

[Cite as *State v. Mobley*, 2009-Ohio-5718.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	
-vs-	:	
	:	Case No. 09-CA-25
DAVID A. MOBLEY	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Fairfield County Court of Common Pleas, Case No. 05-CR-255

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: October 26, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

GREGG MARX
Assistant Prosecuting Attorney
201 S. Broad St., Ste. 400
Lancaster, OH

ERIC J. ALLEN
713 South Front Street
Columbus, OH 43206

Gwin, P.J.

{¶1} Defendant-appellant David Mobley appeals from the March 24, 2009 Judgment Entry of the Fairfield County Court of Common Pleas overruling his Motion for Relief. Plaintiff-appellee is the State of Ohio.

STATEMENT OF FACTS IN THE CASE

{¶2} On April 29, 2005, the Fairfield County Grand Jury indicted appellant on three counts of aggravated robbery, two counts of kidnapping, two counts of abduction, and one count of aggravated burglary. Each count carried a firearm specification. The matter proceeded to jury trial. After considering the evidence presented the jury found the appellant guilty on all charges.¹

{¶3} Appellant appealed his conviction and sentence. This Court affirmed the convictions, but remanded the matter to the trial court for resentencing pursuant to *State v. Foster* (2006), 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d 470. See, *State v. Mobley* (February 15, 2007), Fairfield App. No. 06-CA-00003, 2007-Ohio-851.

{¶4} At the resentencing hearing, appellant was represented by retained counsel. Appellant, pro-se, appealed the trial court's re-sentencing decision. This Court affirmed the trial court's decision. *State v. Mobley* (November 5, 2007), Fairfield App. Case No. 07-CA-26, 2007-Ohio-6101. Appellant sought review to the Ohio Supreme Court, which denied leave to appeal. *State v. Mobley* (June 20, 2007), 114 Ohio St.3d 1428, 2007-Ohio-2904, 868 N.E.2d 681. Appellant, with current counsel, filed a Motion for Reconsideration, which was denied by this Court on December 28, 2007. *State v. Mobley* (December 28, 2007), Fairfield App. Case No. 07-CA-26. The

¹ A Statement of the Facts underlying the offenses upon which appellant was convicted is not necessary to our disposition of this appeal; therefore, such shall not be contained herein.

Ohio Supreme Court denied jurisdiction over the case. *State v. Mobley* (April 9, 2008), 117 Ohio St.3d 1458, 2008-Ohio-1635, 884 N.E.2d 67.

{¶15} Appellant filed a petition for certiorari with the United States Supreme Court, which was denied October 6, 2008. *Mobley v. Ohio* (Oct. 6, 2008), ___U.S.___, 129 S.Ct. 207, 172 L.Ed.2d 168.

{¶16} Appellant filed a motion for relief pursuant to *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 with the trial court on December 8, 2008. By Judgment Entry filed March 24, 2009, the trial court denied appellant's motion.

{¶17} It is from the trial court's Judgment Entry filed March 24, 2009 denying his motion for relief that appellant appeals raising as his sole assignment of error:

{¶18} "I. THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S MOTION FOR RELIEF."

I.

{¶19} Appellant argues in his sole assignment of error that his indictment violated *State v. Colon* (118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, because it did not specify the requisite *mens rea* element for his aggravated robbery charges. Specifically, appellant notes that *Colon I* was decided April 9, 2008. Appellant argues that his appeal to the Ohio Supreme Court was pending at the time that Court decided *Colon I*. We disagree.

{¶10} First, it is important to note that *Colon* was a direct appeal from the appellant's judgment of conviction, while this is an appeal from the dismissal of a motion for relief seeking to vacate or set aside his sentence. See, e.g. *State v. Lucky*, Delaware App. No. 09-CA-39, 2009-Ohio-4737; *State v. Levette*, Richland App. No.

2008 CA 109, 2009-Ohio-2864; *State v. Kimbrough*, Licking App. No. 2008-CA-0075, 2008-Ohio-4438.

{¶11} In *State v. Colon* ("*Colon II*"), 119 Ohio St.3d 204, 2008-Ohio-3749, the Ohio Supreme Court clarified its decision in *Colon I*, and stated:

{¶12} "Our holding in *Colon I* is only prospective in nature, in accordance with our general policy that newly declared constitutional rules in criminal cases are applied prospectively, not retrospectively. In *State v. Evans* (1972), 32 Ohio St.2d 185, 61 O.O.2d 422, 291 N.E.2d 466, we stated that " 'application of a new rule of law to a pending appeal is not retrospective,' and * * * the new rule applie[s] to the cases pending on the announcement date." *Id.* at 186, 291 N.E.2d 466, quoting *State v. Lynn* (1966), 5 Ohio St.2d 106, 108, 34 O.O.2d 226, 214 N.E.2d 226.

{¶13} "We recently restated this principle in *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, 819 N.E.2d 687, at ¶ 6: 'A new judicial ruling may be applied only to cases that are pending on the announcement date. The 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.' (Citations omitted.)

{¶14} "Therefore, the rule announced in *Colon I* is prospective in nature and applies only to those cases pending on the date *Colon I* was announced." *Id.* at ¶ 3-4, 885 N.E.2d 917.

{¶15} In this case, appellant sought review in the Ohio Supreme court from this Court's affirmance of the trial court's re-sentencing after our remand pursuant to *Foster*. It is the Supreme Court's decision denying jurisdiction over the re-sentencing case that was issued on the date *Colon I* was decided. Accordingly, appellant's direct appeal of

his *conviction* was not pending on that date; it was only his post-*Foster* sentencing appeal that, perhaps, remained pending.

{¶16} Assuming *arguendo* that appellant's case was pending on the date *Colon I* was announced, we would find that the indictment in this case was not insufficient.

{¶17} Appellant challenges the sufficiency of Count 1 and Count 3 of the indictment. (Appellant's Brief at 5). In each count, appellant was charged with aggravated robbery in violation of R.C. 2911.01(A) (1). This charge did not contain the physical harm element at issue in *Colon*, but instead charged that the petitioner "[had] a deadly weapon on or about his person or under his control to-wit: a loaded 40 caliber semi-automatic Smith and Wesson pistol..."

{¶18} Unlike the physical harm element, "[t]he deadly weapon element of R.C. 2911.02(A) (1), to wit, '[h]ave a deadly weapon on or about the offender's person or under the offender's control [,]' does not require the *mens rea* of recklessness." *State v. Wharf* (1999), 86 Ohio St.3d 375, 715 N.E.2d 172, paragraph one of the syllabus. More, recently the Ohio Supreme Court has held, "We are persuaded that the General Assembly, by not specifying a *mens rea* in R.C. 2911.01(A)(1), plainly indicated its purpose to impose strict liability as to the element of displaying, brandishing, indicating possession of, or using a deadly weapon. Cf. R.C. 2901.21(B). We hold that the state is not required to charge a *mens rea* for this element of the crime of aggravated robbery under R.C. 2911.01(A) (1)." *State v. Lester*, ___ Ohio St.3d ___, 2009-Ohio-4228. See also, *State v. Thompson*, Ashland App. No. 08 COA 018, 2008-Ohio-5332.

{¶19} Therefore, the indictment in this case was not insufficient.

{¶20} Appellant's sole assignment of error is overruled.

{¶21} The judgment of the Fairfield County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Wise, J., and

Edwards, J., concur

HON. W. SCOTT GWIN

HON. JOHN W. WISE

HON. JULIE A. EDWARDS

WSG:clw 0915

