[Cite as *State v. McDonald*, 2010-Ohio-3076.]

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

State of Ohio — Court of Appeals No. L-08-1384

Appellee — Trial Court No. CR 199605415

v.

Rhomie McDonald — **DECISION AND JUDGMENT**

Appellant — Decided: June 30, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac Rump, for appellant.

* * * * *

COSME, J.

{¶ 1} Rhomie McDonald appeals from a judgment of the Lucas County Court of Common Pleas denying his motion for relief from judgment. For the reasons that follow, we affirm the trial court's judgment.

{¶ 2} In 1997, appellant was found not guilty of robbery by reason of insanity, a second degree felony which carried a maximum of 15 years imprisonment. Appellant was committed for psychiatric treatment and remains committed today. Thirteen years after being committed, appellant moved to dismiss the original indictment against him, arguing that it was defective under *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*") and that his continued commitment is unconstitutional.

{¶ 3} We conclude that we cannot entertain appellant's motion because *Colon I* does not apply retrospectively to this case. Appellant's continued commitment does not violate due process nor does it constitute cruel and unusual punishment. Further, the trial court properly dismissed appellant's untimely petition for postconviction relief.

I. BACKGROUND

{¶ 4} On March 5, 1996, the Lucas County Grand Jury indicted appellant on one count of robbery in violation of R.C. 2911.02. The trial court found appellant incompetent on March 28, 1996, and ordered him to undergo psychiatric treatment. Appellant was subsequently deemed fit to stand trial and, on April 17, 1997, entered a plea of not guilty by reason of insanity.

{¶ 5} Following a bench trial on May 27, 1997, the court found appellant not guilty by reason of insanity. On June 10, 1997, appellant was committed to a locked ward at the Dayton Forensic Center, and is now at Northcoast Behavioral Healthcare System, Toledo Campus.

{¶ 6} On May 5, 2008, appellant filed a motion requesting that the trial court vacate its finding of not guilty by reason of insanity or dismiss the indictment on the authority of *Colon I*. Appellant now appeals from the trial court's denial of that motion, raising two assignments of error.

II. NO STRUCTURAL ERROR IN THE INDICTMENT

{¶ 7} In his first assignment of error, appellant contends that:

{¶ 8} "I. The indictment for robbery omitted an essential element of the crime thereby creating a structural constitutional error."

{¶ 9} Appellant argues that the trial court abused its discretion in denying his motion because his judgment should be voided based upon a "structural error" in the indictment. Specifically, appellant argues that the indictment failed to specify a mens rea element for the physical harm. Appellant argued that, pursuant to *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, ¶ 5 ("*Colon I*"), it was an essential element in the robbery charge.

{¶ 10} We disagree.

{¶ 11} *Colon I* does not apply to appellant's case and his motion is untimely. We first address the timeliness of appellant's motion.

{¶ 12} A petition for postconviction relief under R.C. 2953.21 is a collateral civil attack on a criminal judgment, not an appeal of the judgment. *State v. Steffen* (1994), 70 Ohio St.3d 399, 410. See *State v. Calhoun* (1999), 86 Ohio St.3d 279. See, also, *State v. Macias*, 6th Dist. No. L-01-1391, 2003-Ohio-684, ¶ 10; *State v. Davis*, 7th Dist. No.

08 MA 174, 2009-Ohio-4634, ¶12. "It is a means to reach constitutional issues which would otherwise be impossible to reach because the evidence supporting those issues is not contained in the record." *State v. Murphy* (Dec. 26, 2000), 10th Dist. No. 00AP-233, discretionary appeal not allowed (2001), 92 Ohio St.3d 1441. R.C. 2953.21 affords a prisoner postconviction relief "only if the court can find that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Ohio Constitution or the United States Constitution." *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph four of the syllabus. A postconviction petition does not provide a petitioner a second opportunity to litigate his or her conviction. *State v. Hessler*, 10th Dist. No. 01 AP-1011, 2002-Ohio-3321, ¶ 32. See *State v. Jackson* (1980), 64 Ohio St.2d 107.

{¶ 13} R.C. 2953.21(A)(2) requires that a petition under R.C. 2953.23 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." It further provides that "[i]f 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." Id.; see 1995 S.B. No. 4, Section 3, eff. Sept. 21, 1995, uncodified (providing that a person who is sentenced "prior to the effective date of this act * * * shall file a petition within the time required in division (A)(2) of section 2953.21 of the Revised Code, as amended by this act, or within one year from the effective date of this act, whichever is later.")

{¶ 14} Appellant, who was found not guilty by reason of insanity on May 29, 1997, was required to file his petition within 180 days after the expiration of the time for filing an appeal. Appellant filed his motion nearly 11 years later, making it untimely and leaving the court without jurisdiction to consider it. *State v. Rippey*, 10th Dist. No. 06AP-1229, 2007-Ohio-4521, ¶ 13; *State v. Robinson*, 10th Dist. No. 06AP-368, 2006-Ohio-6649, ¶ 9; *State v. Bivens*, 10th Dist. No. 05AP-1270, 2006-Ohio-4340, ¶ 6; *State v. Macias*, 6th Dist. No. L-05-1266, 2006-Ohio-1988, ¶ 18; *State v. Jordan*, 6th Dist. No. L-02-1322, 2003-Ohio-7269, ¶ 8-10.

{¶ 15} Pursuant to R.C. 2953.23(A), a court may not entertain an untimely petition unless defendant initially demonstrates either: (1) he is unavoidably prevented from discovering facts necessary for the claim for relief; or (2) the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in defendant's situation. R.C. 2953.23(A)(1)(a). If appellant were able to satisfy one of those two conditions, R.C. 2953.23(A) requires he also demonstrate by clear and convincing evidence that, but for the constitutional error at trial, no reasonable fact finder would have found him guilty of the offenses of which he was convicted. R.C. 2953.23(A)(1)(b). Appellant "apparently attempts to circumvent the untimeliness of his motion by pointing to the Supreme Court of Ohio's opinion in *Colon I* and suggesting it creates a new right that applies to his situation." *State v. West*, 10th Dist. No. 08AP-813, 2008-Ohio-6516, ¶ 10; *State v. Frash*, 10th Dist. No. 08AP-870, 2009-Ohio-642, ¶ 10.

{¶ 16} Appellant cannot meet the retroactivity requirement. In *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II*"), the Supreme Court of Ohio reconsidered *Colon I* and specifically stated that its decision in *Colon I* set forth a holding that "is only prospective in nature"; it therefore does not apply retroactively. *Colon II* at ¶ 3. The common pleas court was without jurisdiction to consider appellant's motion.

{¶ 17} Accordingly, appellant's first assignment of error is not well-taken.

III. DUE PROCESS AND CRUEL AND UNUSUAL PUNISHMENT

{¶ 18} In his second assignment of error, appellant contends that:

{¶ 19} "II. McDonald's right to due process of law and to be free from cruel and unusual punishment has been violated."

{¶ 20} Appellant complains that the length of his commitment now exceeds the maximum sentence *currently* imposed for robbery, a second degree felony. The current statute provides that robbery, a second degree felony, is punishable by a maximum penalty of eight years. When appellant was committed, the applicable statute for robbery provided for a maximum incarceration term of 15 years. Appellant has now served 13 years. Appellant complains his continued commitment is cruel and unusual.

{¶ 21} We disagree.

{¶ 22} Individuals in Ohio committed to mental institutions are protected both by the due process clauses of the U.S. and Ohio Constitutions and by statute under Chapter 5122. *In re Fisher* (1974), 39 Ohio St.2d 71; *State v. Thomas* (Aug. 20, 1985), 4th Dist. No. 1742.

{¶ 23} Appellant was found not guilty by reason of insanity and committed pursuant to R.C. 2945.40, and R.C. Chapter 5122. At the time appellant was committed, there was no temporal limitation on the continued commitment. A defendant who was found not guilty by reason of insanity and committed to a psychiatric hospital remained indefinitely subject to the jurisdiction of the trial court to order continued periodic recommitments. See former R.C. 2945.39, 2945.40, and 5122.15.

{¶ 24} Subsequent to the initial commitment, the Ohio Legislature addressed the continuing jurisdiction of the court after an insanity acquittal. R.C. 2945.401, enacted by the 121st General Assembly as part of Am.Sub.S.B. No. 285, effective July 1, 1997, provides that:

{¶ 25} "(A) * * * [A] person found not guilty by reason of insanity and committed pursuant to section 2945.40 of the Revised Code shall remain subject to the jurisdiction of the trial court pursuant to that commitment, and to the provisions of this section, until the final termination of the commitment as described in division (J)(1) of this section. If the jurisdiction is terminated under this division because of the final termination of the commitment resulting from the expiration of the maximum prison term or term of imprisonment described in division (J)(1)(b) of this section, the court or prosecutor may file an affidavit for the civil commitment of the defendant or person pursuant to Chapter 5122. or 5123. of the Revised Code.

{¶ 26} "* * *

{¶ 27} "(J)(1) * * * For purposes of division (J) of this section, the final termination of a commitment occurs upon the earlier of one of the following:

{¶ 28} "* * *

{¶ 29} "(b) The expiration of the maximum prison term or term of imprisonment that the defendant or person could have received if the defendant or person had been convicted of the most serious offense with which the defendant or person is charged or in relation to which the defendant or person was found not guilty by reason of insanity."

{¶ 30} The trial court determined that, pursuant to R.C. 2945.401(J)(1)(b), it had jurisdiction to continue appellant's commitment to the mental health facility for a length of time equivalent to the maximum sentence he could have received if he had been convicted of robbery - in this case, 15 years. Because the court found appellant not guilty by reason of insanity on May 27, 1997, its jurisdiction will terminate on May 27, 2012. Id.

{¶ 31} Appellant does not suggest that he is not still a mentally ill person, but complains that the length of his commitment is a violation of his constitutional rights to due process and to be free from cruel and unusual punishment.

A. Due Process

{¶ 32} As stated in *Jackson v. Indiana* (1972), 406 U.S. 715, 738, 92 S.Ct. 1845, 32 L.Ed.2d 435, "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." See *State v. Sullivan* (2001), 90 Ohio St.3d 502, 506. In *Jackson*, 406 U.S. at 738, the United

States Supreme Court stated that: "a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future."

{¶ 33} Appellant does not suggest that his due process rights were violated by the addition of R.C. 2945.401, which imposed a temporal limitation on the continued commitment, but instead, on the failure to require that this temporal limitation correspond with the maximum prison term at this time rather than the maximum prison term at the time he committed the offense. Appellant's argument fails because R.C. 2945.401(E) does provide for the termination of commitment prior to the expiration date of the maximum term of imprisonment that he could have served.

{¶ 34} In *State v. Tuomala*, 104 Ohio St.3d 93, 2004-Ohio-6239, ¶ 22, the Supreme Court of Ohio suggested that R.C. 2945.401(J)(1)(b) is intended to treat convicted felons and those found not guilty by reason of insanity in a comparable manner in terms of length of incarceration and psychiatric commitment regardless of the implications for treatment.

{¶ 35} The Supreme Court of Ohio recently held in *State v. Williams*, ___ Ohio St.3d ___, 2010-Ohio-2453, ¶ 62, that:

{¶ 36} "* * * 2945.401 do[es] not violate a defendant's due-process rights by * * * permitting a defendant to be committed for a term equal to the maximum term of imprisonment that he could receive for the most serious offense charged."

{¶ 37} The court in *Williams* observed that, "Although * * * a defendant may be committed until the expiration of the maximum term of imprisonment that he could have received for the charged offense, due process is satisfied by the fact that he may be released sooner if he is no longer subject to hospitalization by court order." *Williams* at ¶ 62, quoting *State v. Williams*, 179 Ohio App.3d 584, 2008-Ohio-6245, ¶ 90 (Wolff, P.J., dissenting.)

{¶ 38} Here, in order to retain jurisdiction over appellant, the trial court continued to find, at periodic hearings, that there was clear and convincing evidence that the defendant remained a mentally ill person subject to hospitalization by court order. See R.C. 2945.401(G)(1); see, also, *State v. Hubbard* (Nov. 5, 1999), 11th Dist. No. 97-T-0144. "Clear and convincing evidence is that which will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *State v. Kinman* (1996), 109 Ohio App.3d 95, 99, citing *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 368. R.C. 5122.01(B) defines a "[m]entally ill person" as one "subject to hospitalization by court order." See R.C. 2945.37(A)(8); *State v. Bowen* (2000), 139 Ohio App.3d 41, 45. Since the initial commitment, the trial court has continued to review the factors set forth in R.C. 2945.401(E).

{¶ 39} Therefore, we find that appellant's due process rights have not been violated by his continued commitment.

B. Cruel and Unusual Punishment

{¶ 40} The Eighth Amendment to the United States Constitution applies to the states pursuant to the Fourteenth Amendment. See *Robinson v. California* (1962), 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758. The amendment provides: "* * * nor cruel and unusual punishments inflicted." Section 9, Article I of the Ohio Constitution sets forth the same restriction: "* * * nor cruel and unusual punishments inflicted."

{¶ 41} In *State v. Weitbrecht* (1999), 86 Ohio St.3d 368, 371-372, the Ohio Supreme Court applied the Eighth Amendment analysis set forth in *Harmelin v. Michigan* (1991), 501 U.S. 957, 997, in which the U.S. Supreme Court held, "'[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.'" The court in *Weitbrecht* observed that "'only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality'" may a court compare the punishment under review to punishments imposed in Ohio or in other jurisdictions. *Weitbrecht* at 373, quoting *Harmelin*, 501 U.S. at 1005.

{¶ 42} In *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 69, the Supreme Court of Ohio stated that "[a]s a general rule, a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment." Citing *Martin v. United States* (C.A.9, 1963), 317 F.2d 753 (overruled on other grounds, *United States v. Bishop* (1973),

412 U.S. 346, 93 S.Ct. 2008, 36 L.Ed.2d 941); *Pependrea v. United States* (C.A.9, 1960), 275 F.2d 325; and *United States v. Rosenberg* (C.A.2, 1952), 195 F.2d 583.

{¶ 43} Appellant insists that his continued commitment constitutes cruel and unusual punishment because the temporal limitation does not correspond with the current maximum prison term at this time. Instead, it corresponds with the maximum prison term in effect at the time he committed the offense.

{¶ 44} The same reasons that apply to our analysis of appellant's due process rights also apply to our analysis of whether the continued commitment is cruel and unusual.

{¶ 45} We find that appellant's continued commitment was not cruel and unusual because R.C. 2945.401(E) provides for the termination of commitment prior to the expiration date of the maximum term of imprisonment that he could have served. The trial court's jurisdiction will terminate on May 27, 2012. The commitment is not indefinite. Further, the term of the commitment is defined by a valid statue. See *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 69.

{¶ 46} As the Supreme Court of Ohio observed in *State v. Hawkins* (1999), 87 Ohio St.3d 311, 313, a defendant committed pursuant to R.C. 2945.401 is "not being punished for a crime * * * he is being treated for his illness." Id., quoting *State v. Jackson* (1981), 2 Ohio App.3d 11, 14. Further, "Commitment is neither punishment nor sentence for a crime of which the defendant has been acquitted." *State v. Hawkins* (1999), 87 Ohio St.3d 311, 314.

{¶ 47} Therefore, we find that the continued commitment does not constitute cruel and unusual punishment.

{¶ 48} Nevertheless, we cannot entertain appellant's petition because it was filed outside of the time limits set forth in R.C. 2953.23. Even assuming the motion was timely filed, the constitutional issues present in appellant's second assignment of error are not properly before us for the additional reason that appellant did not raise them in the trial court below. *Shanahan v. Toledo*, 6th Dist. No. L-09-1077, 2009-Ohio-5991, ¶ 13 ("Issues not raised and tried in the trial court cannot be raised for the first time on appeal."), citing *Republic Steel Corp. v. Cuyahoga Cty. Bd. of Revision* (1963), 175 Ohio St. 179, syllabus.

{¶ 49} Accordingly, appellant's second assignment of error is not well-taken.

IV. CONCLUSION

{¶50} Wherefore, based upon the foregoing, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

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.

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, J.

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JUDGE

Keila D. Cosme, J.
CONCUR.

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JUDGE