

[Cite as *State v. Smith*, 2010-Ohio-4492.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94110

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ASHUNTE SMITH

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-327616

BEFORE: Kilbane, P.J., Blackmon, J., and Boyle, J.

RELEASED AND JOURNALIZED: September 23, 2010

APPELLANT

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MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Ashunte Smith (“Smith”), appeals pro se the denial of his motion for postconviction relief, arguing that his indictment was defective and that he received ineffective assistance of counsel. After reviewing the facts and pertinent law, we affirm the trial court’s decision.

Statement of Facts and Procedural History

{¶ 2} On May 22, 1996, Smith was convicted of two counts of aggravated murder, in violation of R.C. 2903.01(A) and (B), and one count of

kidnapping, in violation of R.C. 2905.01, with all attendant specifications.¹ That same day, the trial court sentenced Smith on Counts 1 and 2, the aggravated murder convictions, to two life terms of incarceration. On Count 3, kidnapping, he was sentenced to 8-15 years, to be served concurrently with Counts 1 and 2. Smith was also sentenced to a mandatory consecutive three-year term on the accompanying firearm specifications.

{¶ 3} On August 21, 1997, Smith's conviction was affirmed in *State v. Smith* (Aug. 21, 1997), Cuyahoga App. No. 70855, but his sentence was modified to merge his two aggravated murder convictions. *Id.*

{¶ 4} On June 21, 1998, the Ohio Supreme Court declined to accept jurisdiction of Smith's appeal. *State v. Smith* (1998), 81 Ohio St.3d 1414, 688 N.E.2d 1042.

{¶ 5} On October 12, 2005, Smith's application for habeas corpus was denied. *Smith v. Bradshaw*, Richland App. No. 05-CA-66, 2005-Ohio-5403.

{¶ 6} On April 26, 2006, the Supreme Court affirmed the denial of Smith's habeas corpus petition in *Smith v. Bradshaw*, 109 Ohio St.3d 50, 2006-Ohio-1828, 845 N.E.2d 516.

{¶ 7} On April 3, 2009, Smith filed his petition for postconviction relief, which was denied on September 23, 2009.

¹ Both aggravated murder counts carried felony murder and firearm specifications. The kidnapping count carried firearm specifications.

{¶ 8} On November 25, 2009, Smith filed the instant appeal, asserting two assignments of error. Since they are interrelated, we address both assignments of error together:

“I. The trial court committed reversible error in denying relief where the counts in the indictment did not charge an offense under Ohio law and therefore was a complete failure to invoke subject matter jurisdiction. The defendant is legally innocent as a matter of law.

“II. Defendant Smith experienced ineffective assistance of counsel in the trial court and in his first appeal of right in violation of the sixth amendment and the fourteenth amendment to the United States Constitution.”

Standard of Review

{¶ 9} We recently summarized the standard of review in denial of a petition for postconviction relief under R.C. 2953.21 in *State v. Hines*, 8th Dist. No. 89848, 2008-Ohio-1927:

“ ‘A postconviction proceeding is not an appeal of a criminal conviction, but, rather, a collateral civil attack on the judgment.’ *State v. Steffen* (1994), 70 Ohio St.3d 399, 410, 1994- Ohio-11. In postconviction cases, a trial court acts as a gatekeeper, determining whether a defendant will even receive a hearing. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679. In *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, the Ohio Supreme Court held that the trial court’s gatekeeping function in the postconviction relief process is entitled to deference, including the court’s decision regarding the sufficiency of the facts set forth by the petitioner and the credibility of the affidavits submitted. Accordingly, we review appellant’s postconviction claims brought pursuant to R.C. 2953.21 under an abuse-of-discretion standard. *Id.* An abuse of discretion is more than a mere error in judgment, it implies that a court’s ruling is unreasonable,

arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.” *Hines* at ¶8.

Analysis

Whether Smith’s Petition for Postconviction Relief was Untimely

{¶ 10} At the outset, we note that Smith was convicted and sentenced on May 22, 1996. R.C. 2953.21(A)(2) mandates that petitions for postconviction relief must be filed within 180 days after the transcript is “filed in the court of appeals in the direct appeal of the judgment.” On its face, therefore, Smith’s petition was not timely filed with the trial court. Smith may overcome this presumption if he meets two criteria outlined at R.C. 2953.23:

“(A) * * * [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 division (A)(1) or (2) of this section applies:

“(1) Both of the following apply:

“(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.

“(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.”

{¶ 11} Thus, in order for his delayed petition to be reviewed, Smith must show that he was unavoidably prevented from discovering evidence that he relies on in his claim for relief and in the interim between his conviction and petition, the United States Supreme Court has recognized a new right and has applied it retroactively. Smith must also base his claim on that new right as applied to him by the United States Supreme Court and show that a constitutional error barred the admission of clear and convincing evidence showing that Smith is not guilty. No such facts exist here.

{¶ 12} Smith argues that his indictment is structurally defective. While his indictment was obviously available to him at the time of trial and he was not prevented from discovering it at trial, the cases upon which he relies in his brief in support of his claims were not yet decided. Despite this, the United States Supreme Court has not retroactively changed any constitutional rights as they relate to Smith, and there was no constitutional error at trial barring the admission of clear and convincing evidence that he is not guilty. His petition was therefore untimely filed in the trial court. We address his claims solely for completeness and clarity in the record to

dispose of any potential claim that his indictment lacked the appropriate mens rea.

Smith's Indictment was Sufficient

{¶ 13} In his brief, Smith argues that his indictment was defective since it did not contain any mens rea. In support of this, he cites *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 (*Colon I*), for the proposition that constitutionally defective indictments that so permeate a defendant's trial as to constitute structural error relieve the trial court of jurisdiction. Based upon this argument, Smith argues in his second assigned error that his counsel was ineffective both at trial and on appeal for failing to argue that his indictment was defective.

{¶ 14} Smith fails to point out that upon reconsideration, *Colon I* was severely limited on reconsideration to cases then pending on appeal by *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3479, 893 N.E.2d 169. Both *Colon I* and *Colon II* have since been overruled by *State v. Horner*, _____ N.E.2d ___, 2010-Ohio-3830 (holding that an indictment that charges an offense by tracking the language of the criminal statute is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state). *Colon I* is inapplicable to the instant appeal, since it has been overruled by *Horner*.

{¶ 15} We note that even if *Colon I* did apply to this case, a review of the indictment in this matter reveals that both aggravated murder charges contain the requisite mens rea of “purposely,” so there was no error in Smith’s indictment on Counts 1 and 2.

{¶ 16} With respect to Count 3, kidnapping, Ohio appellate courts have rejected the argument that the kidnapping statute does not set forth a mens rea and have ruled that the mens rea of the statute is purposely. See *State v. Ellis*, 8th Dist. No. 90844, 2009-Ohio-4359, at ¶16, citing *State v. Carver*, Montgomery App. No. 21328, 2008-Ohio-4631; *State v. Riddle*, 8th Dist. No. 90999, 2009-Ohio-348; *State v. Parker*, 8th Dist. No. 90256, 2008-Ohio-3681. Smith’s indictment in Count 3 is therefore not defective. See, also, *Horner*.

Smith’s Ineffective Assistance Argument Fails

{¶ 17} A claim of ineffective assistance of counsel requires Smith to demonstrate both that his attorney’s performance fell below an acceptable standard of reasonable representation and that he was prejudiced by that substandard performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. In evaluating counsel’s performance, this court will not second-guess his decisions in what are matters of trial strategy. *State v. Stone*, Cuyahoga App. Nos. 91679 and 91680, 2009-Ohio-2262, ¶12. Smith cannot complain that his counsel’s performance was substandard and that he was prejudiced by his counsel’s

failure to argue that his indictment was insufficient for failure to contain the requisite mens rea requirement. For the reasons stated above, we have already determined that Smith's indictment was sufficient. He was therefore not prejudiced by his counsel's failure to make this argument.

{¶ 18} Smith's assignments of error are overruled. The trial court did not err in denying his petition for postconviction relief.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
MARY J. BOYLE, J., CONCUR