

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

STATE OF OHIO,	:	APPEAL NO. C-081031
Respondent-Appellee,	:	TRIAL NO. B-0009175
vs.	:	<i>JUDGMENT ENTRY.</i>
ANDREW BEVINS, JR.,	:	
Petitioner-Appellant.	:	

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

Petitioner-appellant Andrew Bevins, Jr., presents on appeal a single assignment of error, challenging the Hamilton County Common Pleas Court's judgment overruling his postconviction petition. We affirm the court's judgment.

Bevins was convicted in 2005 of aggravated burglary and rape. In his direct appeal, we vacated his sentences and remanded for resentencing under *State v. Foster*,<sup>2</sup> but we affirmed the judgment of conviction in all other respects.<sup>3</sup> The trial court resentenced Bevins in January 2007. Bevins did not timely appeal from his resentencing. In December 2007, this court denied him leave to appeal,<sup>4</sup> and in March 2008, the Ohio Supreme Court denied his motion to file a delayed appeal there.<sup>5</sup>

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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> 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

<sup>3</sup> See *State v. Bevins*, 1st Dist. No. C-050754, 2006-Ohio-6974.

<sup>4</sup> See *State v. Bevins* (Dec. 31, 2007), 1st Dist. No. C-070852.

<sup>5</sup> See *State v. Bevins*, 117 Ohio St.3d 1437, 2008-Ohio-1279, 883 N.E.2d 456.

In June 2008, Bevins filed with the common pleas court a “Motion to Vacate Conviction.” The court overruled the motion, and this appeal followed.

In his motion, Bevins sought relief from his aggravated-burglary conviction under the rule announced by the Ohio Supreme Court in its April 2008 decision in *State v. Colon*.<sup>6</sup> In *Colon*, the court held that the failure of an indictment to charge the mens rea element of a crime violated a defendant’s constitutional rights to notice and due process. Bevins asserted that the aggravated-burglary count of his indictment had been defective under the rule in *Colon* because it had not charged a culpable mental state.

But in July 2008, the supreme court held that the *Colon* rule “applies only to those cases pending on the date [it] was announced,” and that it “may not be applied retroactively to a conviction that has become final.”<sup>7</sup> Bevins’s aggravated-burglary conviction became final in March 2007, when the time for taking a direct appeal from his convictions had expired.<sup>8</sup> Thus, because Bevins’s case was not “pending” in April of 2008, *Colon* did not provide him with a ground for relief.

Bevins’s “Motion to Vacate Conviction” was essentially a postconviction petition, reviewable under the standards provided by R.C. 2953.21 et seq.<sup>9</sup> And it was filed well after the time prescribed by R.C. 2953.21(A)(2). Bevins did not demonstrate that he had been unavoidably prevented from discovering the facts upon which his postconviction claim depended. Nor did he base his claim on a new or retrospectively applicable federal or state right recognized by the United States

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<sup>6</sup> 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917.

<sup>7</sup> *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169.

<sup>8</sup> See *State v. Lynn* (1966), 5 Ohio St.2d 106, 108, 214 N.E.2d 226 (defining “final conviction,” in the context of retrospective application of a judicial ruling, as “a conviction in which the accused has exhausted all his appellate remedies or as to which the time for appeal as of right has expired”); accord *Colon*, 119 Ohio St.3d 204, at ¶4.

<sup>9</sup> See *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶12.

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Supreme Court since the prescribed time had expired. Thus, R.C. 2953.23 precluded the common pleas court from entertaining his postconviction petition.

We, therefore, hold that the common pleas court properly denied the petition. Accordingly, we overrule the assignment of error and 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.

**PAINTER, P.J., SUNDERMANN and DINKELACKER, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on July 22, 2009

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