

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
Plaintiff-Appellee	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Julie A. Edwards, J.
-vs-	:	Hon. Patricia A. Delaney, J.
	:	
ROGER MILLETTE	:	Case No. 08-CA-94
	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Licking County Court of  
Common Pleas Court Case No. 04-CR-32

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: June 5, 2009

APPEARANCES:

For Plaintiff-Appellee:

KENNETH W. OSWALT 0037208  
Licking County Prosecuting Attorney  
20 S. Second St., 4<sup>th</sup> Fl.  
Newark, Ohio 43055

For Defendant-Appellant:

ROGER MILLETTE, pro se  
Inmate Number A487-908  
Toledo Correctional Institution  
2001 E. Central Ave.  
P.O. Box 80033  
Toledo, Ohio 43608

*Delaney, J.*

{¶1} Defendant-Appellant, Roger Millette, appeals from the trial court's denial of his "Petition to Vacate or Set Aside Judgment Of Conviction And Sentence, And Request For Counsel." The State of Ohio is Plaintiff-Appellee.

{¶2} On January 16, 2005, the Licking County Grand Jury indicted Appellant on aggravated robbery, aggravated burglary, kidnapping, attempted rape, intimidation of a victim/witness and two counts of gross sexual imposition. At a pre-trial conducted in that case, Adult Court Services suggested a ten-year sentence because Appellant had thirty-seven years remaining on a parole violation. Defense counsel relayed Adult Court Services' suggestion to appellant.

{¶3} On January 24, 2005, Appellant appeared before the trial court for a change of plea hearing. Prior to the commencement of the hearing, Appellant and defense counsel completed an "Admission of Guilt/No Contest" form. Defense counsel added the following language to this form: "Court to follow ACS recommendation unless years remaining on Defendant's parole currently in effect are less than has been represented to the court." Thereafter, Appellant changed his plea to guilty and the trial court dismissed the attempted rape charge.

{¶4} On February 3, 2005, Appellant appeared for sentencing. At that hearing, Kelly Miller, Chief Probation Officer, stated that he completed a presentence investigation. According to Mr. Miller, about one week prior to the sentencing hearing he learned, from an anonymous person, that it was unlikely Appellant's parole would be revoked by the Adult Parole Authority. Based upon this information, the trial court sentenced Appellant to a thirty-three year prison term.

{¶5} On March 8, 2005, appellant filed a pro se “Motion for Post-Conviction Petition,” which was actually a motion to withdraw his guilty plea. The trial court conducted a hearing on Appellant's motion on May 20, 2005. On June 15, 2005, the trial court denied the motion.

{¶6} Appellant timely filed a notice of appeal, arguing that the trial court abused its discretion in denying his motion to withdraw his guilty plea because it was not knowing, voluntary, and intelligent and that but for trial counsel ineffectiveness, there was a reasonable probability that he would not have pled guilty. This Court affirmed the trial court's decision, finding that Appellant did not meet his burden of proving a manifest injustice resulting from the trial court's denial of his motion. *State v. Millette*, 5th Dist. No. 05-CA-79, 2006-Ohio-2099.

{¶7} On June 7, 2008, Appellant filed a Petition to Vacate Or Set Aside Judgment of Conviction and Sentence, and Request for Counsel. In that petition, he argues that based upon the Supreme Court's decision in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, his 2004 indictment was defective as it relates to the aggravated robbery charge because it failed to set forth a mental state of recklessness.

{¶8} On July 7, 2008, the trial court denied the petition.

{¶9} Appellant raises two Assignments of Error:

{¶10} “I. THE APPELLANT WAS DENIED HIS 5<sup>TH</sup> AMENDMENT RIGHT UNDER THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION WHEN THE COMMON PLEAS COURT ABUSED IT'S

[SIC] DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO VACATE OR SET ASIDE JUDGMENT OF CONVICTION AND SENTENCE.

{¶11} "II. THE COURT OF COMMON PLEAS ABUSED IT'S [SIC] DISCRETION IN THAT THE MOTION FOR ASSIGNMENT OF COUNSEL WAS DENIED, THUS VIOLATING APPELLANTS [SIC] 6<sup>TH</sup> AMENDMENT RIGHT AFFORDED BY THE UNITED STATES CONSTITUTION."

I & II

{¶12} In Appellant's first and second assignments of error, he argues that the trial court abused its discretion in not appointing counsel for his post-conviction petition and in denying his post-conviction petition. We disagree.

{¶13} In *State v. Crowder* (1991), 60 Ohio St.3d 151, 152, 573 N.E.2d 652 the Ohio Supreme Court held that a post-conviction petitioner has no constitutional right to counsel. As such, the trial court did not abuse its discretion in denying Appellant's request for counsel.

{¶14} A petition for post-conviction relief is a collateral attack on a criminal judgment that is civil in nature. A post-conviction petition is not an appeal from a criminal judgment. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 281, 714 N.E.2d 905, 908.

{¶15} The petition is a means by which a defendant-petitioner may allow the court to consider constitutional issues that would otherwise be impossible to review because the evidence supporting those issues is not contained in the record of the petitioner's criminal conviction, and thus would not be appropriate for appellate review on direct appeal. *State v. Murphy* (Dec. 26, 2000), 10th Dist. No. 00AP-233. The petition

for post-conviction relief is not intended to provide a defendant with a second opportunity to litigate his conviction. Moreover, the petitioner is not automatically entitled to an evidentiary hearing on the petition. *State v. Jackson* (1980), 64 Ohio St.2d 107, 413 N.E.2d 819.

{¶16} For a trial court to grant a hearing based on a petition for post-conviction relief, the petitioner must provide evidence that demonstrates a cognizable claim of constitutional error. R.C. 2953.21(C). The evidence presented by the petitioner must demonstrate that the denial or infringement of the petitioner's constitutional rights render the petitioner's conviction or sentence void. *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 175, paragraph four of the syllabus. If such evidentiary materials are not submitted, the trial court may deny the petition without a hearing. *Murphy*, supra, citing *Jackson*, supra, at 110.

{¶17} When a petition is untimely filed, as is the one in the present case, additional requirements apply. R.C. 2953.23(A)(1) states the following in pertinent part regarding an untimely filing:

{¶18} “(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:

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

{¶20} “(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 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.

{¶21} “(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 claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.”

{¶22} In this case, there is no question that Appellant’s most recent petition was filed more than 180 days subsequent to his judgment of conviction. Appellant was convicted on February 3, 2005. Thus, the issue is whether appellant can satisfy both of the requirements set forth in R.C. 2953.23(A)(1).

{¶23} Appellant argues the indictment in his case was defective because it “did not include the required mens rea of reclessness [sic] in count 2 of Aggravated Robbery,” and he was not placed on notice “that the state was required to prove that he had been ‘reckless’ in order to convict him of aggravated robbery,” thus violating his Fifth Amendment right.

{¶24} Appellant's argument does not rely on the language in R.C. 2953.23(A)(1)(a) that he “was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief,” but rather new case law i.e., *Colon I*. First, *Colon I* is not a decision from the United States Supreme Court. Secondly, in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169

(*Colon II*), ¶ 3, the Supreme Court of Ohio reconsidered *Colon I* and specifically stated *Colon I* “is only prospective in nature;” therefore, it does not apply retroactively and hence, does not apply in the case at bar.

{¶25} Furthermore, *Colon I* involved the offense of robbery in violation of R.C. 2911.02(A)(2). In this case, Appellant was indicted for aggravated robbery in violation of R.C. 2911.01. Unlike the “physical harm” element contained in R.C. 2911.02, R.C. 2911.01 contains a “deadly weapon” element which does not require the mens rea of recklessness. Therefore, the indictment in this case was not defective. *State v. Thompson*, 5th Dist. No. 08 COA 018, 2008-Ohio-5332, ¶ 28-31; see also *State v. Berry*, 10th Dist. No. 08AP-762, 2009-Ohio-1557.

{¶26} For the foregoing reasons, we find Appellant’s argument to be without merit. We affirm the judgment of the Licking County Court of Common Pleas.

By: Delaney, J.

Gwin, P.J. and

Edwards, J. concur.

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HON. PATRICIA A. DELANEY

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO  
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STATE OF OHIO	:	
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-vs-	:	JUDGMENT ENTRY
	:	
ROGER MILLETTE	:	
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Defendant-Appellant	:	Case No. 08-CA-94
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For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to Appellant.

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HON. PATRICIA A. DELANEY

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS