

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23087
v.	:	T.C. NO. 95CR1245/ 95CR1244/95CR819
TYRONE A. WINSTON	:	
Defendant-Appellant	:	(Criminal appeal from Common Pleas Court)
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**OPINION**

Rendered on the 11<sup>th</sup> day of December, 2009.

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Attorney for Plaintiff-Appellee

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TYRONE A. WINSTON, #A318-196, London Correctional Institute, P. O. Box 69, London, Ohio 43140  
Defendant-Appellant

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DONOVAN, P.J.

{¶ 1} On April 21, 1995, the Montgomery County Grand Jury returned three indictments against Appellant Tyrone A. Winston. Winston entered into plea negotiations

with the State agreeing to plead guilty to the following charges: Aggravated Robbery, and a related firearm specification in Case No. 95-CR-819; Aggravated Robbery in Case No. 96-CR-1244; and two counts of Rape and three counts of Aggravated Robbery—one count with a related firearm specification—in Case No. 95-CR-1245. On September 25, 1995, Winston received indeterminate sentences of 10-25 years, 9-25 years, and 10-25 years.

{¶ 2} On July 25, 2008, Winston filed a pro se Motion to Void Judgment Pursuant to Rule 60(B)(4), (5), and (6). Winston asserted that the indictments charging him with aggravated robbery were defective because they failed to mention a mental state. On October 8, 2008, the trial court issued a written Decision and Entry Overruling Defendant's Motion to Avoid Judgment.

{¶ 3} Winston filed a pro se Notice of Appeal on November 17, 2008. On November 24, 2008, the State of Ohio filed a motion to dismiss the appeal based on untimeliness. On April 9, 2009, we found that Winston's notice of appeal was timely due to the trial court's failure to comply with Civil R. 58(B) in issuance of the judgment.

{¶ 4} On July 31, 2009, appointed counsel representing Winston submitted an *Anders* brief, suggesting that no arguably meritorious issues exist for appeal. By magistrate's order of August 3, 2009 we informed Winston that his counsel filed an *Anders* brief and the significance thereof. We invited Winston to file a pro se brief assigning any error for our review within sixty days of August 3, 2009. Winston had submitted an initial pro se brief on November 18, 2008; however, Winston has not filed any additional brief.

{¶ 5} Pursuant to our responsibilities under *Anders*, we have conducted an independent review of the entire record and, having done so, we agree with the assessment

of appointed counsel that there are no arguably meritorious issues to present on appeal. Though appointed counsel found no arguably meritorious issues for appeal, Counsel did raise the following potential errors for our consideration:

{¶ 6} “(1) Whether the trial court erred in utilizing a plain error standard of review in this matter instead of finding that structural error was appropriate;

{¶ 7} “(2) Whether the trial court erred in finding that plain error was not present.”

{¶ 8} We find the trial court’s reasoning was correct. The Ohio Supreme Court held in *State v. Colon*, 2008-Ohio-1624 (“*Colon I*”) that an indictment was defective because it failed to include the requisite mens rea. However, the Court limited *Colon I* in *State v. Colon*, 2008-Ohio-3749 (“*Colon II*”) to cases pending on direct review when *Colon I* was decided. Winston’s case was not pending on direct review on the date *Colon I* was announced. Thus, *Colon I* is not applicable to Winston’s case.

{¶ 9} The Court further clarified in *Colon II*: “In a defective-indictment case that does not result in multiple errors that are inextricably linked to the flawed indictment such as those that occurred in *Colon I*, structural-error analysis would not be appropriate.” *Id.* at ¶ 7. The Court noted that “applying structural-error analysis to a defective indictment is appropriate only in rare cases in which multiple errors at the trial follow the defective indictment.” *Id.* at ¶ 6. When the only error was the omission of the applicable mens rea from the indictment, traditional concepts of plain error would apply. *Id.* at ¶ 6-7.

{¶ 10} In this case, Winston failed to allege that the defect caused him any particular prejudice. Furthermore, in *State v. Lester*, 2009-Ohio-4225, the Ohio Supreme Court held

that aggravated robbery in violation of R.C. 2911.01(A)(1) imposes strict liability with regard to the element of brandishing, displaying, using, or indicating possession of a deadly weapon and the indictment is not required to set forth a culpable mental state.

{¶ 11} Therefore, we agree with the trial court that no plain error exists. Judgment affirmed.

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FAIN, J. and GRADY, J., concur.

Copies mailed to:

- Carley J. Ingram
- Scott N. Blauvelt
- Tyrone A. Winston
- Hon. Timothy N. O'Connell