

[Cite as *State v. Dixon*, 2010-Ohio-3894.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 10AP-75
v.	:	(C.P.C. No. 93CR-09-5085)
	:	
Robert A. Dixon,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 19, 2010

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Robert A. Dixon, pro se.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Robert A. Dixon ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas dismissing his petition for post-conviction relief. For the following reasons, we affirm.

{¶2} Appellant was indicted in September 1993 for aggravated robbery, robbery, and having a weapon while under disability. With the assistance of counsel, he

pleaded guilty to aggravated robbery, and the trial court sentenced him in December 1994. On August 6, 2008, he filed a petition for post-conviction relief, claiming his indictment was defective because it did not specify a mens rea for aggravated robbery. He relied on the April 2008 decision that the Supreme Court of Ohio rendered in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"). The trial court dismissed the petition.

{¶3} Appellant appeals, raising the following assignment of error:

THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION TO CONVICT APPELLANT OF AGGRAVATED ROBBERY UPON COUNT ONE OF THE INDICTMENT AS COUNT ONE FAILED TO LIST ALL OF THE REQUIRED ELEMENTS TO CHARGE A VIOLATION OF R.C. § 2911.01 WHEREIN IT DID NOT LIST A MENS REA ELEMENT. FURTHER, THAT NO RATIONAL TRIER OF FACT COULD FIND ALL ESSENTIAL ELEMENTS TO CONVICT WITHOUT THE MENS REA ELEMENT ALSO HAVING BEEN PROVEN. ALL OF WHICH IS IN VIOLATION OF ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION; SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION; O.R.C. §§ 2901.21, 2901.22, 2903.01(B), AND CRIMINAL RULE 7(B). AND RENDERS APPELLANT'S CONVICTION ON COUNT ONE OF THE INDICTMENT VOID. [sic]

{¶4} In his single assignment of error, appellant argues that the trial court erred by dismissing his petition for post-conviction relief. We disagree.

{¶5} The post-conviction relief process is a collateral civil attack on a criminal judgment, not an appeal of the judgment. *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111. Post-conviction relief is a narrow remedy that affords appellant no rights beyond those granted by statute. *State v. Calhoun*, 86 Ohio St.3d 279, 281, 1999-Ohio-102. We need not disturb a trial court's decision to deny a post-conviction

petition absent an abuse of discretion. *State v. White*, 118 Ohio St.3d 12, 2008-Ohio-1623, ¶45. An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶6} Appellant was sentenced before the September 21, 1995 amendment of R.C. 2953.21, which set deadlines for post-conviction relief petitions. See *State v. Wright*, 10th Dist. No. 08AP-1095, 2009-Ohio-4651, ¶19. Given the date of appellant's sentencing, he was governed by a requirement that he file his petition within one year from September 21, 1995. *Id.* Thus, his petition is untimely because he filed it on August 6, 2008, well beyond the deadline.

{¶7} A trial court lacks jurisdiction to consider an untimely post-conviction petition unless an exception applies pursuant to R.C. 2953.23(A). *State v. Foster*, 10th Dist. No. 09AP-227, 2009-Ohio-5202, ¶7. Appellant's petition did not satisfy any of the exceptions. For instance, he did not submit DNA evidence establishing his innocence. See R.C. 2953.23(A)(2). Nor did the petition involve a new retroactive federal or state right recognized by the United States Supreme Court. See R.C. 2953.23(A)(1)(a). Appellant also cannot justify the untimely petition on grounds that he was "unavoidably prevented from discovery" of evidence to support the claims in his petition. *Id.* Instead, he challenged the sufficiency of his indictment, and the facts giving rise to that challenge existed when the indictment was issued before the deadline for filing a petition for post-conviction relief. See *State v. Smith*, 10th Dist. No. 09AP-46, 2009-Ohio-3244, ¶9, citing *State v. Berry*, 10th Dist. No. 08AP-762, 2009-Ohio-1557.

Because appellant failed to establish an exception that would allow the trial court to consider his untimely post-conviction petition, it was appropriate for the court to dismiss the petition. *Smith* at ¶10.

{¶8} Furthermore, res judicata bars a defendant who was represented by counsel from asserting in a post-conviction petition an issue that could have been raised at trial or on direct appeal. *Smith* at ¶13, citing *State v. Szefcyk*, 77 Ohio St.3d 93, 1996-Ohio-337, syllabus. Appellant was previously represented by counsel and could have challenged his indictment in the trial court or on direct appeal. See *Smith* at ¶13. Thus, res judicata bars him from further litigating the sufficiency of his indictment. *Id.*

{¶9} In any event, appellant's petition fails on the merits. He relied on *Colon I* to support his claim that his indictment was defective. *Colon I* is not retroactive, however, and does not relate back to his aggravated robbery conviction. See *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, ¶3-5; *Smith* at ¶11. Additionally, *Colon I* does not apply to defendants who, like appellant, pleaded guilty in lieu of having a trial on an indictment. *Smith* at ¶12, citing *State v. Tabor*, 10th Dist. No. 08AP-1066, 2009-Ohio-2657, ¶8.

{¶10} In conclusion, the trial court did not abuse its discretion by dismissing appellant's petition for post-conviction relief. Accordingly, we overrule appellant's single assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and SADLER, JJ., concur.

