

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2008 CA 103
v.	:	T.C. NO. 01 CR 0081
JOHN T. HIBBLER, II	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 24th day of July, 2009.

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JOHN T. HIBBLER, #411907, P. O. Box 56, State Route 63, Lebanon, Ohio 45036
Defendant-Appellant

HARSHA, J. (by assignment)

{¶ 1} Several years after being convicted of attempted burglary and improperly discharging a firearm, John T. Hibbler filed a motion to vacate his conviction on the basis that the indictment was defective. He did so in response to *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 (*Colon I*), which held an indictment for aggravated robbery that failed to include the default mens rea element of recklessness was

defective, and because the error was structural, it was not forfeited by the defendant's failure to object.

{¶ 2} Hibbler now claims his indictment for aggravated burglary omitted "the required Mens Rea" for the charge of Aggravated Burglary, i.e., that the R.C. 2901.21(B) default mental state of recklessness applied and was missing from the indictment. Thus, he claims the trial court's denial of his motion to vacate was erroneous. We reject this argument on several grounds.

{¶ 3} First, Hibbler's motion appears to be a motion for post-conviction relief under R.C. 2953.21 because it: 1) was filed after his direct appeal, *State v. Hibbler*, Clark App. No. 01-CA-43, 2002-Ohio-4464; 2) claims a denial of his constitutional rights; 3) seeks to render the judgment void; and 4) asked for vacation of the judgment and sentence. *State v. Reynolds* (1997), 79 Ohio St.3d 158, 160. However, Hibbler's motion to vacate was untimely because R.C. 2953.21(A) requires the petition to be filed no later than 180 days after the transcript in his direct appeal was filed. At the latest, the 180 day cutoff date occurred sometime in 2002. Although a petitioner may seek untimely relief under R.C. 2953.23(A)(1)(a) if certain conditions are present, none of those conditions exist or have even been asserted. In the absence of a timely filing and the existence of the extenuating circumstances, a trial court lacks jurisdiction to consider the petition. *State v. Brewer* (May 14, 1999), Montgomery App. No. 17201; *State v. Ayers* (Dec. 4, 1998), Montgomery App. No. 16851.

{¶ 4} Moreover, there was nothing preventing Hibbler 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 from raising the issue in post-conviction relief when he could have presented that same issue in his direct appeal. *State v. Perry* (1967), 10 Ohio St.2d 175, syllabi 7,8,9.

{¶ 5} Finally, even if we were to consider the merits of Hibbler’s argument, we would reject it. The State indicted Hibbler for aggravated burglary under R.C. 2911.11(A)(2), which provides:

{¶ 6} “(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

{¶ 7} * * *

{¶ 8} “(2) The offender has a deadly weapon or dangerous ordnance on or about the offender’s person or under the offender’s control.”

{¶ 9} Unlike the aggravated robbery charge in *Colon I*, supra, the aggravated burglary charge here explicitly provides the mens rea element of “purposely”. The level of intent to commit a burglary offense is clearly expressed in the statute, i.e., “with purpose to commit * * * any criminal offense.” *State v. Davis*, Cuyahoga App. No. 90050, 2008-Ohio-3453, at ¶17. Therefore, R.C. 2901.21(B) does not apply to aggravated burglary, which has an explicitly specified mens rea element. *Id.* at ¶21 and *State v. Smith*, Montgomery App. Nos. 21463 and 22334, 2008-Ohio-6330, at ¶74.

{¶ 10} Moreover, the Supreme Court of Ohio clarified its decision in *Colon I* and limited its syllabus “to the facts in that case.” *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, at ¶8.

{¶ 11} Thus, Hibbler’s indictment is not defective. Accordingly, we overrule the assignment of error.

JUDGMENT AFFIRMED.

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BROGAN, J. and FROELICH, J., concur.

(Hon. William H. Harsha, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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Hon. Richard J. O’Neill