

[Cite as *State v. Kapsouris*, 2010-Ohio-754.]
STATE OF OHIO, MAHONING COUNTY

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IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)

PLAINTIFF-APPELLEE)

VS.

MICHAEL KAPSOURIS

DEFENDANT-APPELLANT)

CASE NO. 08 MA 265

OPINION

CHARACTER OF PROCEEDINGS:

Criminal Appeal from the Court of
Common Pleas of Mahoning County,
Ohio

Case No. 02-CR-359A

JUDGMENT:

Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor
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For Defendant-Appellant:

Michael Kapsouris, Pro se
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P.O. Box 901
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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: February 24, 2010

WAITE, J.

{¶1} Appellant, Michael Kapsouris, appeals the judgment entry of the trial court overruling his “Motion Seeking Notice of Plain Error Pursuant to Crim. Rule 52(B).” In his 52(B) motion, Appellant asserts that the trial court violated his constitutional rights, because his indictment did not state the requisite mens rea element for aggravated robbery, pursuant to the Ohio Supreme Court’s decision in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917. Because Appellant’s motion is untimely and the decision in *Colon* does not apply retrospectively, the judgment entry of the trial court overruling the motion is affirmed.

{¶2} Appellant was indicted on April 4, 2002 on one count of aggravated robbery, a violation of R.C. 2911.01, a felony of the first degree, and one count of felonious assault, a violation of R.C. 2903.11, a felony of the first degree. Following a jury trial, in which Appellant was convicted on both counts of the indictment, the trial court sentenced Appellant to ten years of imprisonment for aggravated robbery and three years for felonious assault, to be served consecutively.

{¶3} Appellant appealed his conviction and sentence in *State v. Kapsouris*, 7th Dist. No. 02CA230, 2004-Ohio-5119 (“*Kapsouris I*”). On September 23, 2004, we rejected Appellant’s prejudicial joinder argument, as well as his challenge to the admissibility of certain evidence, and ultimately concluded that the manifest weight of the evidence favored his conviction.

{¶4} The only sentencing issue Appellant raised in his first appeal was the trial court's imposition of more than the minimum sentence for felonious assault. Although he conceded that the trial court made the requisite statutory findings for the imposition of a greater than minimum sentence, Appellant argued that the sentence constituted cruel and unusual punishment. Because the sentence was within the statutory range, we held that the sentence did not violate the Eighth Amendment to the United States Constitution.

{¶5} We allowed Appellant to reopen his appeal in *State v. Kapsouris*, 7th Dist. No. 02CA230, 2005-Ohio-4476 ("*Kapsouris II*"), in which he attacked the trial court's imposition of consecutive sentences, and argued that the trial court failed to make findings pursuant to R.C. 2929.14(E)(4). Because the record did not include certain statutorily-required findings, we vacated Appellant's sentence and remanded the case for resentencing.

{¶6} Resentencing occurred on February 2, 2006, prior to the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. At that time, Kapsouris argued that Ohio's felony sentencing statutes were unconstitutional because they violated the Sixth Amendment. The sentencing entry was filed on March 2, 2006, a few days after the *Foster* decision was rendered. In that entry, the trial court imposed the same sentence, and cited liberally to statutory sections that were deemed unconstitutional under *Foster*.

{¶7} In *State v. Kapsouris*, 7th Dist. No. 06MA47, 2006-Ohio-7056 ("*Kapsouris III*"), Appellant argued that his sentence was based on facts that were

found by the trial judge and not by the jury, and, therefore, violated his Sixth Amendment rights. We agreed, citing to *Foster*, which rendered portions of Ohio's felony sentencing statutes unconstitutional on the basis that they violated the Sixth Amendment. We vacated the sentence and remanded the cause for resentencing in accordance with *Foster*.

{¶8} We noted in *Kapsouris III* that Appellant raised ex post facto and due process challenges in his reply brief. We observed that those issues would not be ripe for review until resentencing under *Foster* had occurred. On remand, the trial court imposed the same sentence on March 9, 2007. In *State v. Kapsouris*, 7th Dist. No. 07 MA 101, 2008-Ohio-1534 ("*Kapsouris IV*"), we rejected Appellant's ex post facto and due process challenges to this sentence.

{¶9} On October 23, 2008, Appellant filed his 52(B) motion. He claims that the trial court violated his "constitutional rights of indictment by a grand jury and due process." (Appellant's Brf., p. 1.) He seeks the dismissal of his conviction for aggravated robbery. (Appellant's Brf., p. 4.)

{¶10} In a judgment entry filed on November 17, 2008, the trial court overruled the motion. This timely appeal followed. As both of Appellant's assignments of error are premised upon the Ohio Supreme Court's decision in *Colon*, supra, they will be addressed together for the purpose of judicial economy.

Error No. I

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

Error No. II

{¶12} “Appellant Kapsouris meets Colon II [sic] criteria for the Colon I [sic] reversal due to the defendant lacking notice that the mens rea element of Robbery was ‘Reckless.’ ”

{¶13} Where a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such motion is construed as a petition for post-conviction relief as defined in R.C. 2953.21. *State v. Reynolds* (1997), 79 Ohio St.3d 158, 679 N.E.2d 1131, syllabus.

{¶14} Pursuant to R.C. 2953.21, a petition for post-conviction relief must be filed within one hundred eighty days of the date in which the trial transcript is filed in the court of appeals in the direct appeal, unless certain exceptions enumerated in 2953.23 apply. *Id.* R.C. 2953.23 reads, in pertinent part:

{¶15} “(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section * * * unless division (A)(1) or (2) of this section applies:

{¶16} “(1) Both of the following apply:

{¶17} “(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United

States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

{¶18} “(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

{¶19} “(2) The petitioner was convicted of a felony, the petitioner is an inmate for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death.”

{¶20} A trial court is without jurisdiction to consider a petition for post-conviction relief that is filed outside of the statutory time limit. *State v. Davis*, 7th Dist. No. 08 MA 16, 2008-Ohio-6211, ¶9. Lack of subject matter jurisdiction may be raised sua sponte by a court at any stage in the proceedings and may be raised for the first

time on appeal. *Id.* at ¶10. In fact, an appellate court is bound to raise jurisdictional questions not raised by the parties. *Id.*

{¶21} The final volume of the trial transcript in the direct appeal of this case was filed on February 6, 2003, and none of the exceptions listed in R.C. 2953.23 apply. Thus, Appellant's motion for post-conviction relief is clearly untimely.

{¶22} Even assuming that the motion was timely filed, the Ohio Supreme Court held in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169 ("*Colon II*"), that the rule of law announced in *Colon* applies only prospectively. *Id.* at ¶3. A new judicial ruling may be applied only to cases that are pending on the announcement date. *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, 819 N.E.2d 687, ¶6. The new ruling may not be applied retroactively to a conviction that has become final; that is, where the accused has exhausted all of his appellate remedies. *Id.* Appellant's conviction was final on September 23, 2004.

{¶23} Accordingly, both of Appellant's assignments of error are overruled and the judgment entry of the trial court is affirmed.

Donofrio, J., concurs.

DeGenaro, J., concurs.