

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-081056
Plaintiff-Appellee,	:	TRIAL NO. B-0401289
vs.	:	<i>JUDGMENT ENTRY.</i>
COURTNEY A. SMITH,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Defendant-appellant Courtney A. Smith presents on appeal four assignments of error that together challenge the common pleas court’s judgment denying the relief sought in his “Motion to Vacate and Set Aside Judgments of Conviction and Sentence.” We overrule the assignments of error because the court had no jurisdiction to entertain the motion.

Smith was convicted in 2004 of aggravated robbery, robbery, and two counts of felonious assault. In his direct appeal, we overruled assignments of error challenging (1) the weight and sufficiency of the evidence to support his convictions, (2) the imposition of maximum and consecutive sentences under *Blakely v. Washington*,<sup>2</sup> and (3) the imposition of separate prison terms for aggravated robbery and robbery and for both counts of felonious assault as violative of R.C. 2941.25. But

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

<sup>2</sup> (2004), 542 U.S. 296, 124 S.Ct. 2531.

because the trial court had failed to notify Smith at sentencing concerning postrelease control, we vacated the sentences and remanded the case to the trial court for resentencing. The Ohio Supreme Court declined to accept for review his appeals there.<sup>3</sup>

The trial court resentenced Smith in April 2005. He took no direct appeal from his April 2005 judgment of conviction.

But in July 2008, he filed with the common pleas court a “Motion to Vacate and Set Aside Judgments of Conviction and Sentence.” In his motion, he cited (1) the Ohio Supreme Court’s 2008 decision in *State v. Cabrales*<sup>4</sup> in support of his challenge, under R.C. 2941.25, to the separate prison terms imposed for aggravated robbery and robbery and for both felonious-assault charges, and (2) the supreme court’s 2008 decision in *State v. Colon*<sup>5</sup> in support of his contention that the counts of his indictment charging aggravated robbery and robbery were void because they had omitted the mens rea elements of the offenses. The court overruled the motion, and this appeal followed.

We conclude that the common pleas court had no jurisdiction to entertain Smith’s “Motion to Vacate and Set Aside Judgments of Conviction and Sentence.” Smith did not timely appeal the judgment of conviction entered upon his resentencing. And the postconviction statutes provide “the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case.”<sup>6</sup> Thus, the common pleas court properly recast Smith’s motion as a petition for postconviction relief, reviewable under the standards

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<sup>3</sup> See *State v. Smith*, 1st Dist. No. C-040348, 2005-Ohio-1325, appeals not accepted for review, 107 Ohio St.3d 1701, 2005-Ohio-6763, 840 N.E.2d 205, and 108 Ohio St.3d 1509, 2006-Ohio-1329, 844 N.E.2d 855.

<sup>4</sup> 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181.

<sup>5</sup> 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917.

<sup>6</sup> R.C. 2953.21(J).

provided by R.C. 2953.21 et seq.<sup>7</sup> And the court properly declined to entertain the petition on its merits because Smith failed to satisfy either the time limits of R.C. 2953.21(A)(2) or the jurisdictional requirements of R.C. 2953.23.

A trial court retains jurisdiction to correct a void judgment.<sup>8</sup> But the supreme court has not held that either a *Colon* error, absent structural error, or a *Cabrales* error renders a judgment of conviction void.<sup>9</sup>

We, therefore, hold that the common pleas court properly overruled Smith's "Motion to Vacate and Set Aside Judgments of Conviction and Sentence." Accordingly, we affirm the court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HENDON, P.J., SUNDERMANN and CUNNINGHAM, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on October 28, 2009

per order of the Court \_\_\_\_\_.

Presiding Judge

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<sup>7</sup> See *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶12.

<sup>8</sup> See *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶18-19.

<sup>9</sup> See *State v. Morgan*, 181 Ohio App.3d 747, 2009-Ohio-1370, 910 N.E.2d 1075, ¶33 (overruling *State v. Shugars*, 165 Ohio App.3d 379, 2006-Ohio-718, 846 N.E.2d 592, to the extent of its holding that a defective indictment deprives a trial court of jurisdiction). Cf. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶12 (holding that a sentence imposed without proper postrelease-control notification is "void").