

[Cite as *State v. Stubbs*, 2008-Ohio-5983.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 89883**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**JAMES STUBBS**

DEFENDANT-APPELLANT

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**JUDGMENT: APPLICATION DENIED**

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APPLICATION FOR REOPENING  
MOTION NO. 411808  
LOWER COURT NO. CR-489399  
COMMON PLEAS COURT

**RELEASE DATE:** November 18, 2008

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**ATTORNEYS FOR PLAINTIFF-APPELLEE**

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ANTHONY O. CALABRESE, JR., J.:

{¶ 1} James L. Stubbs has filed a timely application for reopening pursuant to App.R. 26(B). Stubbs is attempting to reopen the appellate judgment that was rendered in *State v. Stubbs*, Cuyahoga App. No. 89883, 2008-Ohio-1930, which affirmed his conviction and sentence of incarceration with regard to the offenses of felonious assault with firearm specifications, possession of drugs with firearm specifications, and having weapons while under disability. For the following reasons, we decline to reopen Stubbs appeal.

{¶ 2} The Supreme Court of Ohio, in *State v. Spivey*, 84 Ohio St.3d 24, 1998-Ohio-704, 701 N.E.2d 696, fully examined the test that is to be applied to an application for reopening that is filed pursuant to App.R. 26(B) and held that: "In *State v. Reed* (1996), 74 Ohio St.3d 534, 535, 660 N.E.2d 456, 458, we held that the two prong analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, is the appropriate standard to assess a defense request for reopening under App.R. 26(B)(5). [Applicant] must prove that his counsel were deficient for failing to raise the issues he now presents, as well as showing that had he presented those claims on appeal, there was a 'reasonable probability' that he would have been successful. Thus [applicant] bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *Id.*, at 25.

{¶ 3} In the case sub judice, Stubbs raises two proposed assignments of error in support of his claim of ineffective assistance of appellate counsel:

{¶ 4} “The evidence was insufficient to establish guilt beyond a reasonable doubt with respect to the charge of felonious assault with gun specifications.”; and

{¶ 5} “Appellant was denied his 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendment rights to the United States Constitution and Article 1, Section 10 of the Ohio Constitution.”

{¶ 6} Stubbs, through his initial proposed assignment of error, argues that appellate counsel should have argued on appeal that sufficient evidence was not adduced at trial to support his conviction for the offense of felonious assault. This court has previously determined that Stubbs’ conviction for the offense of felonious assault was supported by the weight of the evidence. See *State v. Stubbs*, supra, at ¶13. A finding of sufficiency of the evidence must necessarily include a finding of sufficiency.

{¶ 7} “Because sufficiency is required to take a case to the jury, finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. Thus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency. *State v. Roberts* (Sept 17, 1997), Lorain App. No. 96CA006462 at 4.” *State v. Dowell*, Cuyahoga App. No. 83575, 2005-Ohio-1966, ¶13.

{¶ 8} Since this court has already determined that the conviction for felonious assault was not against the manifest weight of the evidence, Stubb’s argument of sufficiency of the evidence must also fail. *State v. Logan*, Cuyahoga App. No. 88472, 2008-Ohio-1934.

Appellate counsel was not ineffective on appeal for failing to argue the issue of sufficiency of the evidence.

{¶ 9} Stubbs, through his second proposed assignment of error, argues that appellate counsel should have argued on appeal that the trial court erred by failing to inquire into the defendant’s dissatisfaction with his appointed legal counsel. Stubbs, however, has failed to demonstrate, vis-a-vis the record, the existence of any dissatisfaction or conflict with his appointed trial counsel. In addition, Stubbs has failed to demonstrate that his appellate counsel was deficient for failing to raise the issue of inquiry into dissatisfaction with trial counsel and has also failed to demonstrate that had he presented this issue on appeal, there was a “reasonable probability” that he would have been successful. See App.R. 26(B). Stubbs has failed to demonstrate a “genuine issue” as to whether he possesses a “colorable claim” of ineffective assistance of appellate counsel. *State v. Spivey*, supra; *State v. Reed*, 74 Ohio St.3d 534, 1996-Ohio-21, 660 N.E.2d 456; *State v. Walker*, Cuyahoga App. No. 87677, 2007-Ohio-2917.

{¶ 10} Accordingly, Stubbs’ application for reopening is denied.

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ANTHONY O. CALABRESE, JR., JUDGE

SEAN C. GALLAGHER, P.J., and  
MARY EILEEN KILBANE, J., CONCUR