

[Cite as *State v. Guthrie*, 2009-Ohio-4586.]

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

STATE OF OHIO	:	
	:	Appellate Case No. 08-CA-88
Plaintiff-Appellee	:	:
	:	Trial Court Case Nos. 2004-CR-216
v.	:	:
	:	(Criminal Appeal from
JASON MICHAEL GUTHRIE	:	Common Pleas Court)
	:	
Defendant-Appellant	:	

.....
OPINION

Rendered on the 4th day of September, 2009.

.....

STEPHEN K. HALLER, Atty. Reg. #0009172, by ELIZABETH A. ELLIS, Atty. Reg. #0074332, Greene County Prosecutor's Office, 61 Greene Street, Xenia, Ohio 45385
Attorney for Plaintiff-Appellee

JASON MICHAEL GUTHRIE, #A478845, Toledo Correctional Institution, P.O. Box 80033, Toledo, Ohio 43608-0033
Defendant-Appellant, *pro se*

.....

BROGAN, J.

{¶ 1} In September 2004, Appellant Jason Guthrie was convicted of ten

counts of rape of a child under ten years of age and two counts of gross sexual imposition of a child under thirteen. He was sentenced to ten concurrent life sentences and two four-year terms to be served concurrently for a total of a mandatory life term. Guthrie did not appeal his convictions, but in August, 2008 Guthrie filed a post-conviction relief petition based on the holding of *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624. The trial court denied his petition as untimely.

{¶ 2} Guthrie argues in his assignment of error that the trial court erred in deciding that it did not have jurisdiction to consider his petition. Guthrie contends he was unavoidably prevented from discovering the facts upon which he must rely to present his claim and that but for the constitutional error at trial, no reasonable factfinder would have found him guilty of the crimes for which he was indicted. Specifically, he contends his indictment was defective because the word “knowingly” was omitted from the indicted offenses, citing *State v. Colon*, supra.

{¶ 3} The State argues that Guthrie cannot meet the requirements of the exception to the time requirements of R.C. 2953.21 by relying on new case law as opposed to newly discovered facts. See *State v. Gulertekin* (June 8, 2000), Franklin App. No. 99 A.P.-900. We agree.

{¶ 4} R.C. 2953.23(A)(1) provides as follows:

{¶ 5} “(A) Whether a hearing is or is not held on a petition filed pursuant to Section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

{¶ 6} “(1) **Both** of the following apply:

{¶ 7} “(a) Either the petitioner shows that **the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period of prescribed in division (A)(2) of Section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner’s situation,** and the petition asserts a claim based on that right.

{¶ 8} “(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or if the factfinder would have found the petitioner eligible for the death sentence.”

{¶ 9} The United States Supreme Court has not recognized a new federal or state right that applies retroactively to persons in Guthrie’s situation. Furthermore, there was nothing preventing Guthrie from raising the issue of a purported missing mens rea element in his direct appeal. This is true even though an assignment of that purported error would have predated *Colon I*. Thus, res judicata prevents him raising that issue in his post-conviction relief proceeding. See *State v. John T. Hibbler II* (July 24, 2009), Clark App. No. 2008-CA-103.

{¶ 10} Lastly, the indictment related to the rape charges is not defective for its failure to include the mens res element of knowingly because rape of a child under 13 is a strict liability offense. See *State v. Randall Todd O’Dell* (March 9, 2009), Montgomery App. No. 22691. The Appellant’s assignment of error is Overruled.

{¶ 11} The judgment of the trial court is Affirmed.

.....

FAIN and FROELICH, JJ., concur.

Copies mailed to:

Stephen K. Haller
Elizabeth A. Ellis
Jason Michael Guthrie
Hon. Stephen Wolaver