

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-L-051
DARYL L. GOTEL,	:	
Defendant-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 05 CR 000090.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Daryl L. Gotel, pro se, PID: 491-911, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030-8000 (Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Daryl L. Gotel, appeals the judgment of the Lake County Court of Common Pleas denying his motion to vacate his conviction. At issue is whether appellant’s guilty plea precluded him from challenging a defect in his indictment and whether the assigned errors are barred by res judicata. For the reasons that follow, we affirm.

{¶2} On April 26, 2005, appellant was charged in the Lake County Court of Common Pleas in a three-count indictment with two counts of robbery, in violation of R.C. 2911.02(A)(2), felonies of the second degree, and one count of grand theft, in violation of R.C. 2913.02, a felony of the fourth degree. The state and appellant entered into a plea bargain whereby, in exchange for appellant's agreement to plead guilty to one count of robbery, the state would move to dismiss the remaining counts.

{¶3} On July 14, 2005, the Lake County Court of Common Pleas conducted a guilty plea hearing at which appellant entered a guilty plea to robbery. At the hearing, appellant admitted he entered the Whitehall jewelry store at the Great Lakes Mall in Mentor, Ohio with an accomplice with the purpose to steal jewelry. They stole 66 watches worth in excess of \$63,000.00 by threatening two clerks with acid. After finding that the guilty plea was knowingly, voluntarily, and intelligently made, the court accepted appellant's guilty plea, found him guilty of robbery, and dismissed the remaining felony counts. On August 30, 2005, the court sentenced appellant to a term of six years in prison.

{¶4} Appellant subsequently appealed his conviction, which this court affirmed in *State v. Gotel*, 11th Dist. No. 2006-L-015, 2007-Ohio-888, motion for leave to file delayed appeal denied at 114 Ohio St.3d 1476, 2007-Ohio-3699, 2007 Ohio LEXIS 1819 ("*Gotel I*"). Appellant also filed an original action in this court for a writ of habeas corpus, arguing the trial court did not have jurisdiction of his case because he was not charged with all three offenses in the municipal court for which he was indicted by the grand jury. This court dismissed the action in *Gotel v. Gansheimer*, 11th Dist. No. 2006-A-0087, 2007-Ohio-2311, affirmed at 116 Ohio St.3d 316, 2007-Ohio-6437 ("*Gotel II*").

{¶5} Thereafter, on August 18, 2008, appellant filed a complaint for declaratory judgment in the Ashtabula County Court of Common Pleas. He alleged he is being falsely imprisoned by the prison warden pursuant to a void conviction. He alleged that, because his robbery indictment did not include the culpable mental state, or mens rea, of recklessness as an element of the offense, structural error was committed, and he was entitled to a declaration that his conviction is void. The trial court dismissed the complaint and appellant appealed. In *Gotel v. Ganshiemer*, 11th Dist. No. 2008-A-0070, 2009-Ohio-5423 (“*Gotel III*”), we affirmed the trial court’s ruling.

{¶6} Meanwhile, in the Lake County Court of Common Pleas, on December 4, 2008, appellant filed a “common law motion to vacate or to set aside void judgment,” asserting basically the same argument he raised and we rejected in *Gotel III*. He argued the trial court did not have jurisdiction to enter his conviction because the indictment did not include recklessness as an element of robbery and thus did not charge an offense. He therefore asked the court to vacate his conviction. He also filed a motion for summary judgment on his motion to vacate.

{¶7} Subsequently, appellant filed an original action in this court for a writ of procedendo to compel the Lake County trial judge to rule on his motion to vacate. He argued he was entitled to a writ because the trial court had not yet ruled on his motion, although it had been pending on the trial court’s docket for two months. In *State v. Gotel*, 11th Dist. No. 2009-L-022, 2009-Ohio-1148 (“*Gotel IV*”), this court dismissed appellant’s petition.

{¶8} Thereafter, the trial court entered its judgment denying appellant’s motion to vacate his conviction and his motion for summary judgment. Appellant now appeals

the trial court's judgment asserting two assignments of error. Because they are interrelated, we shall consider them together. They allege:

{¶9} “[1.] Trial court abused its discretion and erred in its finding that appellant waived any objection to the fatally defective indictment for robbery by not raising it at the trial court level.

{¶10} “[2.] Trial court erred and abused its discretion by denying appellant's common law motion to vacate or set aside void judgment.”

{¶11} Under his assigned errors, appellant presents essentially the identical argument he made in *Gotel III*. Once again, he argues that, because his indictment for robbery did not include the culpable mental state of recklessness as an element, the indictment did not charge an offense and the trial court did not have jurisdiction to enter its judgment of conviction. He argues that his conviction is therefore void and resulted in structural error that cannot be cured and can be asserted and apparently reasserted at any time. However, as we held in *Gotel III*, appellant's current challenge to the validity of his conviction is barred by his guilty plea.

{¶12} The United States Supreme Court has held: “When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.” *Tollett v. Henderson* (1973), 411 U.S. 258, 267.

{¶13} The Supreme Court, in *Lefkowitz v. Newsome* (1975), 420 U.S. 283, further held:

{¶14} “In most States a defendant must plead not guilty and go to trial to preserve the opportunity for state appellate review of his constitutional challenges to *** admissibility of various pieces of evidence ***. A defendant who chooses to plead guilty rather than go to trial in effect deliberately refuses to present his federal claims to the state court in the first instance. *** Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained. *** It is in this sense, therefore, that ordinarily ‘a guilty plea represents a break in the chain of events which has preceded it in the criminal process.’” (Internal citations omitted.) *Lefkowitz* at 289, quoting *Tollett*, *supra*, at 267.

{¶15} The United States Supreme Court held in *Haring v. Prosise* (1983), 462 U.S. 306:

{¶16} “*** [A] counseled plea of guilty is an admission of factual guilt[] so reliable that *** it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State’s imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established.” (Emphasis sic.) *Id.* at 321, quoting *Menna v. New York* (1975), 423 U.S. 61, 62-63, n. 2.

{¶17} In *State v. Barton*, 108 Ohio St.3d 402, 2006-Ohio-1324, the Supreme Court of Ohio held that “Barton waived any deficiency in the indictment by failing to object to the indictment and by pleading guilty to the offense.” *Id.* at 414. Barton alleged that the grand jury had failed to properly indict him for having a weapon while

under a disability. He claimed the defective indictment posed a jurisdictional defect that could be raised at any time. *Id.* at 413. The Supreme Court rejected this argument and held that Barton's guilty plea waived his right to contest the defective indictment on appeal. *Id.* at 414.

{¶18} As noted above, appellant argues the omission of the mens rea element in his indictment is a structural error that can be raised at any time. In *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"), the Supreme Court of Ohio held: "When an indictment fails to charge a mens rea element of a crime and the defendant fails to raise that defect in the trial court, the defendant has not waived the defect in the indictment." *Id.* at syllabus.

{¶19} Since the Supreme Court of Ohio issued its decision in *Colon I*, Ohio appellate courts have repeatedly and uniformly held that a guilty plea precludes a defendant from asserting a violation under *Colon I*. In *State v. Gant*, 3d Dist. No. 1-08-22, 2008-Ohio-5406, the Third District held that a guilty plea waives any defect in the indictment occasioned by a failure to allege a culpable mental state. *Id.* at ¶13. The Third District held: "This Court is not persuaded that the Court in *Colon* was also overruling the longstanding waiver rules with regard to guilty pleas. Accordingly, this Court finds that Gant admitted guilt of the substantive crime of burglary and has, therefore, waived any alleged indictment defects for purposes of appeal." *Id.* Accord *State v. Smith*, 2d Dist. No. 08CA0060, 2009-Ohio-5048, ¶25; *State v. Easter*, 2d Dist. No. 22487, 2008-Ohio-6038, at ¶27.

{¶20} In *State v. Treft*, 6th Dist. Nos. WD-07-085 and WD-08-012, 2009-Ohio-1127, the Sixth District held:

{¶21} “This court has previously considered an appeal based upon a claimed mens rea structural defect to an indictment *** in a case where the defendant was convicted pursuant to a guilty plea. *State v. Smith*, 6th Dist. No. L-07-1346, 2009-Ohio-48. We recognized that a guilty plea precludes subsequent ‘independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea’ and, therefore, precluded challenges to the constitutionality of indictments under *Colon* *** where conviction is based upon a guilty plea. *Id.* at ¶10, quoting *Tollett*[, supra, at] 267 and *State v. Spates* (1992), 64 Ohio St.3d 269, 272, 1992-Ohio-130; accord *State v. Straughter*, 10th Dist. No. 08AP-777, 2009-Ohio-641; *State v. Hayden*, 8th Dist. No. 90474, 2008-Ohio-6279; *State v. McGinnis* (Nov. 10, 2008), 3d Dist. No. 15-08-07, 2008-Ohio-5825. We conclude that appellant’s assignment of error is without merit on the basis of his guilty pleas alone.” *Treft*, supra, at ¶8.

{¶22} In *State v. Kovach*, 7th Dist. No. 08-MA-125, 2009-Ohio-2892, the Seventh District held that by entering a plea of guilty, a criminal defendant waives any alleged errors or defects in his indictment. *Id.* at ¶41. The court further held: “Because a guilty plea precludes subsequent, independent claims relating to the deprivation of constitutional rights that occurred prior to the guilty plea, a guilty plea precludes challenges to the constitutionality of the indictment under *** [*Colon I.*]” *Kovach*, supra, citing *Treft*, supra.

{¶23} In *Hayden*, supra, the Eighth District held that by pleading guilty, the defendant waived any alleged defect in the indictment on appeal, and that *Colon I* did not overrule the longstanding waiver rule with regard to guilty pleas, i.e., that a guilty plea precludes a defendant from raising claims relating to the deprivation of

constitutional rights that occurred prior to the entry of the guilty plea. *Id.* at ¶6. Accord *Smith*, *supra*, at ¶10; *McGinnis*, *supra*, at ¶26.

{¶24} In *State v. Peeks*, 10th Dist. No. 08AP-1027, 2009-Ohio-1546, the Tenth District held: “[A]ppellant could not raise a *Colon* challenge here because he did not exercise his constitutional right to a jury trial, but rather entered pleas of guilty. This court recently held in *State v. Palacios*, 10th Dist. No. 08AP-669, 2009-Ohio-1187, ¶19, that when the defendant enters a guilty plea, structural error does not occur.” *Id.* at ¶11.

{¶25} Finally, in *State v. Dudas*, 11th Dist. Nos. 2008-L-109 and 2008-L-110, 2009-Ohio-1001, this court held that an appellant is precluded from asserting structural error under *Colon I* where his conviction is based on a guilty plea. *Id.* at ¶43.

{¶26} Based on the foregoing authority, we hold that because appellant’s conviction was based on his guilty plea, he is precluded from asserting any defect in his indictment based on an alleged violation of *Colon I*.

{¶27} Further, even if appellant had not pled guilty, his motion to vacate would be barred because the Supreme Court of Ohio has held the rule announced in *Colon I* applies prospectively and to those cases pending on appeal on the date *Colon I* was announced. *State v. Colon*, 119 Ohio St.3d 204, 204-205, 2008-Ohio-3749 (“*Colon II*”). Appellant’s appeal was not pending on the date *Colon I* was announced, and therefore *Colon I* is not applicable to his case.

{¶28} The trial court found that because *Colon I* is not retroactive, this court’s holding in *State v. Batich*, 11th Dist. No. 2006-A-0031, 2007-Ohio-2305 applies. In that case this court held that a defendant who fails to object to the omission of the mens rea element in an indictment waives the error on appeal. However, *Batich* is inapposite

because the defendant in that case did not plead guilty. As noted above, our holding today is determined by appellant's guilty plea.

{¶29} Next, we observe that even if appellant's appeal was pending on the date *Colon I* was announced, his motion to vacate would be barred because the holding in *Colon I* is limited to those cases where the defective indictment results in multiple constitutional errors in the defendant's trial. In contrast to *Colon I*, appellant's conviction was based on a guilty plea, and thus the error in his indictment did not result in multiple errors in a trial.

{¶30} In *Colon I*, the Supreme Court of Ohio held that "defects in an indictment that fail *** 'to charge an offense' do not need to be raised prior to trial and can be raised any time during the pendency of the proceeding. An indictment that omits the mens rea element of recklessness fails to charge the offense of robbery ***." *Colon I* at 33. The Court then determined that the defect was a "structural error" because the defective indictment "permeated" the entire trial. The Supreme Court of Ohio held:

{¶31} "The defective indictment in this case resulted in several violations of the defendant's constitutional rights. First, the indictment against the defendant did not include all the elements of the offense charged, as the indictment omitted the required mens rea for the crime of robbery. ***

{¶32} "Second, there is no evidence in the record that the defendant had notice that the state was required to prove that he had been reckless in order to convict him of the offense of robbery, and thus the defendant's due process rights were violated. Further, the state did not argue that the defendant's conduct in inflicting physical harm on the victim constituted reckless conduct.

{¶33} “*** [W]hen the trial court instructed the jury on the elements of robbery ***, the court failed to include the required mens rea for the offense. The defendant’s counsel did not object to the incomplete instruction. There is no evidence in the record that the jury considered whether the defendant was reckless in inflicting *** physical harm, as is required to convict under R.C. 2911.02(A)(2). Finally, during closing argument, the prosecuting attorney treated robbery as a strict-liability offense.” *Colon I* at 32.

{¶34} The Court further held: “*** here, the defects in the indictment led to significant errors throughout the defendant’s trial, and therefore, structural-error analysis is appropriate. As stated previously, structural errors permeate the trial from beginning to end and put into question the reliability of the trial *** in serving its function as a vehicle for determination of guilt or innocence. *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, at ¶17.” *Colon I* at 31.

{¶35} On reconsideration, the Supreme Court of Ohio clarified its ruling in *Colon I* in *Colon II*. The Court in *Colon II* held:

{¶36} “*** 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. ***

{¶37} “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. As we stated in *Colon I*, when a defendant fails to object to an indictment that is defective because the indictment did not include an essential element of the charged offense, a plain-error analysis is

appropriate. *** In most defective-indictment cases in which the indictment fails to include an essential element of the charge, we expect that plain-error analysis, pursuant to Crim.R. 52(B), will be the proper analysis to apply.

{¶38} “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. *** Consistent with our discussion herein, we emphasize that the syllabus in *Colon I* is confined to the facts in that case.” (Internal citation omitted.) *Colon II* at 205-206.

{¶39} The instant case is easily distinguished from *Colon I* because, here, appellant entered a guilty plea and did not proceed to trial, while the Supreme Court’s holding in *Colon I* was based on the multiple constitutional errors that occurred throughout the trial.

{¶40} As noted above, the Supreme Court of Ohio in *Colon II* held that in a defective-indictment case that does not result in multiple errors, a structural-error analysis would not be appropriate; rather, a plain-error analysis applies. *Id.* at 205-206. In *Easter*, supra, the robbery indictment failed to charge the mens rea element. The Second District held that, although the indictment was deficient for want of a culpable mental state, plain-error analysis was appropriate, rather than structural-error analysis, because the defective indictment did not result in multiple violations of the defendant’s constitutional rights as the defendant pled guilty to the charge. *Id.* at ¶8-10.

{¶41} We therefore hold that the omission of the recklessness element in appellant’s indictment did not result in structural error because the error was not

followed by multiple errors throughout a trial. Thus, the error would be subject to review only under a plain-error analysis.

{¶42} However, appellant does not alternatively argue plain error. In *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, the Supreme Court of Ohio held: “The burden of demonstrating plain error is on the party asserting it. See, e.g., *State v. Jester* (1987), 32 Ohio St.3d 147, 150 ***. A reversal is warranted if the party can prove that the outcome ‘would have been different absent the error.’ *State v. Hill* (2001), 92 Ohio St.3d 191, 203, 2001-Ohio-141 ***.” *Payne* at 505.

{¶43} In the case sub judice, even if we were to review the error under a plain-error analysis, the error would not constitute plain error. We note that at his guilty plea hearing, appellant admitted that in stealing the watches from the jewelry store, he used acid to threaten the two store clerks. Such evidence is sufficient to show purpose or knowledge, either of which is sufficient to show recklessness. R.C. 2901.22(E). Further, the record does not show that, but for the alleged error, appellant would not have pled guilty to robbery. Thus, we do not discern plain error.

{¶44} We further hold that, because the error in the indictment did not result in structural error and appellant’s conviction is therefore not void, appellant’s assignments of error are also barred by res judicata. In *State v. Reynolds*, 79 Ohio St.3d 158, 1997-Ohio-304, the Supreme Court of Ohio held: “where a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation *** of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21.” *Id.* at 160.

{¶45} The Court in *Reynolds* further held that because Reynolds' motion was a petition for postconviction relief, it was barred by res judicata. *Id.* at 161. The Court held:

{¶46} “Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant *** from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at trial *** or on an appeal from that judgment.” *Reynolds*, *supra*, quoting *State v. Perry* (1967), 10 Ohio St.2d 175, syllabus.

{¶47} Further, in *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, the Supreme Court of Ohio held:

{¶48} “*** [T]he doctrine [of res judicata] serves to preclude a defendant who has had his day in court from seeking a second [day in court] on that same issue. In so doing, res judicata promotes the principles of finality and judicial economy by preventing endless relitigation of an issue on which a defendant has already received a full and fair opportunity to be heard.” *Id.* at 181.

{¶49} In the instant case, appellant could have challenged the validity of the indictment due to the lack of the mens rea element in the trial court or in his appeal, but failed to do so. Moreover, he actually challenged the indictment raising the identical issue he now asserts in his complaint for declaratory relief in *Gotel III*. In that case we held that because appellant's conviction was based on a guilty plea, he was precluded from asserting any defect in his indictment. *Gotel III* at ¶23. We also held that because appellant pled guilty and did not go to trial, the omission of the mens rea element in his

indictment did not result in structural error. *Id.* at ¶37. By virtue of our holding in *Gotel III*, appellant's assigned errors are also barred by *res judicata*.

{¶50} Based upon the foregoing analysis, appellant's assignments of error are without merit.

{¶51} For the reasons stated in the Opinion of this court, the assignments of error are without merit. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDALL, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.