

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 08AP-1066
 : (C.P.C. No. 05CR04-2322)
 Tony A. Tabor, : (ACCELERATED CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on June 9, 2009

Ron O'Brien, Prosecuting Attorney, and *Kimberly M. Bond*,
for appellee.

Tony A. Tabor, pro se.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, Tony A. Tabor, was originally indicted in case No. 05CR04-2322 on four counts: Counts 1 and 2 alleged that appellant committed robbery in violation of R.C. 2911.02, with Count 1 being charged as a felony of the second degree, Count 2 charged appellant as a felony of the third degree. Counts 3 and 4 alleged that appellant failed to comply with an order or signal of a police officer in

violation of R.C. 2921.331, with Count 3 being a felony of the third degree and Count 4 being a felony of the fourth degree. Appellant pleaded guilty to Counts 1 and 3 and was sentenced to a period not to exceed six months to be served at the Franklin County Community Based Correctional Facility with five years of community control.

{¶2} On July 24, 2006, appellant was indicted in case No. 06CR07-5342 on two counts of robbery and one count of receiving stolen property. Appellant agreed to plead guilty to the lesser-included offense of theft on Count 1 and the court imposed a sentence of one year of incarceration. At the hearing in which the trial court accepted appellant's plea in case No. 06CR07-5342, appellant stipulated that he had violated the terms of his community control in case No. 05CR04-2322. In case No. 05CR04-2322, the court imposed seven years of incarceration on Count 1 and four years of incarceration on Count 3, with those sentences to be served concurrently with the one-year sentence imposed in case No. 06CR07-5342. Appellant appealed and this court affirmed. See *State v. Tabor*, 10th Dist. No. 07AP-267, 2007-Ohio-5796.

{¶3} In August 2008, appellant filed a motion to withdraw his guilty plea in case No. 05CR04-2322, alleging that the indictment was defective because it omitted the mens rea. Appellant was relying upon *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"). The trial court denied appellant's motion.

{¶4} Appellant filed a notice of appeal and raised the following assignments of error:

- I. The trial court abused its discretion by denying defendant's motion to withdraw guilty plea to set aside judgment which sought to correct manifest injustice.

II. The trial court abused its discretion when defendant was deprived of his rights to a grand jury indictment, to due process pursuant to Article I, Section 10 of the Ohio Constitution and the Fifth and Fourteenth Amendment to the United States Constitution when the indictment failed to include all the essential elements of the offense charged and the jury and never instructed on the culpable mental state.

III. The trial court abused its discretion when it entered the judgment of conviction in the absence of sufficient evidence to establish all the elements of the offense charged in the indictment.

{¶5} The first two assignments of error are interrelated and will therefore be addressed together. In the first assignment of error, appellant contends that the trial court abused its discretion by denying his motion to withdraw his guilty plea. In his second assignment of error, appellant contends that the trial court abused its discretion when he was deprived of his rights to a grand jury indictment, to due process pursuant to Article I, Section 10 of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution when the indictment failed to include all the essential elements of the offense charged and the jury was never instructed on the culpable mental state.

{¶6} A post-sentence motion to withdraw a guilty plea, pursuant to Crim.R. 32.1, "will only be granted in order to correct 'manifest injustice.'" *State v. Price*, 4th Dist. No. 07CA47, 2008-Ohio-3583, ¶11. A showing of manifest injustice "is an extremely high standard, which permits a defendant to withdraw his guilty plea only in extraordinary cases." *Id.* A trial court's decision to grant or deny a Crim.R. 32.1 motion is "committed to the sound discretion of the trial court, and appellate courts review a motion to withdraw a guilty plea under the abuse of discretion standard." *Id.*

{¶7} Appellant was indicted in Count 1 of a violation of R.C. 2911.02(A)(2), a felony of the second degree and in Count 2 with a violation of R.C. 2911.02(A)(3), a felony of the third degree. In *Colon I* at ¶15, the Supreme Court of Ohio held that a criminal defendant's indictment for robbery under R.C. 2911.02(A)(2) was defective because it failed to include the mental element of "recklessness," or because it failed to charge that "the physical harm was recklessly inflicted." The court found that the defect in the indictment constituted a constitutional, structural error. This court has also extended *Colon I* to reverse convictions based on indictments that charged robbery under R.C. 2911.02(A)(3). See *State v. Palacios*, 10th Dist. No. 08AP-669, 2009-Ohio-1187, ¶13. However, we have not extended the *Colon* analysis to a charge of failure to comply, and we decline to do so now; therefore, we will consider *Colon's* applicability to Count 1 of the indictment in this case.

{¶8} Appellant argues that his indictment was defective for failing to allege a culpable mental state based upon *Colon I*. However, several appellate districts, including the Tenth District, have found *Colon I* inapplicable where the defendant has entered a guilty plea and, thus, not tried under the indictment. See *State v. McGinnis*, 3d Dist. No. 15-08-07, 2008-Ohio-5825, ¶26; *State v. Gant*, 3d Dist. No. 1-08-22, 2008-Ohio-5406, ¶13; *State v. Smith*, 6th Dist. No. L-07-1346, 2009-Ohio-48, ¶10; *State v. Hayden*, 8th Dist. No. 90474, 2008-Ohio-6279, ¶6; *State v. Mills*, 10th Dist. No. 08AP-687, 2008-Ohio-6609; *State v. Straughter*, 10th Dist. No. 08AP-777, 2009-Ohio-641.

{¶9} Even if the holding in *Colon I* were applicable to situations in which a defendant has entered a guilty plea, we find that the trial court did not abuse its discretion in finding that *Colon I* does not mandate granting appellant's request to

withdraw his guilty plea in these circumstances. On reconsideration, the Supreme Court of Ohio clarified that *Colon I* declared a new constitutional rule that "is prospective in nature" and does not apply retroactively. *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, ¶5 ("*Colon II*"). Thus, *Colon I* applies only to cases that were pending on the date *Colon I* was announced or April 9, 2008. Appellant did not appeal from his sentence when he pleaded guilty in case No. 05CR04-2322 and his appeal from case No. 06CR07-5342 was final in October 2007. Appellant had exhausted his appellate remedies before *Colon I* was announced, therefore, it does not apply to his convictions.

{¶10} Appellant's arguments are also barred by res judicata because he could have raised the issue of the defective indictment in the trial court or on direct appeal. The doctrine of res judicata provides that "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, syllabus. In *Grava*, the court stated that the doctrine of res judicata bars not only subsequent actions involving the same legal theory of recovery as the previous action, but also claims which could have been litigated in the previous action:

It has long been the law of Ohio that "an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were *or might have been* litigated in a first lawsuit" (emphasis *sic*) (quoting *Rogers v. Whitehall* [1986], 25 Ohio St.3d 67, 69, 25 OBR 89, 90, 494 N.E.2d 1387, 1388). We also declared that "[t]he doctrine of *res judicata* requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it.

(Emphasis sic.) *Grava* at 382, quoting *Natl. Amusements, Inc. v. Springdale* (1990), 53 Ohio St.3d 60, 62. In *State ex rel. Hadlock v. McMackin* (1991), 61 Ohio St.3d 433, 434, the Supreme Court of Ohio stated that a defendant must raise the issue of an insufficient indictment on direct appeal. Thus, appellant could have and should have raised the issue in the trial court or on direct appeal, but did not do so and is barred from doing so now by the doctrine of res judicata.

{¶11} In his third assignment of error, appellant contends that the trial court abused its discretion when it entered a judgment of conviction in the absence of sufficient evidence to establish all the elements of the offense. Unlike the defendant in *Colon I*, who had a jury trial, here, appellant pleaded guilty to the charges. "The plea of guilty is a complete admission of the defendant's guilt." Crim.R. 11(B)(1). Thus, "[b]y entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime." *State v. Kitzler*, 3d Dist. No. 16-02-06, 2002-Ohio-5253, ¶12, quoting *State v. Barnett* (1991), 73 Ohio App.3d 244, 248. A criminal defendant is limited on appeal and may only attack the voluntary, knowing, and intelligent nature of the plea and may not raise independent claims relating to the alleged deprivation of the constitutional rights that occurred prior to the entry of the guilty plea. *State v. Woods*, 3d Dist. No. 1-05-82, 2006-Ohio-2368, ¶14. Thus, appellant admitted the elements of the offense when he pleaded guilty to the charges. Appellant's third assignment of error is not well-taken.

{¶12} Since appellant has not demonstrated manifest injustice as required by Crim.R. 32.1, the trial court did not abuse its discretion in overruling appellant's motion to withdraw his guilty plea. Appellant's three assignments of error are not well-taken.

{¶13} For the foregoing reasons, appellant's three assignments of error are overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN and McGRATH, JJ., concur.
