

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22814
v.	:	T.C. NO. 1998 CR 2418
	:	
OSCAR D. MITCHELL, JR.	:	(Criminal appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 26th day of June, 2009.

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OSCAR D. MITCHELL, JR., #370-891, Lebanon Correctional Institution, P. O. Box 56, Lebanon, Ohio 45036
Defendant-Appellant

DONOVAN, P.J.

{¶ 1} This matter is before the Court on Notice of Appeal of Oscar D. Mitchell, Jr., filed June 27, 2008. On December 11, 1998, Mitchell was indicted for one count of Aggravated Murder in violation of R.C. 2903.01(A) and one count of Aggravated Burglary in violation of R.C. 2911.11(A)(1). Thereafter, Mitchell pleaded guilty to the

two counts of the indictment and was sentenced to life in prison for the Aggravated Murder and a concurrent ten-year sentence for the Aggravated Burglary. On May 21, 2008, Mitchell filed a motion to withdraw his guilty plea to Aggravated Burglary pursuant to Criminal Rule 32.1. The trial court denied the motion to withdraw the guilty plea on June 16, 2008, and Mitchell appeals the trial court's ruling on the motion.

{¶ 2} In his motion to withdraw guilty plea, Mitchell argued that based upon the language of the indictment for Aggravated Burglary, which failed to include any allegation of the necessary mental state element, it was defective based on the recent Supreme Court decision in *State v. Colon* (2008), 118 Ohio St.3d 26, 2008-Ohio-1624. (*Colon I*). Mitchell contended that the indictment failed to allege that he acted recklessly, thereby rendering a fatal error in the indictment. Thus, Mitchell argued that a manifest injustice resulted in his serving a sentence of an additional ten years based upon the guilty plea to Aggravated Burglary.

{¶ 3} Mitchell sets forth two interrelated assignments of error which we consider together. The assignments of error are as follows:

{¶ 4} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT AN INDICTMENT THAT IS DEFECTIVE FOR FAILING TO PROPERLY CHARGE THE OFFENSE OF AGGRAVATED BURGLARY BY OMITTING THE REQUISITE ALLEGATION OF A NECESSARY CULPABLE MENTAL STATE, IS NOT A STRUCTURAL DEFECT, BUT IS SUBJECT TO HARMLESS ERROR ANALYSIS, BASED SOLELY UPON THE FACT THAT A GUILTY PLEA WAS ENTERED."

{¶ 5} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO GRANT RELIEF ON THE MOTION TO WITHDRAW GUILTY PLEA ON

THE AGGRAVATED BURGLARY CONVICTION WHERE APPELLANT WAS NEVER PROPERLY CHARGED THEREWITH, WHICH CONSTITUTES A STRUCTURAL DEFECT NOTWITHSTANDING THE ENTRY OF A GUILTY PLEA.”

{¶ 6} Mitchell contends that the trial court erred when it overruled his motion to withdraw his guilty plea pursuant to Criminal Rule 32.1. Criminal Rule 32.1 allows “[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct *manifest injustice* the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.” Crim. R. 32.1 (emphasis added). Relying upon *Colon I*, Mitchell argues that his indictment for Aggravated Burglary lacked the requisite mental state, thereby constituting a manifest injustice. For this reason, Mitchell alleges the trial court erred by overruling his motion to withdraw his guilty plea.

{¶ 7} Recently the Ohio Supreme Court held in *Colon I* that when an indictment for Aggravated Robbery failed to include the mens rea element of the crime, the error is a structural error. *Colon I*, 118 Ohio St.3d at 30; *State v. Perry* (2004), 101 Ohio St.3d 118, *Arizona v. Fulminante* (1991), 499 U.S. 279, 309-310, 111 S.Ct. 1246, 113 L.Ed.2d 302. A structural error is a constitutional defect because it affects the framework within which the trial proceeds. *Colon I*, 118 Ohio St.3d at 30. Furthermore, a structural error permeates the trial from beginning to end putting into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence. *Id.* at 31. *Colon I* held generally that when an indictment fails to charge a mens rea element of a crime and the defendant fails to raise that defect in the trial court, the defendant has not waived the defect in the

indictment. *Id.* at 35.

{¶ 8} On a motion to reconsider *Colon I*, the Supreme Court narrowed the holding of *Colon I*. The Court held that *Colon I* was confined to the facts in that case. *State v. Colon* (2008), 119 Ohio St.3d 204, 206, 2008-Ohio-3749. (*Colon II*). In *Colon II*, the court further held that “[i]n a defective-indictment case that does not result in multiple errors that are inextricably linked to the flawed indictment such as those that occurred in *Colon I*, structural-error analysis would not be appropriate.” *Id.* at 205. The Court emphasized that structural-error analysis to a defective indictment is appropriate only in rare cases in which multiple errors follow the defective indictment. *Id.* Finally, *Colon II* ruled that the ruling in *Colon I* was to be prospective in nature and applied only to those cases pending on the date *Colon I* was announced. *Id.*

{¶ 9} First, Mitchell’s case was not pending on direct appeal when *Colon I* and *Colon II* were decided. Thus, even if he was charged with Aggravated Robbery, these cases are not applicable to Mitchell.

{¶ 10} More importantly, we have repeatedly held that the holdings in *Colon I* and *Colon II* do not apply to an Aggravated Burglary indictment that tracks the language of the statute. *State v. Murillo*, Montgomery App. No. 22226, 2009-Ohio-2325 at ¶ 16; *State v. Day*, Clark App. No. 07-CA-139, 2009-Ohio-56; *State v. Davis*, Cuyahoga App. No. 90050, 2008-Ohio-3453; *State v. Smith*, Montgomery App. Nos. 21463 and 22334, 2008-Ohio-6330.

{¶ 11} Since *Colon I* and *Colon II* do not apply to an Aggravated Burglary indictment that tracks the language of the statute, the trial court did not err when it overruled Mitchell’s motion to withdraw his guilty plea. The indictment in question

stated that Mitchell “by force, stealth or deception, did trespass in an occupied structure . . . when another person, other than the accomplice of the offender was present, with purpose to commit . . . any criminal offense, and did then inflict or attempt or threaten to inflict physical harm to another . . . ” The language of the indictment does track the language of R.C. 2911.11(A)(1), the applicable statute.

{¶ 12} Accordingly, Mitchell’s assignments of error are overruled, and the judgment of the trial court is affirmed.

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GRADY, J. and FROELICH, J., concur.

Copies mailed to:

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Oscar D. Mitchell, Jr.

Hon. Michael T. Hall