

[Cite as *State v. Levette*, 2009-Ohio-2864.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MANDERLIN T. LEVETTE

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. 2008CA109

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Richland County Court of
Common Pleas, Criminal Case No.
1990CR609H

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

June 15, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

JAMES J. MAYER, JR.
PROSECUTING ATTORNEY
RICHLAND COUNTY, OHIO

KIRSTEN L. PSCHOLKA-GARTNER
Assistant Prosecuting Attorney
38 South Park Street
Mansfield, Ohio 44902

MANDERLIN T. LEVETTE, PRO SE
Inmate No. A234-942
Trumbull Correctional Institution
P.O. Box 901
Leavittsburg, Ohio 44430

Hoffman, J.

{¶1} Defendant-appellant Manderlin T. Levette appeals the October 20, 2008 Judgment Entry of the Richland County Court of Common Pleas denying his petition for post-conviction relief. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On August 31, 1990, the Richland Bank's main office was robbed by Kent Davenport, Raymond Hardnick and Appellant Manderlin Levette. In the course of the robbery, Kent Davenport shot and killed a bank customer, Theodore Vanetta. Following the robbery, Appellant and his two co-defendants fled from the scene but were soon apprehended.

{¶3} After his apprehension by the Ohio State Highway Patrol, S.A. Wheeler and Detective Tom Erre of the Mansfield Police Department went to Medina where Appellant had been apprehended. While at the Medina Post of the Ohio State Highway Patrol, Wheeler and Erre questioned Appellant. Appellant was read his Miranda rights from an FBI form at 2:26 pm. Appellant signed the form indicating a waiver of his constitutional rights.

{¶4} The officers interrogated Appellant for forty to forty-five minutes. Officer Wheeler then made a written statement wherein he paraphrased Appellant's statements during the interview. The statements admitted to Appellant's involvement in the robbery. Subsequently, Appellant stated in his own handwriting he had read the statement, the statement was true and correct, he voluntarily waived his rights and he waived his rights because he did not want a lawyer at that time.

{¶15} Appellant was indicted for one count of aggravated robbery with a firearm specification and one count of aggravated murder with a firearm specification. Following a jury trial, Appellant was found guilty of both counts and the trial court sentenced Appellant accordingly. Appellant subsequently appealed his conviction to this Court. Via Judgment Entry of September 26, 1991, this Court affirmed the conviction. Appellant later filed an application to reopen his appeal, which this Court granted. Via Judgment Entry of May 24, 1996, this Court again affirmed Appellant's conviction.

{¶16} On October 8, 2008, Appellant filed a petition for post-conviction relief. Via Judgment Entry of October 20, 2008, the trial court denied Appellant's petition.

{¶17} Appellant now appeals, assigning as error:

{¶18} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ITS FAILURE TO GRANT RELIEF TO DEFENDANT LEVETTE, A LEGALLY INNOCENT DEFENDANT, WHERE THE COUNTS IN DEFENDANT LEVETTE'S INDICTMENT THAT PURPORT TO CHARGE AGGRAVATED MURDER AND AGGRAVATED ROBBERY ARE INSUFFICIENT TO CHARGE THOSE OFFENSES; AS A MATTER OF LAW HE HAS NEVER BEEN CHARGED WITH THOSE OFFENSES UNDER OHIO LAW.

{¶19} "II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ITS FAILURE TO GRANT RELIEF TO DEFENDANT LEVETTE WHERE THE AGGRAVATED MURDER AND AGGRAVATED ROBBERY [SIC] COUNTS IN THE INDICTMENT, AS A MATTER OF LAW, ARE INSUFFICIENT TO CHARGE AN OFFENSE UNDER OHIO LAW.

{¶10} “III. THE CONSTITUTIONALLY DEFECTIVE COUNTS IN THE INDICTMENT REQUIRES LEVETTE’ [SIC] AGGRAVATED MURDER AND AGGRAVATED ROBBERY OFFENSE TO BE REVERSED AND SET ASIDE.”

{¶11} Appellant’s assigned errors raise common and interrelated issues; therefore, we will address the arguments together.

{¶12} Ohio Revised Code Section 2953.21 reads:

{¶13} “Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.”

{¶14} Section 2953.23 reads:

{¶15} “(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:

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

{¶17} “(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.

{¶18} “(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.”

{¶19} Upon review, Appellant’s petition for post-conviction relief is untimely as it is filed outside of the 180-day time limitation set forth in the statute.

{¶20} Appellant relies on the recent Ohio Supreme Court ruling in *State v. Colon* (2008), 118 Ohio St. 3d 26, as a new legal right applicable to his petition. *Colon* held:

{¶21} “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.”

{¶22} However, the Ohio Supreme Court clarified its holding in *Colon I* in *State v. Colon* (2008), 119 Ohio St. 3d 204 (hereinafter *Colon II*):

{¶23} “Our holding in *Colon I* is only prospective in nature, in accordance with our general policy that newly declared constitutional rules in criminal cases are applied prospectively, not retrospectively. In *State v. Evans* (1972), 32 Ohio St.2d 185, 61 O.O.2d 422, 291 N.E.2d 466, we stated that “ ‘application of a new rule of law to a pending appeal is not retrospective,’ and * * * the new rule applie[s] to the cases

pending on the announcement date.” *Id.* at 186, 61 O.O.2d 422, 291 N.E.2d 466, quoting *State v. Lynn* (1966), 5 Ohio St.2d 106, 108, 34 O.O.2d 226, 214 N.E.2d 226.

{¶24} “We recently restated this principle in *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, 819 N.E.2d 687, at ¶ 6: “A new judicial ruling may be applied *205 only to cases that are pending on the announcement date. The new judicial ruling may not be applied retroactively to a conviction that has become final, i.e., where the accused has exhausted all of his appellate remedies.” (Citations omitted.)

{¶25} “Therefore, the rule announced in *Colon I* is prospective in nature and applies only to those cases pending on the date *Colon I* was announced.”

{¶26} As this appeal stems from Appellant’s appeal of the denial of his petition for post-conviction relief; rather than the direct appeal of his conviction, *Colon* does not apply. Accordingly, Appellant’s petition for post-conviction relief is untimely, and the trial court did not error in so finding. Furthermore, the attempt to raise a defect in the indictment is now barred under *res judicata* principles.

{¶27} The October 20, 2008 Judgment Entry of the Richland County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Wise, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ John W. Wise
HON. JOHN W. WISE

