitioner was indicted in Medina County for rape, attempted rape and gross sexual imposition. He was convicted by a jury on all counts. On January 24, 2003, appellant was sentenced to concurrent sentences totaling six years. He raised no issues to the trial court concerning his current argument. His conviction was affirmed in *State v. Starcher*, 9th Dist. No. 03CA0014-M, 2003-Ohio-6588, where he did not raise any issues regarding his indictment or the mens rea instructions. He failed to timely appeal to the Ohio Supreme Court, and his request for leave to file a delayed appeal was denied. *State v. Starcher*, 103 Ohio St.3d 1403, 2004-Ohio-3980.

PETITION FOR A WRIT

¶{3} On July 1, 2008, petitioner filed the within action seeking a writ of habeas corpus. He has also filed a motion for summary judgment. He suggests that the writ should be granted because respondent failed to answer. However, we granted respondent time to file which has not yet expired. In any case, a writ of habeas corpus is not granted thereby releasing a prisoner merely because the warden does not file an answer or a response to summary judgment. See, e.g., R.C. 2725.05; 2725.17. Rather, we review the issue of law presented before us, which as petitioner urges is a simple legal matter waiting for our resolution. Even viewing all the facts alleged by petitioner as true, he is not entitled to a writ based upon the arguments he presents.

¶{4} For instance, petitioner claims that his indictment is fatally defective because it fails to state the required recklessness mental state for certain elements of the offenses. He relies entirely upon the *Colon* case and urges that the case has retrospective application. He concludes that the problem with the indictment is

structural error because, as in the *Colon* case, the error permeated the trial since the court's instructions did not inform the jury that recklessness was the proper mental state for a portion of each offense.

COLON CASE REVIEW

¶{5} In *Colon*, the defendant was indicted for robbery, and the indictment provided the following elements: in attempting or committing a theft offense or in fleeing immediately thereafter, the defendant inflicted, attempted to inflict or threatened to inflict physical harm on the victim. See *Colon*, 118 Ohio St.3d 26 at ¶2. Theft carries its own mental states; for instance, purposely depriving the owner and knowingly obtaining property. However, the robbery statute does not provide a mens rea for the inflicting physical harm portion of the crime. See id. at ¶11.

¶{6} "When a section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offenses." R.C. 2901.21(B).

¶{7} The *Colon* Court concluded that the mental state of recklessness applies to the inflicting physical harm portion of the robbery offense. *Colon* at ¶14. The Court then concluded that the failure to include this mental state in the indictment resulted in a defective indictment. Id. at ¶15. Not only was the indictment defective, but there were other indications that the defendant had no notice of this mens rea. Moreover, the state did not argue that recklessness was the test for the physical harm element and in fact treated the test as strict liability, and the trial court did not instruct the jury on recklessness as a required mental state. Id. at ¶30-31. The Supreme Court thus found structural error which permeated the entire trial. Id. at ¶19, 23, 32.

¶{8} In a reconsideration decision, the *Colon* Court pointed out that these factors are important evidence of an error permeating the entire trial and noted that in most defective indictment cases where the indictment fails to include an essential element, the plain error, rather than structural error, test is the proper analysis where the defendant failed to bring the error to the court's attention below. *State v. Colon*, __ Ohio St.3d __, 2008-Ohio-3749, ¶6-7. The Court also announced that *Colon I* was

only prospective, not retrospective, in nature and would thus only apply to those cases pending on the date *Colon I* was announced. Id. at ¶3-5.

THE OFFENSES

¶{9} The first count of petitioner's indictment was for rape in violation of R.C. 2907.02(A)(2), and the second count was for attempting to commit rape under this same section. R.C. 2907.02(A)(2) provides:

¶{10} "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force."

¶{11} The third count of petitioner's indictment was for gross sexual imposition in violation of R.C. 2907.05(A)(1), which statute provides in pertinent part:

¶{12} "No person shall have sexual contact with another * * * when * * * [t]he offender purposely compels the other person * * * to submit by force or threat of force."

ANALYSIS

¶{13} Petitioner believes that the "engage in sexual conduct with another" element of rape and the "have sexual contact with another" element of gross sexual imposition must have recklessness as their mens rea because there is no indication that strict liability is intended to be the mens rea. However, there are multiple problems with this argument and/or problems with raising it in a habeas action.

¶{14} Initially, we emphasize that contrary to petitioner's argument on *Colon*'s retrospective application, the structural error analysis of *Colon I* is only to be applied prospectively to those cases pending at the time of its release. *Colon II*, 2008-Ohio-3749 at ¶3-5. Because this petition was filed only in response to *Colon*, it does not receive the benefit of such holding regarding structural error and lack of waiver.

¶{15} In any event, this case did not proceed as if strict liability were the test for the sexual conduct or sexual contact elements. Rather, the trial proceeded as if purposely was the test. The mens rea of purposely is harder to prove than recklessness (and harder to prove than strict liability). Thus, prejudice is not apparent.

¶{16} More to the point, though, the strict liability versus recklessness issue only arises "[w]here the section defining an offense does not specify any degree of culpability * * *." See R.C. 2901.21(B). Unlike the *Colon* case and the particular offense at issue therein, the sections defining the offenses here do in fact specify a degree of culpability: purposely.

¶{17} The entire sentence defining the offense must be read grammatically. That is to say, engaging in a sexual act[1] by purposely compelling the other to submit by force or threat of force necessarily requires purpose to engage in the sexual act. In both rape and gross sexual imposition, engaging in a sexual act is the object of the submission. Accordingly, the premise of the *Colon* case is inapplicable to the offenses at issue in the case before us.

¶{18} Finally, the grounds here are not the proper topic for a writ of habeas corpus. See *Galloway v. Money*, 100 Ohio St.3d 74, 2003-Ohio-5060, ¶3,6 (where petitioner argued that the trial court lacked jurisdiction to convict and sentence him because of ambiguities in his indictments); *Turner v. Ishee*, 98 Ohio St.3d 411, 2003-Ohio-1671, ¶7 ("habeas corpus is not available to test the validity or sufficiency of an indictment or other charging instrument"). This ties in with the *Colon II* statement that the *Colon I* ruling cannot be applied to a conviction which becomes final as a result of the exhaustion of appellate remedies. *Colon*, 2008-Ohio-3749 at ¶5.

¶{19} For all of the foregoing reasons, this petition for a writ of habeas corpus is denied.

¶{20} Final order. Clerk to serve notice as provided by the Civil Rules.

VUKOVICH, J., concurs.
DONOFRIO, J., concurs.
WAITE, J., concurs.

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[1]We use this generic sexual act language here to refer to either sexual conduct or sexual contact as the same analysis applies to the phraseology of both the forcible rape and the forcible gross sexual imposition statutes. We also note here that sexual contact, which is related to the gross sexual imposition charge, is specifically defined as requiring the touching of a certain zone "for the purpose" of sexually arousing or gratifying either person. See R.C. 2907.01(B). See, also, *State v. Mundy* (1994), 99 Ohio App.3d 275, 295 (finding the "having sexual contact" element of the gross sexual imposition statute to be subject to the purposely mens rea).