

[Cite as *State v. Tucker*, 2010-Ohio-2642.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23408
vs.	:	T.C. CASE NO. 05CR4970
REGINALD D. TUCKER	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 11th day of June, 2010.

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 Defendant-Appellant, Pro Se

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GRADY, J.:

{¶ 1} Defendant, Reginald Tucker, appeals from a judgment of the common pleas court that denied his motion to vacate his judgment of conviction.

{¶ 2} Defendant was indicted in 2006 on one count of aggravated robbery with firearm and repeat violent offender specifications,

one count of kidnaping with the same specifications, one count of having a weapon under disability with a firearm specification, and three counts of aggravated murder with capital specifications and firearm specifications, all charges arising from the shooting and death of Antoinette Hollingsworth. Defendant was acquitted following a trial before a three judge panel of one of the murder charges and its attendant specifications, but was found guilty of all remaining charges and specifications. At sentencing the trial court merged the murder convictions, the aggravated robbery and kidnaping convictions, and all of the firearm specifications, and imposed an aggregate sentence of forty-three years to life.

On May 16, 2008, we affirmed Defendant's conviction and sentence on direct appeal. *State v. Tucker*, Montgomery App. No. 22089, 2008-Ohio-2386.

{¶}3 On December 22, 2008, Defendant filed a "motion to vacate void judgment," claiming that because his indictment for aggravated robbery and aggravated murder committed during the course of an aggravated robbery did not allege the mens rea element of those offenses, the trial court lacked subject matter jurisdiction and therefore his conviction and sentence for those offenses are void.

On April 1, 2009, the trial court denied Defendant's motion, without a hearing. The court concluded that it had jurisdiction in the case and, in any event, because Defendant failed to raise

the issue of a defective indictment in his direct appeal, res judicata now bars Defendant from raising that issue as a ground for post-conviction relief. Defendant timely appealed to this court.

FIRST ASSIGNMENT OF ERROR

{¶ 4} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN VIOLATION OF APPELLANT'S ABSOLUTE RIGHT TO PROCEDURAL DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE I, SECTION 16, OHIO CONSTITUTION IN DISMISSING THE MOTION TO VACATE JUDGMENT WITHOUT FIRST CONDUCTING AN EVIDENTIARY HEARING."

SECOND ASSIGNMENT OF ERROR

{¶ 5} "DEFENDANT-APPELLANT'S CONVICTION AND SENTENCE FOR AGGRAVATED MURDER, AGGRAVATED ROBBERY, KIDNAPING AND WEAPONS UNDER DISABILITY ARE VOID WHERE THE COMPLAINT AND INDICTMENT FAILED TO PUT APPELLANT ON NOTICE OF THE CHARGES IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS AS WELL AS ARTICLE I, §§ 10, 16, OHIO CONSTITUTION."

{¶ 6} Omission of a required mens rea element from an indictment renders a conviction resulting from the indictment merely voidable, not void, *State v. Johnson*, 179 Ohio App.3d 151, 2008-Ohio-5769, and does not deprive the trial court of jurisdiction. *Evans v. Sacks* (1962), 173 Ohio St. 116. Whether the indictment was

defective is an issue that could have been raised by Defendant in his direct appeal. It was not. Therefore, res judicata bars Defendant from now raising that issue as a ground for post-conviction relief. *Johnson*, at ¶41; *State v. Perry* (1967), 10 Ohio St.2d 175, at paragraph nine of the syllabus.

{¶7} Defendant's assignments of error are overruled. The judgment of the trial court will be affirmed.

FAIN, J. And FROELICH, J., concur.

Copies mailed to:

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Reginald D. Tucker
Hon. Mary Katherine Huffman