

[Cite as *State v. Huber*, 2009-Ohio-2541.]

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2008 CA 15
v.	:	T.C. NO. 06CR22B/06CR 163
JAMES M. HUBER	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	
	:

OPINION

Rendered on the 29th day of May, 2009.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notices of Appeal of James Huber, filed June 6, 2008, from case numbers 2006 CR 163 and 2006 CR 22B, in Miami County. Huber pled no contest to breaking and entering, theft, possession of drugs, engaging in a pattern of corrupt activity and conspiracy to engage in a pattern of corrupt activity, and he received an

aggregate 12 year sentence. A mandatory fine of \$7500 was also imposed. On February 1, 2008, we affirmed Huber's sentence on his direct appeal. On May 27, 2008, Huber filed motions to withdraw his no contest pleas in each case, and the trial court overruled his motions on May 29, 2008.

{¶ 2} Huber asserts one assignment of error herein as follows:

{¶ 3} "THE TRIAL COURT ERRED WHEN IT FOUND APPELLANT, JAMES HUBER, GUILTY OF BREAKING AND ENTERING BECAUSE OF A DEFECTIVE INDICTMENT."

{¶ 4} Huber argues that his indictment was defective, resulting in structural error, in reliance upon *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, ("*Colon I*"), which held that the failure to include the requisite mental state in an indictment charging robbery, in violation of R.C. 2911.02(A)(2), results in structural error that cannot be waived by a defendant's failure to raise objection at the trial court level. Alternatively, Huber concedes that *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II*"), limited the holding in *Colon I*, and he argues that plain error is shown.

{¶ 5} We initially note, in *Colon II*, the Supreme Court of Ohio determined that application of *Colon I* was prospective in nature, applying only to cases pending when *Colon I* was decided. *Colon II*, ¶ 3. *Colon I* was decided on April 8, 2008, and before that date, Huber's conviction became final. Further, we need not reach the merits of Huber's assigned error because it is barred by the doctrine of res judicata, as the State asserts. *State v. Perry* (1967), 10 Ohio St.2d 175, 180 ("Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that

judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment.”) In other words, Huber could have raised his structural error or plain error arguments before judgment or on direct appeal, and his failure to do so bars him from raising them herein.

{¶ 6} Huber’s assigned error is overruled. Judgment affirmed.

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BROGAN, J. and WOLFF, J., concur.

(Hon. William H. Wolff, Jr., retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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