[Cite as *State v. Kimbrough*, 2009-Ohio-3377.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91928

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TYRONE KIMBROUGH

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-457677 and CR-458320

BEFORE: Rocco, P.J., Dyke, J., and Jones, J.

RELEASED: July 9, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant, Tyrone Kimbrough, appeals from common pleas court orders in two separate criminal cases denying his motion to vacate the judgment and his motion to withdraw his guilty plea or alternatively modify his sentence. Appellant argues that the indictment charging him with aggravated robbery in Case No. CR-457677 was constitutionally deficient because it did not charge that he committed the offense recklessly, thus omitting the mens rea element of the offense. We find the newly-declared constitutional rule established by the Ohio Supreme Court in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, upon which appellant relies, applies prospectively to cases pending on or after the date of the announcement of the *Colon* decision. Appellant's conviction was final some years before *Colon* was decided. Therefore, *Colon* does not apply to his case.

{¶ 2} Appellant's notice of appeal indicated that he was appealing decisions entered in two criminal cases, Case Nos. CR-457677 and CR-458320. However, his brief only addresses Case No. CR-457677. Appellant having failed to demonstrate any error in the court's decision in Case No. CR-458320, we affirm that ruling.

{¶ 3} In Case No. CR-457677, appellant pleaded guilty to one count of

aggravated robbery with a three-year firearms specification, one count of felonious assault, and one count of failure to comply with the order or signal of a police officer. On January 21, 2005, the court sentenced appellant to three years' imprisonment on the firearms specification, to be served prior and consecutive to a sentence of three years' imprisonment on the aggravated robbery charge. The court further imposed a concurrent sentence of three years' imprisonment on the felonious assault charge. Finally, the court imposed a consecutive sentence of two years' imprisonment on the charge of failure to comply.

{¶ 4} By pleading guilty, appellant waived any defects in the indictment. *State v. Barton*, 108 Ohio St.3d 402, 2006-Ohio-1324, at ¶73. Furthermore, appellant did not appeal from his convictions, so they became final in 2005, well before the *Colon* decision was entered in 2008. The Ohio Supreme Court has held that its decision in *Colon* only applies prospectively to cases pending at the time the decision was announced. Therefore, *Colon* does not apply here.

{¶ 5} Even if appellant could argue application of *Colon* in this case, *Colon* would not require that appellant's conviction be vacated. Appellant pleaded guilty to aggravated robbery in violation of R.C. 2911.01(A)(1), that is, that appellant "did, in attempting or committing a theft offense * * * have a deadly weapon to-wit: gun, on or about his person or under his control and either displayed the weapon, brandished it, indicated that he possessed it, or used it." We have previously rejected application of *Colon* to this charge because, unlike

the physical harm element of the robbery charge at issue in *Colon*, the supreme court has held that it is not necessary to prove a specific mental state regarding the deadly weapon element of the offense of robbery. *State v. Wharf*, 86 Ohio St.3d 375, 1999-Ohio-112, 715 N.E.2d 172, paragraph two of the syllabus. Therefore, an indictment for aggravated robbery under R.C. 2911.01(A)(1) does not need to state a culpable mental element as required by *Colon* because it is a strict liability offense. See, e.g., *State v. Peterson*, Cuyahoga App. No. 90263, 2008-Ohio-4239, ¶13-15.

{¶ 6} The common pleas court did not err by overruling appellant's motion to vacate his judgment of conviction. Therefore, we affirm.

Affirmed.

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 be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

KENNETH A. ROCCO, PRESIDING JUDGE

ANN DYKE, J., and
LARRY A. JONES, J., CONCUR