

[Cite as *State v. Roberson*, 2007-Ohio-6631.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION  
**No. 88338**

**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**KARL ROBERSON**

DEFENDANT-APPELLANT

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**JUDGMENT: APPLICATION DENIED**

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APPLICATION FOR REOPENING  
MOTION NO. 400757  
LOWER COURT NO. CR-466735  
COMMON PLEAS COURT

**RELEASE DATE:** December 11, 2007

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PATRICIA A. BLACKMON, J.:

{¶ 1} On September 7, 2007, the applicant, Karl Roberson, applied pursuant to App.R. 26(B) to reopen this court's judgment in *State v. Roberson*,<sup>1</sup> in which this court affirmed Roberson's conviction and sentence for felonious assault. Roberson argues that his appellate counsel was ineffective for not arguing that *State v. Foster*'s<sup>2</sup> elimination of beneficial sentencing presumptions cannot be retroactively applied to defendants whose criminal conduct predated *Foster*. Although the State of Ohio received an extension of time until November 8, 2007, in which to file a brief in opposition, it never timely filed a brief. Nevertheless, this court denies the application.

{¶ 2} First, res judicata properly bars this application. See, generally, *State v. Perry*.<sup>3</sup> Res judicata prevents repeated attacks on a final judgment and applies to all issues which were or might have been litigated. In *State v. Murnahan*<sup>4</sup>, the Supreme Court of Ohio ruled that res judicata may bar a claim of ineffective assistance of appellate counsel unless circumstances render the application of the doctrine unjust.

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<sup>1</sup> Cuyahoga App. No. 88338, 2007-Ohio-2772.

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

<sup>3</sup> (1967), 10 Ohio St.2d 175, 226 N.E.2d 104.

<sup>4</sup> (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204.

{¶ 3} In the present case Roberson appealed to the Supreme Court of Ohio, which denied his appeal.<sup>5</sup> This court has consistently held that such appeals bar claims of ineffective assistance of appellate counsel based on the principles of res judicata.<sup>6</sup> Furthermore, before the Supreme Court of Ohio, Roberson argued the identical issues raised in this application. In his second proposition of law, he argued “*State v. Foster*’s elimination of beneficial sentencing presumptions cannot be retroactively applied to defendant’s (sic) whose criminal conduct pre-dated the *Foster* decision.” His third proposition argued that his appellate counsel was ineffective for failing to argue that Roberson’s due process rights were violated by *Foster*’s retroactive application. The application of res judicata in this case would not be unjust.

{¶ 4} Moreover, this court fully considered the *Foster* ex post facto argument in *State v. Mallette*<sup>7</sup> and rejected it. Appellate counsel cannot be considered ineffective

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<sup>5</sup> *State v. Roberson*, Supreme Court of Ohio Case No. 2007-1413, 2007-Ohio-5735.

<sup>6</sup> *State v. Kaszas* (Sept. 21, 1998), Cuyahoga App. Nos. 72546 and 72547, reopening disallowed (Aug. 14, 2000), Motion No. 16752; *State v. Bussey* (Dec. 2, 1999), Cuyahoga App. No. 75301, reopening disallowed (Aug. 8, 2000), Motion No. 16647 and *State v. Bluford* (Dec. 9, 1999), Cuyahoga App. No. 75228, reopening disallowed (May 31, 2000), Motion No. 15241.

<sup>7</sup> Cuyahoga App. No. 87984, 2007-Ohio-715, discretionary appeal not allowed, 115 Ohio St.3d 1439, 2007-Ohio-5567. See also, *State v. Moviel*, Cuyahoga app. No. 88984, 2007-Ohio-5947.

for rejecting a losing argument. Also, appellate counsel is not deficient for failing to argue developing issues in the law.<sup>8</sup>

{¶ 5} Accordingly, this court denies the application to reopen.

PATRICIA A. BLACKMON, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and  
COLLEEN CONWAY COONEY, J., CONCUR

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<sup>8</sup> *State v. Williams* (1991), 74 Ohio App.3d 686, 600 N.E.2d 298; *State v. Columbo* (Oct. 7, 1987), Cuyahoga App. No. 52715, reopening disallowed (Feb. 14, 1995), Motion No. 55657; *State v. Munici* (Nov. 30, 1987), Cuyahoga App. No. 52579, reopening disallowed (Aug. 21, 1996), Motion No. 71268, at 11-12: “appellate counsel is not responsible for accurately predicting the development of the law in an area marked by conflicting holdings.” *State v. Harey* (Nov. 10, 1997), Cuyahoga App. No. 71774, reopening disallowed (July 7, 1998), Motion No. 90859; *State v. Sanders* (Oct. 20, 1997), Cuyahoga App. No. 71382, reopening disallowed, (Aug. 25, 1998), Motion No. 90861; *State v. Bates* (Nov. 20, 1997), Cuyahoga App. No. 71920, reopening disallowed (Aug. 19, 1998), Motion No. 91111; and *State v. Whittaker* (Dec. 22, 1997), Cuyahoga App. No. 71975, reopening disallowed, (July 28, 1998), Motion No. 92795.