

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-09-030

Appellee

Trial Court No. 2000-CR-313

v.

Alphonso Darden

DECISION AND JUDGMENT

Appellant

Decided: January 8, 2010

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Alphonso Darden, pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Alphonso Darden, appeals the April 29, 2009 judgment of the Erie County Court of Common Pleas which dismissed appellant's petition for postconviction relief. For the reasons that follow, we affirm the trial court's judgment.

{¶ 2} A brief recitation of the facts is as follows. On June 8, 2000, appellant was indicted on two counts of robbery, R.C. 2911.02(A)(2), one count of receiving stolen property, R.C. 2913.51(A), one count of intimidation of a crime victim, R.C. 2921.04(B), three counts of aggravated robbery, R.C. 2911.01(A)(1), one count of tampering with evidence, R.C. 2921.12(A)(1), two counts of theft, R.C. 2913.02(A)(1), one count of felonious assault, R.C. 2903.11(A)(1), and one count of aggravated robbery, R.C. 2911.01(A)(3). The robbery and aggravated robbery counts contained the specification that during the commission of the offense, appellant "did cause or threaten to cause physical harm." The aggravated robbery, felonious assault, and intimidation of a crime victim counts also contained a firearm specification. Appellant entered a not guilty plea to all the counts.

{¶ 3} Following a jury trial, appellant was convicted of one count of receiving stolen property, one count of tampering with evidence, one count of theft, one count of aggravated robbery with a firearm specification and a specification that appellant caused physical harm during the commission of the offense. Appellant was found not guilty as to the remaining charges. Appellant was sentenced on November 17, 2000. Due to appellant's counsel's failure to file an appeal, appellant's sentence was vacated and re-imposed.

{¶ 4} On direct appeal, appellant argued that he was denied due process of law based upon the prosecutor's improper reference to his past criminal conduct and that his

trial counsel was ineffective. On November 8, 2002, we affirmed appellant's sentence. See *State v. Darden*, 6th Dist. No. E-01-047, 2002-Ohio-6184.

{¶ 5} On April 1, 2009, appellant filed a petition for postconviction relief. In his petition, appellant argued that trial counsel was ineffective in failing to object to a void indictment. Specifically, appellant argued that the indictment failed to specify a mens rea element for the physical harm and firearm specifications. Appellant argued that, pursuant to *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, it was an essential element in the aggravated robbery charge. The state filed a motion for summary judgment.

{¶ 6} On April 29, 2009, the court dismissed the petition finding that it was filed beyond the 180 day time limitation set forth in R.C. 2953.21. The court found that appellant failed to demonstrate that he was unavoidably prevented from discovery of the facts or that but for the constitutional error no reasonable factfinder would have found appellant guilty of the offense. R.C. 2953.23(A). This appeal followed.

{¶ 7} Appellant, pro se, now raises the following three assignments of error for our review:

{¶ 8} "First Assignment of Error: The trial court committed error by dismissing Defendant-appellant petition for post-conviction relief because petition was untimely and thus barred by res judicata.

{¶ 9} "Second Assignment of Error: Defendant-appellant's trial counsel and appellate counsel both provided ineffective assistance of counsel in violation of the Sixth

Amendment to the United State Constitution and Section 10, Article I of the Ohio Constitution by failing to object to void indictment that failed to charge an offense.

{¶ 10} "Third Assignment of Error: Defendant-appellant's trial counsel and appellate counsel both provided ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution by failing to object to specification 'did cause or threaten to cause physical harm during the commission of the offense' that omits mens rea."¹

{¶ 11} Appellant's three assignments of error dispute the trial court's dismissal of his motion for postconviction relief. The first assignment of error specifically relates to the dismissal of his petition for postconviction relief; the second and third assignments of error address the merits of the arguments raised in the petition. Appellant argues that the trial court erred in dismissing his petition for postconviction relief because where a judgment is void for lack of jurisdiction, it is not subject to the time limitations set forth in R.C. Chapter 2953.

{¶ 12} In support of appellant's argument he relies on *State v. Wilson*, 73 Ohio St.3d 40, 1995-Ohio-217. In *Wilson*, the court determined that, absent proper bindover procedures, the trial court lacked subject matter jurisdiction over a juvenile defendant. Thus, the court concluded that the judgment was void ab initio and that the exclusive

¹We note that in his reply brief, appellant has improperly raised two new allied offenses arguments. Pursuant to App.R. 16(C), appellant may file a brief in reply to the brief of appellee. Unless such arguments were raised in appellee's brief, which they were not, a discussion of new arguments in a reply brief is improper.

subject matter of the juvenile court could not be waived. *Id.* at paragraph two of the syllabus.

{¶ 13} In the present case, appellant contends that his judgment was void based upon a "structural error" in the indictment. Appellant's argument is based on *State v. Colon*, *supra*, ("*Colon I*"). In *Colon I*, the Supreme Court of Ohio held that where an indictment fails to include a *mens rea* element of the crime, the defendant has not waived the defect in the indictment. *Id.* at syllabus. In *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II*"), the Supreme Court of Ohio clarified its *Colon I* decision by specifically limiting its application to only those cases pending on the date that *Colon I* was announced. *Id.* at ¶ 5. The *Colon II* court further explained that a "new judicial ruling may not be applied retroactively to a conviction that has become final, i.e., where the accused has exhausted all of his appellate remedies." *Id.* at ¶ 4.

{¶ 14} In *State v. Diaz*, 6th Dist. Nos. L-08-1222, L-08-1252, 2008-Ohio-6389, this court considered the applicability of *Colon I* to a petition for postconviction relief. In *Diaz*, appellant appealed the dismissal of his second and third petitions for postconviction relief; both petitions were filed after the announcement of *Colon I*. Relying on *Colon II*, we held that *Colon I* did not apply because appellant's direct appeal was denied in August 2007; thus, the arguments were barred by *res judicata*. *Id.* at ¶ 13. Accord *State v. Smith*, 6th Dist. Nos. L-08-1283, L-08-1286, L-08-1287, 2009-Ohio-1538.

{¶ 15} In the present case, appellant's direct appeal was denied on November 8, 2002, well before *Colon I*. No other appeal was filed and an application for reopening of

his appeal was not pending on the date that appellant filed his petition for postconviction relief. Thus, appellant may not assert defective indictment claims under R.C. 2953.23(A)(1), and the trial court properly dismissed appellant's untimely petition for postconviction relief. Appellant's first, second, and third assignments of error are not well-taken.

{¶ 16} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Erie County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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