

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

DARYL L. GOTEL,	:	OPINION
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2008-A-0070
RICHARD GANSHIEMER, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2008 CV 1116.

Judgment: Affirmed.

Daryl L. Gotel, pro se, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030 (Plaintiff-Appellant).

Richard Cordray, Attorney General, and *Ashley D. Rutherford*, Assistant Attorney General, State Office Tower, 30 East Broad Street, Columbus, OH 43215 (For Defendants-Appellees).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Daryl L. Gotel, appeals the judgment of the Ashtabula County Court of Common Pleas dismissing his complaint for declaratory judgment against appellees, Richard Ganshiemer, Warden, Lake Erie Correctional Institution, and Terry Collins, Director, Ohio Department of Rehabilitation and Corrections. At issue is whether appellant was entitled to maintain a declaratory judgment action to collaterally attack his conviction of robbery. For the reasons that follow, we affirm.

{¶2} On April 26, 2005, appellant was charged in the Lake County Court of Common Pleas in a three-count indictment with two counts of robbery, in violation of R.C. 2911.02(A)(2), felonies of the second degree, and one count of grand theft, in violation of R.C. 2913.02, a felony of the fourth degree. The state and appellant entered into a plea agreement whereby, in exchange for appellant's agreement to plead guilty to count one, robbery, the state would move to dismiss counts two and three.

{¶3} On July 14, 2005, the Lake County Court of Common Pleas conducted a guilty plea hearing at which appellant entered a guilty plea to robbery. At the hearing appellant admitted he entered the Whitehall jewelry store at the Great Lakes Mall in Mentor, Ohio with an accomplice with the purpose to steal jewelry. They stole sixty-six watches worth in excess of \$63,000.00 by threatening two clerks with acid. After finding that the guilty plea was knowingly, voluntarily, and intelligently made, the court accepted appellant's guilty plea, found him guilty of robbery, and dismissed the remaining felony counts. On August 30, 2005, the court sentenced appellant to a term of six years in prison.

{¶4} Appellant subsequently appealed his conviction, which this court affirmed in *State v. Gotel*, 11th Dist. No. 2006-L-015, 2007-Ohio-888, motion for leave to file delayed appeal denied at 114 Ohio St.3d 1476, 2007-Ohio-3699, 2007 Ohio LEXIS 1819. Appellant filed a petition for habeas corpus, which this court dismissed in *Gotel v. Gansheimer*, 11th Dist. No. 2006-A-0087, 2007-Ohio-2311, affirmed at 116 Ohio St.3d 316, 2007-Ohio-6437.

{¶5} Three years after his conviction, appellant filed his complaint for declaratory judgment in the Ashtabula County Court of Common Pleas. In his complaint

appellant alleged he is being falsely imprisoned by appellees pursuant to the Supreme Court of Ohio's decision in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"). In that case the Court held the culpable mental state, or mens rea, of robbery, i.e., recklessness, must be included in the indictment. Appellant alleged that because his robbery indictment did not include this mental state, his rights under *Colon I* were violated, and he asked the trial court to declare his indictment void and to award him damages.

{¶6} Appellees filed a motion to dismiss, arguing that a declaratory judgment action cannot be used to collaterally attack a criminal conviction. The trial court granted appellees' motion. Appellant now appeals the trial court's judgment asserting three assignments of error. Because the assigned errors are interrelated, we shall consider them together. They are as follows:

{¶7} "[1.] Trial court erred by dismissing appellant's claim without first determining whether or not his constitutional rights had been violated.

{¶8} "[2.] A litigant cannot use an action for declaratory judgment as a means of appellate review.

{¶9} "[3.] Plaintiff failed to state a claim upon which relief could be granted."

{¶10} On appeal appellant's argument mirrors the allegations of his complaint. He argues that because the indictment to which he pled guilty did not allege recklessness, pursuant to *Colon I*, structural error was committed and his conviction is void. He argues he is therefore entitled to a declaration to this effect and an award of damages. A declaratory judgment action is a civil action, and provides a remedy in addition to other legal and equitable remedies available. *State v. Brooks* (1999), 133

Ohio App.3d 521, 524; *Schaefer v. First Natl. Bank of Findlay* (1938), 134 Ohio St. 511, at paragraph three of the syllabus. It is well-settled that the trial court's decision to grant or deny declaratory relief will not be overturned on appeal absent a finding of abuse of discretion. *Brooks*, supra, at 525; *Englefield v. Corcoran*, 4th Dist. No. 06CA2906, 2007-Ohio-1807, at ¶11; *Arbor Health Care Co. v. Jackson* (1987), 39 Ohio App.3d 183, 185. An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. A trial court properly dismisses a declaratory judgment action when no real controversy or justiciable issue exists between the parties. *Weyandt v. Davis* (1996), 112 Ohio App.3d 717, 721; *Carter v. Walters* (Mar. 22, 1990), 3d Dist. No. 11-88-24, 1990 Ohio App. LEXIS 1214, *3.

{¶11} Appellees' sole argument is that a declaratory judgment action may not be used to collaterally attack appellant's conviction. However, we note that appellant's declaratory judgment action is also barred by his guilty plea and pursuant to *Colon I*.

{¶12} First, appellant's guilty plea precludes him from challenging the validity of his conviction. The United States Supreme Court has held: "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson* (1973), 411 U.S. 258, 267.

{¶13} The Supreme Court in *Lefkowitz v. Newsome* (1975), 420 U.S. 283, further held:

{¶14} “In most States a defendant must plead not guilty and go to trial to preserve the opportunity for state appellate review of his constitutional challenges to *** admissibility of various pieces of evidence ***. A defendant who chooses to plead guilty rather than go to trial in effect deliberately refuses to present his federal claims to the state court in the first instance. *** Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained. *** It is in this sense, therefore, that ordinarily ‘a guilty plea represents a break in the chain of events which has preceded it in the criminal process.’” (Citations omitted.) *Id.* at 289, quoting *Tollett*, *supra*, at 267.

{¶15} The United States Supreme Court held in *Haring v. Prosise* (1983), 462 U.S. 306:

{¶16} “**** (A) counseled plea of guilty is an admission of factual guilt[] so reliable that *** it quite validly removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State’s imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established.” *Id.* at 321, quoting *Menna v. New York* (1975), 423 U.S. 61, 62-63, n. 2.

{¶17} Ohio appellate courts have repeatedly held that a guilty plea precludes a defendant from asserting a violation under *Colon I*. In *State v. Gant*, 3d Dist. No. 1-08-22, 2008-Ohio-5406, the Third District held that a guilty plea waives any defect in the indictment occasioned by a failure to allege a culpable mental state. *Id.* at ¶13. The

Third District held: “This Court is not persuaded that the Court in *Colon* was also overruling the longstanding waiver rules with regard to guilty pleas. Accordingly, this Court finds that Gant admitted guilt of the substantive crime of burglary and has, therefore, waived any alleged indictment defects for purposes of appeal.” *Id.* Accord *State v. Easter*, 2d Dist. No. 22487, 2008-Ohio-6038, at ¶27.

{¶18} In *State v. Treft*, 6th Dist. Nos. WD-07-085, WD-08-012, 2009-Ohio-1127, the Sixth District held:

{¶19} “This court has previously considered an appeal based upon a claimed mens rea structural defect to an indictment *** in a case where the defendant was convicted pursuant to a guilty plea. *State v. Smith*, 6th Dist. No. L-07-1346, 2009-Ohio-48. We recognized that a guilty plea precludes subsequent ‘independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea’ and, therefore, precluded challenges to the constitutionality of indictments under *Colon* *** where conviction is based upon a guilty plea. *Id.* at ¶10, quoting *Tollett*[, supra, at] 267 and *State v. Spates*, 64 Ohio St.3d 269, 272, 1992-Ohio-130; accord *State v. Straughter*, 10th Dist. No. 08AP-777, 2009-Ohio-641; *State v. Hayden*, 8th Dist. No. 90474, 2008-Ohio-6279; *State v. McGinnis*, 3d Dist. No. 15-08-07, 2008-Ohio-5825. We conclude that appellant’s assignment of error is without merit on the basis of his guilty pleas alone.” *Treft* at ¶8.

{¶20} In *State v. Kovach*, 7th Dist. No. 08-MA-125, 2009-Ohio-2892, the Seventh District held that by entering a plea of guilty, a criminal defendant waives any alleged errors or defects in his indictment. *Id.* at ¶41. The court further held: “Because a guilty plea precludes subsequent, independent claims relating to the deprivation of

constitutional rights that occurred prior to the guilty plea, a guilty plea precludes challenges to the constitutionality of the indictment under *** [*Colon I.*]” *Kovach*, supra, citing *Treft*, supra.

{¶21} In *Hayden*, supra, the Eighth District held that by pleading guilty, the defendant waived any alleged defect in the indictment on appeal, and that *Colon I* did not overrule the longstanding waiver rule with regard to guilty pleas, i.e., that a guilty plea precludes a defendant from raising claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. *Id.* at ¶6. Accord *Smith*, supra, at ¶10; *McGinnis*, supra, at ¶26.

{¶22} Finally, in *State v. Dudas*, 11th Dist. Nos. 2008-L-109 and 2008-L-110, 2009-Ohio-1001, this court held that an appellant is precluded from asserting structural error under *Colon I* where his conviction is based on a guilty plea. *Id.* at ¶43.

{¶23} Based on the foregoing authority, we hold that, because appellant’s conviction was based on his guilty plea, he is precluded from asserting any defect in his indictment based on an alleged violation of *Colon I*.

{¶24} Second, even if appellant had not pled guilty, his declaratory judgment claim would be barred because the rule announced in *Colon I* is prospective in nature and applies only to those cases pending on appeal on the date *Colon I* was announced. *State v. Colon*, 119 Ohio St.3d 204, 204-205, 2008-Ohio-3749 (“*Colon I*”). Appellant’s appeal was not pending on the date *Colon I* was announced, and it is therefore not applicable to his case. However, even if appellant’s appeal was pending on the date *Colon I* was announced, appellant’s declaratory judgment action would be barred because the holding in *Colon I* was based on the fact that the defective indictment

resulted in multiple errors in the defendant's trial, while here, appellant's conviction was based on a guilty plea.

{¶25} In *Colon I*, the Court held that where an indictment for robbery failed to contain the applicable mens rea element, i.e., recklessness, the issue is not waived where the defendant failed to raise the defect in the trial court. *Id.* at syllabus. The Court held that “defects in an indictment that fail either ‘to show jurisdiction in the court’ or ‘to charge an offense’ do not need to be raised prior to trial and can be raised any time during the pendency of the proceeding. An indictment that omits the mens rea element of recklessness fails to charge the offense of robbery ***.” *Colon I* at 33. The Court then determined that the defect was a “structural error” because the defective indictment “permeated” the entire trial. The Supreme Court held:

{¶26} “The defective indictment in this case resulted in several violations of the defendant's constitutional rights. First, the indictment against the defendant did not include all the elements of the offense charged, as the indictment omitted the required mens rea for the crime of robbery. ***

{¶27} “Second, there is no evidence in the record that the defendant had notice that the state was required to prove that he had been reckless in order to convict him of the offense of robbery, and thus the defendant's due process rights were violated. Further, the state did not argue that the defendant's conduct in inflicting physical harm on the victim constituted reckless conduct.

{¶28} “In addition to the defendant's being unaware of the elements of the crime with which he was charged, and the prosecutor's failing to argue that the defendant's conduct in this case was reckless, when the trial court instructed the jury on the

elements of robbery *** , the court failed to include the required mens rea for the offense. The defendant’s counsel did not object to the incomplete instruction. There is no evidence in the record that the jury considered whether the defendant was reckless in inflicting *** physical harm, as is required to convict under R.C. 2911.02(A)(2). Finally, during closing argument, the prosecuting attorney treated robbery as a strict-liability offense.” *Colon I* at 32.

{¶29} The Court further held: “*** here, the defects in the indictment led to significant errors throughout the defendant’s trial, and therefore, structural-error analysis is appropriate. As stated previously, structural errors permeate the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence. *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, at ¶17.” *Colon I* at 31.

{¶30} On reconsideration, the Supreme Court of Ohio clarified its ruling in *Colon I* in *Colon II*. The Court in *Colon II* noted that the facts in *Colon I* were “unique” in that “the defective indictment resulted in several other violations of the defendant’s rights,” and that structural error arising from a defective indictment is limited to the facts in *Colon I*. The Court in *Colon II* held:

{¶31} “We assume that the facts that led to our opinion in *Colon I* are unique. As we stated in *Colon I*, the defect in the defendant’s indictment was not the only error that had occurred: the defective indictment resulted in several other violations of the defendant’s rights. [*Colon I* at 32.] ***

{¶32} “In 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. As we stated in *Colon I*, when a defendant fails to object to an indictment that is defective because the indictment did not include an essential element of the charged offense, a plain-error analysis is appropriate. [Id. at 31.] *** In most defective-indictment cases in which the indictment fails to include an essential element of the charge, we expect that plain-error analysis, pursuant to Crim.R. 52(B), will be the proper analysis to apply.

{¶33} “Applying structural-error analysis to a defective indictment is appropriate only in rare cases, such as *Colon I*, in which multiple errors at the trial follow the defective indictment. *** Consistent with our discussion herein, we emphasize that the syllabus in *Colon I* is confined to the facts in that case.” (Internal citation omitted.) *Colon II* at 205-206.

{¶34} The instant case is easily distinguished from *Colon I* because, here, appellant entered a guilty plea and did not proceed to trial, while *Colon I* was based on the multiple errors that occurred at trial.

{¶35} In *Easter*, supra, the robbery indictment failed to charge the mens rea element. The Second District held that, although the indictment was deficient for want of a culpable mental state, plain error analysis was appropriate, rather than structural error analysis, because the defective indictment did not result in multiple violations of the defendant’s constitutional rights as the defendant pled guilty to the charge. In applying plain error analysis, the court noted the facts of the case supported a conviction of robbery. The court held: “These facts certainly support the inference that Easter purposely or knowingly threatened the immediate use of force against the store clerk. R.C. 2901.22(A), (B). Either of these culpable mental states are sufficient to

establish the default mens rea of recklessness, the element missing from the indictment against Easter. R.C. 2901.21(B), R.C. 2901.22(E).” Id. at ¶25.

{¶36} Further, in *Hayden*, supra, the Eighth District held that *Colon I* does not apply where the defendant does not go to trial, but rather pleads guilty. *Hayden* at ¶6. Accord *Smith*, supra, at ¶10.

{¶37} We therefore hold that because appellant pled guilty and did not go to trial, the omission of the recklessness element in his indictment did not result in structural error.

{¶38} While appellant has not alternatively argued plain error, in light of our discussion below, any attempt to do so would be unavailing in a declaratory judgment action. However, even reviewing the error under a plain error analysis, we note that an alleged error does not constitute plain error pursuant to Crim.R. 52(B) “* * * unless, but for the error, the outcome of the trial clearly would have been otherwise.” *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus. We note that at his guilty plea hearing appellant admitted that in stealing the watches from the jewelry store, he used acid to threaten the two store clerks. Such evidence is sufficient to show purpose or knowledge, either of which is sufficient to show recklessness. R.C. 2901.22(E). Further, appellant has not argued that, but for the alleged error, he would not have entered a guilty plea to the robbery charge. Thus, we do not discern plain error.

{¶39} Third, even if appellant had not pled guilty and structural error was present, his declaratory judgment action would still be barred. In *O’Donnell v. State*, 4th Dist. No. 05CA3022, 2006-Ohio-2696, the inmate was indicted for aggravated burglary, but convicted by a jury of complicity to commit aggravated burglary. Five years later, he

filed a complaint for declaratory judgment seeking a declaration that the state violated his due process right to notice of the charge. The Fourth District held:

{¶40} “In his complaint, O’Donnell asserts that his indictment in a prior criminal case was insufficient to put him on notice that the state would try him for complicity to commit the offenses charged in the indictment. We have previously held that a litigant may not use a declaratory judgment as a method of appellate review. *Brooks*, supra, at 525, citing *Tootle v. Wood* (1974), 40 Ohio App.2d 576, 577.” *O’Donnell*, supra, at ¶12.

{¶41} In explaining the rationale for its holding, the court in *O’Donnell* held:

{¶42} “In *Tootle* and *Brooks* we recognized: “An action under declaratory judgment acts will not lie to determine whether rights theretofore adjudicated have been properly decided, nor will it lie to determine the propriety of judgments in prior actions between the same parties. An action for a declaratory judgment cannot be used as a subterfuge for, or for the veiled purpose of, relitigating questions as to which a former judgment is conclusive. *** [A] party who acquiesced in the procurement of such [prior] judgment cannot procure a declaratory judgment which would in effect disregard the prior judgment as being void. ****” *Id.*, quoting *Tootle* at 578, quoting 26 Corpus Juris Secundum 93-94, Declaratory Judgments, Section 23.” *O’Donnell*, supra, at ¶13.

{¶43} In *Moore v. Mason*, 8th Dist. No. 84821, 2005-Ohio-1188, the inmate previously pled guilty to abduction and felonious assault, and he was sentenced to concurrent terms of imprisonment. The inmate did not appeal. More than three years later, he filed a declaratory judgment action against the prosecutor, alleging that the sentence imposed failed to comply with the statutory sentencing scheme of R.C. Ch. 2929. The Eighth District held:

{¶44} “A declaratory judgment action *** cannot be used as a substitute for an appeal or as a collateral attack upon a conviction. Declaratory relief ‘does not provide a means whereby previous judgments by state or federal courts may be reexamined, nor is it a substitute for appeal ***.’ *Shannon v. Sequeechi* (C.A.10, 1966), 365 F.2d 827, 829. A declaratory judgment action is simply not part of the criminal appellate process. *** *Brooks*[, supra, at] 525.

{¶45} “Neither [R.C. 2701.02] nor Civ.R. 57 convert[s] a claimed error at law by a trial judge acting as a judge in a criminal case into a justiciable controversy between the defendant and the judge subject to resolution by declaration ***.’ *Id.*, quoting *Carter v. Walters* (Mar. 22, 1990), 3rd Dist. No. 11-88-24, 1990 Ohio App. Lexis 1214.

{¶46} “Here, appellant seeks a declaration that the sentence imposed in Case No. 399223 is unenforceable because specific findings under R.C. Chapter 2929 were not journalized in the court's sentencing entry. This is not a justiciable controversy capable of resolution by declaration under R.C. Chapter 2721. On the contrary, it is an argument properly raised by appeal ***. Relief by way of declaration under R.C. Chapter 2721 *** is not appropriate.” *Moore*, supra, at ¶14-16.

{¶47} By appellant’s own admission in his brief, the instant action is an attempt to collaterally attack his conviction. Appellant does not present a justiciable controversy capable of resolution by declaratory relief. We therefore hold the trial court did not abuse its discretion in dismissing appellant’s complaint for declaratory judgment.

{¶48} For the reasons stated in the Opinion of this court, the assignments of error are without merit. It is the judgment and order of this court that the judgment of the Ashtabula County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

COLLEEN MARY O'TOOLE, J.,

concur.