

[Cite as *State v. Howe*, 2010-Ohio-1621.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 23423
Plaintiff-Appellee	:	:
	:	Trial Court Case No. 92-CR-1673/1
v.	:	:
	:	
WESTON LEE HOWE, JR.	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	:

.....  
OPINION

Rendered on the 9<sup>th</sup> day of April, 2010.

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MATHIAS H. HECK, JR., by MICHELE D. PHIPPS, Atty. Reg. #0069829, Montgomery County Prosecutor’s Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422  
Attorney for Plaintiff-Appellee

WESTON LEE HOWE, JR., #269-277, Mansfield Correctional Institution, Post Office Box 788, Mansfield, Ohio 44901  
Defendant-Appellant, *pro se*

FAIN, J.

{¶ 1} Defendant-appellant Weston L. Howe, Jr., appeals from a 2009 order of the trial court overruling his motion to dismiss his 1992 indictment for Aggravated Robbery and for Aggravated Burglary. Howe contends that his indictment for those

offenses was defective because it failed to allege mens rea elements required for Aggravated Robbery and for Aggravated Burglary. He contends that this defect renders his convictions for those offenses not merely voidable, but void.

{¶ 2} We conclude that if the indictment were defective in the manner Howe claims, this would have rendered his convictions for Aggravated Robbery and for Aggravated Burglary merely voidable, not void. Therefore, since Howe could have raised this issue in his direct appeal, which resulted in an affirmance by this court in 1994,<sup>1</sup> the claim he raised in his 2009 motion to dismiss his 1992 indictment is barred by res judicata. Accordingly, the order of the trial court overruling Howe's motion to dismiss is Affirmed.

I

{¶ 3} In 1992, Howe was indicted on two counts of Aggravated Murder, two counts of Aggravated Robbery, one count of Aggravated Burglary, and one count of Having a Weapon Under a Disability, all with firearm specifications. All but the Aggravated Murder counts contained prior aggravated felony specifications.

{¶ 4} Howe pled no contest to the Having a Weapon Under a Disability count. The trial court ultimately found him guilty of that offense, but not guilty of either the firearm specification or the prior aggravated felony specification associated with that charge.

{¶ 5} The remaining charges were tried to a jury. The jury found Howe not guilty of one of the Aggravated Murder counts and one of the Aggravated Robbery

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<sup>1</sup> *State v. Howe* (September 30, 1994), Montgomery App. No. 13969.

counts, but it found him guilty of the remaining Aggravated Murder count, the remaining Aggravated Robbery count, and the Aggravated Burglary count. The jury found Howe not guilty on the firearm specifications attached to those counts. Howe stipulated to the prior aggravated felony specifications attached to the Aggravated Robbery and Aggravated Burglary counts.

{¶ 6} Howe was sentenced to life imprisonment for Aggravated Murder, to an indefinite term of from fifteen to twenty-five years for Aggravated Robbery, to an indefinite term of from fifteen to twenty-five years for Aggravated Burglary, and to a definite term of one to one and a half years for Having a Weapon Under a Disability, all sentences to be served consecutively. *State v. Howe*, supra at fn. 1. He appealed; we affirmed. *State v. Howe*, supra.

{¶ 7} In 2009, Howe moved to dismiss his indictment for Aggravated Robbery and Aggravated Burglary upon the ground that the indictment is defective because it lacks an allegation of the required mens rea for each of those offenses. The trial court overruled his motion.

{¶ 8} From the order overruling his motion to dismiss his indictment, Howe appeals.

## II

{¶ 9} Howe's assignments of error are as follows:

{¶ 10} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY OVERRULING DEFENDANT'S MOTION TO DISMISS SPECIFIED COUNTS (4 AND 5) OF HIS INDICTMENT.

{¶ 11} “TRIAL COURT ERRED IN FINDING DEFENDANT’S INDICTMENT WAS NOT DEFECTIVE ON COUNTS FOUR (AGG. ROBBERY) AND COUNT FIVE (AGG. BURGLARY) IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE OHIO AND U.S. CONSTITUTIONS.”

{¶ 12} Howe eschews reliance upon *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, reconsidered at 119 Ohio St.3d 204, 2008-Ohio-3749:

{¶ 13} “Defendant was and is fully aware that Colon does not apply to him and therefore would not rely on that case. Defendant’s appellate remedies were exhausted long before Colon was decided.” (Underlining in original.)

{¶ 14} Howe argues that his 1993 indictment for Aggravated Robbery and for Aggravated Burglary lacked required mens rea elements for those offenses, and then relies upon *State v. Cimpritz* (1953), 158 Ohio St. 490, for the proposition that this defect in his indictment renders his convictions on those offenses not merely voidable, but void, thus avoiding the application of res judicata.

{¶ 15} Assuming, for purposes of argument, only, that Howe is correct that his 1993 indictment was defective, *State v. Cimpritz*, supra, does seem to opine that a substantial defect in an indictment renders a resulting conviction not merely voidable, but void:

{¶ 16} “We find that the indictment involved in the instant case is deficient, ineffective and invalid. It stands to reason that a judgment of conviction based on an indictment which does not charge an offense is void for lack of jurisdiction of the subject matter and may be successfully attacked either on direct appeal to a reviewing court or by a collateral proceeding. See *People v. Edge*, 406 Ill. 490, 94 N.E.2d 359.”

Id., at 494.

{¶ 17} But we conclude that *State v. Cimpritz*, supra, has been clarified on this point, by the later case of *State v. Wozniak* (1961), 172 Ohio St. 517, (cited in Howe's reply brief), in which the Supreme Court of Ohio, in seeking to reconcile *State v. Cimpritz* with later cases, opined:

{¶ 18} “ \* \* \* , after a judgment of conviction for the crime sought to be charged in such indictment, such a collateral attack would no longer be effective because the judgment of conviction necessarily binds a defendant, where the court rendering it had jurisdiction of the person of the defendant and also the jurisdiction of the subject matter, i.e., jurisdiction to try the defendant for the crime for which he was convicted. Such a judgment of conviction is necessarily binding as between the state and the defendant and can only be set aside by a direct and not a collateral attack.” *State v. Wozniak*, supra, at 522-523.

{¶ 19} In *State v. Cimpritz*, supra, the defendant had tested the sufficiency of his indictment both before trial, by a motion to quash, and during trial, by a motion for a directed verdict at the close of the State's case, both of which were overruled. The Supreme Court of Ohio reviewed the sufficiency of the indictment in the course of a direct appeal from the judgment of the court of appeals, also on direct appeal from that defendant's conviction. Thus, the language in the opinion suggesting that the sufficiency of an indictment may be tested in a collateral proceeding, after a judgment of conviction has become final after the exhaustion of all appeals, was dictum. The later dictum in *State v. Wozniak*, supra, is clearly to the contrary.

{¶ 20} We conclude, based upon the dictum in *State v. Wozniak*, supra, with

which we agree, that it is too late for a criminal defendant to challenge the sufficiency of his indictment once all direct appeals from his conviction have been exhausted. We therefore agree with the trial court that Howe's claims in support of his motion to dismiss his indictment are barred by res judicata.

{¶ 21} Both of Howe's assignments of error are overruled.

III

{¶ 22} Both of Howe's assignments of error having been overruled, the order of the trial court overruling his motion to dismiss his indictment is Affirmed.

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GRADY and FROELICH, JJ., concur.

Copies mailed to:

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Hon. Gregory F. Singer