

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-P-0076
RONALD D. NICHOLAS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 05 CR 292.

Judgment: Affirmed.

Victor V. Viglucci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Ronald D. Nicholas, pro se, PID# 494-947, Marion Correctional Institution, P.O. Box 57, Marion, OH 44301 (Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Ronald D. Nicholas, appeals the Order and Journal Entry of the Portage County Court of Common Pleas, denying his Motion for Leave to Vacate Void Judgment pursuant to Crim.R. 34, Fifth, Sixth & Fourteenth Amendments, and *Apprendi v. New Jersey*. For the following reasons, we affirm the judgment of the court below.

{¶2} On June 9, 2005, Nicholas was indicted by the Portage County Grand Jury for three counts of Robbery, felonies of the second degree in violation of R.C. 2911.12(A)(2) and (B).

{¶3} On September 27, 2005, Nicholas entered a Written Plea of Guilty to three counts of Robbery as charged in the Indictment.

{¶4} On December 15, 2005, the trial court sentenced Nicholas to seven years imprisonment for each count of Robbery, to be served consecutively with each other.

{¶5} On May 30, 2008, Nicholas filed a Motion for Leave to Dismiss/Defective Indictment, in which he claimed the June 9, 2005 Indictment for three counts of second degree Robbery was structurally defective for failing to charge the mens rea element of the crime.

{¶6} On August 28, 2008, the trial court denied Nicholas' Motion.

{¶7} On June 19, 2009, this court affirmed the trial court's Judgment Entry, denying Nicholas' Motion for Leave to Dismiss/Defective Indictment. *State v. Nicholas*, 11th Dist. Nos. 2008-P-0080 and 2008-P-0082, 2009-Ohio-2953.

{¶8} On August 30, 2010, Nicholas filed a Motion for Leave to Vacate Void Judgment pursuant to Crim.R. 34, Fifth, Sixth & Fourteenth Amendments, and *Apprendi v. New Jersey*.

{¶9} On September 14, 2010, the trial court entered an Order and Journal Entry, overruling Nicholas' Motion for Leave to Vacate.

{¶10} On September 23, 2010, Nicholas filed his Notice of Appeal. On appeal, Nicholas raises the following assignments of error:

{¶11} “[1.] The State of Ohio erred to the prejudice of the defendant-appellant when it deprived defendant-appellant of his Fifth, Sixth and Fourteenth Amendment Rights.”

{¶12} “[2.] The trial court erred to the prejudice of the defendant-appellant when they proceeded against defendant-appellant without ever invoking subject matter jurisdiction.”

{¶13} Nicholas’ assignments of error will be considered jointly. In the first assignment of error, Nicholas claims the Robbery Indictments against him were defective in that they failed to include the mens rea element of recklessness. The failure to issue a valid indictment violated his Fifth, Sixth, and Fourteenth Amendment Rights. Under the second assignment of error, Nicholas asserts that a valid indictment is a jurisdictional prerequisite to a valid conviction. As the trial court lacked subject matter jurisdiction to proceed against him, Nicholas’ convictions are void and must be vacated.

{¶14} Nicholas’ arguments fail for several reasons. In the first instance, the validity of the Indictment was affirmed in a prior appeal and, therefore, the issue is res judicata. See *Nicholas*, 2009-Ohio-2953, at ¶14 and ¶19.

{¶15} Additionally, by pleading guilty to the Indictment, Nicholas waived the right to challenge alleged errors in the Indictment. *State v. Haney*, 180 Ohio App.3d 554, 2009-Ohio-149, at ¶18 (“[b]y pleading guilty ***, appellant waived any right in questioning the validity of his indictment on appeal”) (citation omitted); *State v. Smith*, 8th Dist. No. 75512, 2000 Ohio App. LEXIS 924, at *7 (“a knowing and intelligent guilty plea to an amended indictment waives any alleged error within that indictment on

appeal”); *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, at paragraph three of the syllabus (“[b]y failing to timely object to a defect in an indictment, a defendant waives all but plain error on appeal”).

{¶16} Lastly, the Ohio Supreme Court has held: “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.” *Horner*, 2010-Ohio-3830, at paragraph one of the syllabus. In the present case, Nicholas’ three-count Robbery Indictment tracked the words of the statute. *Nicholas*, 2009-Ohio-2953, at ¶19. Thus, the Indictment was not defective for failing to identify the culpable mental state of recklessness.

{¶17} The assignments of error are without merit.

{¶18} In its brief, the State has moved this court for a declaration that Nicholas is a vexatious litigator.

{¶19} “[A] prosecuting attorney *** who has defended against habitual and persistent vexatious conduct in the court of claims or in a court of appeals, court of common pleas, municipal court, or county court may commence a civil action in a court of common pleas with jurisdiction over the person who allegedly engaged in the habitual and persistent vexatious conduct to have that person declared a vexatious litigator.” R.C. 2323.52(B). There is no provision in the Revised Code authorizing a court of appeals to make this determination. Accordingly, the State’s motion is denied. *Howard v. Indus. Comm.*, 6th Dist. No. L-04-1037, 2004-Ohio-5672, at ¶6.

{¶20} For the foregoing reasons, the judgment of the Portage County Court of Common Pleas, denying Nicholas' Motion for Leave to Vacate Void Judgment, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.