

[Cite as *State v. Lucky*, 2009-Ohio-4737.]

COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Julie A. Edwards, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 09-CA-39
JEFFREY LUCKY	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Delaware County Court of Common Pleas, Case No. 06CRI110500

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 4, 2009

APPEARANCES:

For Plaintiff-Appellee

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Gwin, P.J

{¶1} Defendant-appellant Jeffrey Lucky appeals the March 26, 2009 judgment entry of the Delaware County Court of Common Pleas dismissing his petition for post-conviction relief. Plaintiff-appellee is the State of Ohio.

#### STATEMENT OF THE FACTS AND CASE

{¶2} On November 17, 2006, the Delaware County Grand Jury indicted appellant on one count of “physical harm” robbery, in violation of R.C. 2911.02(A) (2), and one count of “force” robbery, in violation of R.C. 2911.02(A) (3). The matter proceeded to trial by jury on March 1, 2007.

{¶3} After hearing all the evidence and deliberations, the jury rendered a verdict finding appellant not guilty as to the first count of robbery, and guilty of the second count. The trial court sentenced appellant to a four-year prison term.

{¶4} On January 29, 2008, this Court affirmed appellant’s convictions and sentences. See *State v. Lucky*, Delaware App. No. 07CAA040018, 2008-Ohio-331.

{¶5} The Ohio Supreme Court remanded appellant’s case back to this Court on July 17, 2008 for consideration of whether the judgment should be modified in view of *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260, 884 N.E.2d 595<sup>1</sup>. See, *State v. Lucky*, 118 Ohio St.3d 446, 889 N.E.2d 1019, 2008-Ohio-3178. This Court affirmed the conviction and appellant’s application for reconsideration was denied December 22, 2008.

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<sup>1</sup> In *Smith*, the Supreme Court of Ohio held that theft is a lesser-included offense of robbery. *State v. Smith*, 117 Ohio St.3d 447, 884 N.E.2d 595, 2008-Ohio -1260, paragraph two of the syllabus.

{¶16} Defendant-appellant filed a petition for post conviction relief on February 19, 2009. In that petition, he argues that, based upon the Supreme Court's decision in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, his indictment was defective as it relates to the robbery charge because it failed to set forth a mental state of recklessness. That petition was denied by the trial court because it was not filed in a timely manner pursuant to R.C. 2953.21(A) (2).

{¶17} Appellant filed his appeal from the denial of his petition for post conviction relief in this court and has set forth the following two assignments of error:

{¶18} "I. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT-APPELLANT HIS RIGHT TO DUE PROCESS OF LAW UNDER BOTH THE OHIO AND UNITED STATES CONSTITUTION WHERE DEFENDANT-APPELLANT'S JUDGMENT OF CONVICTION IS VOID FOR LACK OF JURISDICTION OF THE SUBJECT MATTER.

{¶19} "II. THE TRIAL ERRED AS A MATTER OF LAW WHEN IT DENIED DEFENDANT APPELLANT HIS UNITED STATES CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW AS WELL AS HIS OHIO CONSTITUTION ARTICLE I, SECTION 10 RIGHT TO DUE PROCESS OF LAW WHEN HIS UNTIMELY POST CONVICTION PETITION COMPORTS WITH THE STATUTORY EXCEPTION R.C. 2953.23(A) (1) (A) AND R.C. 2953.23(A) (1) (B)."

## I. &amp; II.

{¶10} Appellant, in his two assignments of error, challenges the denial of his petition for post conviction relief.

{¶11} Post conviction efforts to vacate a criminal conviction or sentence on constitutional grounds are governed by R.C. 2953.21, which provides:

{¶12} “Any person who has been convicted of a criminal offense \* \* \* and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, and any person who has been convicted of a criminal offense that is a felony, who is an inmate, \* \* \* may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief.”

{¶13} Pursuant to R.C. 2953.21(A) (2), a petition for post conviction relief “shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.”

{¶14} The record indicates appellant did file a direct appeal in this matter with a transcript. The transcript was filed in this Court on June 21, 2007. Therefore, under R.C. 2953.21(A) (2), appellant was required to file his petition " \* \* \* one hundred eighty days after the date on which the trial transcript is filed in the court of appeals...”

{¶15} However, appellant did not file his petition for post-conviction relief until February 19, 2009, which is well beyond the period provided for in the statute. Because appellant's petition was untimely filed, the trial court was required to entertain appellant's petition only if he could meet the requirements of R.C. 2953.23(A). This statute provides, in pertinent part:

{¶16} \* \* \* [A] court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless both of the following apply:

{¶17} "(1) Either of the following applies:

{¶18} "(a) 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.

{¶19} "(b) 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.

{¶20} "(2) 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."

{¶21} Appellant's argument does not rely on the language in R.C. 2953.23(A)(1)(a) that he "was unavoidably prevented from discovery of the facts upon

which the petitioner must rely to present the claim for relief,” but rather new case law i.e., *Colon I*.<sup>2</sup>

{¶22} As this Court noted in *State v. Vance*, Ashland App. No. 2007-COA-035, 2008-Ohio-4763, the Supreme Court reconsidered *Colon I* in *State v. Colon* (“*Colon II*”), 119 Ohio St.3d 204, 893 N.E.2d 169, 2008-Ohio-3749. In *Colon II*, the Court held:

{¶23} “Applying structural-error analysis to a defective indictment is appropriate only in rare cases, such as *Colon I*, in which multiple errors at the trial follow the defective indictment. In *Colon I*, the error in the indictment led to errors that ‘permeate[d] the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence.’ Id. at ¶ 23, 885 N.E.2d 917, citing *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, at ¶ 17. Seldom will a defective indictment have this effect, and therefore, in most defective indictment cases, the court may analyze the error pursuant to Crim.R. 52(B) plain-error analysis.” Id. at ¶ 8, 802 N.E.2d 643. The Court noted the multiple errors that occurred in *Colon I*:

{¶24} “As we stated in *Colon I*, the defect in the defendant's indictment was not the only error that had occurred: the defective indictment resulted in several other violations of the defendant's rights. 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, ¶ 29. In *Colon I*, we concluded that there was no evidence to show that the defendant had notice that recklessness was an element of the crime of robbery, nor was there evidence that the state argued that the defendant's conduct was reckless. Id. at ¶

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<sup>2</sup> Although appellant may not have been aware until the Supreme Court of Ohio decided *Colon I* that there may have been a legal basis to challenge the indictment, the factual basis nevertheless existed at the time the indictment was issued, and appellant cannot claim he was unaware of the indictment. See *State v. Berry*, 10th Dist. No. 08AP-762, 2009-Ohio-1557.

30, 885 N.E.2d 917. Further, the trial court did not include recklessness as an element of the crime when it instructed the jury. *Id.* at ¶ 31, 885 N.E.2d 917. In closing argument, the prosecuting attorney treated robbery as a strict-liability offense. *Id.* *Colon II* at ¶ 6.” See also, *Vance*, *supra* at ¶ 51-53. Accordingly, a defect in the appellant's indictment does not alone render the judgment of conviction void.

{¶25} Concerning R.C. 2953.23(A)(1)(b), we note that *Colon I* was not a decision by the United States Supreme Court, and therefore did not constitute recognition by the United States Supreme Court of a new federal or state right that applies retroactively to persons in appellant's situation. *State v. Berry*, 10th Dist. No. 08AP-762, 2009-Ohio-1557 at 19; *State v. Smith*, 10<sup>th</sup> Dist. No. 09AP-46, 2009-Ohio-3244 at ¶10.

{¶26} Because appellant's petition for post-conviction relief was untimely filed under R.C. 2953. 21(A) (2) and fails to meet the narrow exceptions allowing for untimely filing provided by R.C. 2953.23(A), dismissal of the petition was appropriate. A court has no jurisdiction to hear an untimely petition for post conviction relief unless the petitioner meets the requirements in R.C. 2953.23(A). *State v. Demastry* 5th Dist. No. 05CA14, 2005-Ohio-4962 at ¶ 15. (Citations omitted); *State v. Mong*, 5<sup>th</sup> Dist. No. 04CA50, 2005-Ohio-2008 at ¶ 11; *State v. Reynolds*, 10th Dist. No. 08AP-1052, 2009-Ohio-2147, ¶ 10.

{¶27} Finally, a trial court may also dismiss a petition seeking post-conviction relief if it determines that the doctrine of res judicata applies. *State v. Szefcyk*, 77 Ohio St.3d 93, 1996-Ohio-337. Res judicata bars a defendant who was represented by counsel from raising an issue in a petition seeking post-conviction relief if the defendant raised or could have raised the issue at trial or on direct appeal. *Id.* at syllabus. In this

case, appellant could have challenged the sufficiency of the indictment before the trial court or on direct appeal, and, therefore, res judicata acts to bar further litigation regarding the sufficiency of the indictment. *State v. Smith*, supra at ¶13.

{¶28} The trial court properly dismissed appellant's petition seeking post-conviction relief. Accordingly, appellant's first and second assignments of error are overruled.

{¶29} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed.

By Gwin, P.J.,

Edwards, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. PATRICIA A. DELANEY

