

[Cite as *State v. Lawson*, 2009-Ohio-219.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 90589**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**RODNEY LAWSON**

DEFENDANT-APPELLANT

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**JUDGMENT: APPLICATION DENIED**

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APPLICATION FOR REOPENING  
MOTION NO. 415561  
LOWER COURT NO. CR-477406  
COMMON PLEAS COURT

**RELEASE DATE:** January 16, 2009

**ATTORNEYS FOR PLAINTIFF-APPELLEE**

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ANTHONY O. CALABRESE, JR., J.:

{¶ 1} In *State v. Lawson*, Cuyahoga County Court of Common Pleas Case No. CR-477406, applicant, Rodney Lawson, was convicted of: three counts of rape, each with a sexually violent predator specification, a notice of prior conviction and repeat violent offender specification; kidnapping with a sexual motivation specification, a notice of prior conviction and repeat violent offender specification; and aggravated robbery with a sexual motivation specification, a notice of prior conviction and repeat violent offender specification. This court affirmed that judgment in *State v. Lawson*, Cuyahoga App. No. 90589, 2008-Ohio-5590. Lawson has not appealed to the Supreme Court of Ohio.

{¶ 2} Lawson has filed with the clerk of this court an application for reopening. He asserts that he was denied the effective assistance of appellate counsel because appellate counsel failed to assign as error that his trial counsel was ineffective. We deny the application for reopening. As required by App.R. 26(B)(6), the reasons for our denial follow.

{¶ 3} Having reviewed the arguments set forth in the application for reopening in light of the record, we hold that Lawson has failed to meet his burden to demonstrate that "there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). In *State v. Spivey* (1998), 84 Ohio St.3d 24, 1998-Ohio-704, 701 N.E.2d 696, the Supreme Court specified the proof required of an applicant. "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. Applicant cannot satisfy either prong of the *Strickland* test. We must, therefore, deny the application on the merits.

{¶ 4} After Lawson filed his application for reopening, the state filed an opposing brief and Lawson filed a reply. Although App.R. 26(B) does not authorize the filing of a reply, we will consider the application and reply as presenting Lawson's arguments in support of reopening. Also, we note that Lawson argues the ineffective assistance of trial counsel throughout the application. In his reply, Lawson restates his argument by contending that appellate counsel was ineffective for failing to assign as error that trial counsel was ineffective. We will, therefore, consider Lawson's arguments on the merits.

{¶ 5} During the proceedings before the trial court, Lawson's counsel withdrew and the court of common pleas appointed new counsel. Lawson complains that his initial counsel did not turn over records to his new counsel. He further contends that his new counsel made representations regarding the sentence which Lawson would receive which were inconsistent with the sentence he did receive. He also asserts that his new counsel did not raise a defense which Lawson requested.

{¶ 6} Lawson does not, however, indicate that the record provides a factual basis for any of these assertions. Lawson could not have maintained these arguments on direct appeal, because he relies on matters outside the record. His appellate counsel was not, therefore, deficient by failing to raise these issues on direct appeal. See, e.g., *State v. O'Neal*, Cuyahoga App. No. 83393, 2004-Ohio-2862, reopening disallowed, 2005-Ohio-3568, at ¶6, quoting *State v. Prather*, Cuyahoga App. No. 83227, 2004-Ohio-2395, reopening disallowed, 2005-Ohio-2710, Motion No. 362747, at ¶12. Reopening would, therefore, not be

appropriate with respect to Lawson's claims that his appellate counsel was ineffective for failing to assign as error that: his initial trial counsel did not turn over records to new counsel; his trial counsel indicated that his sentence would be less than that which the trial court imposed; and trial counsel did not raise an issue which Lawson requested.

{¶ 7} Lawson also contends that he was arrested on February 10, 2006 and held without bond until February 14, 2006. Yet, testimony at trial reflects that Lawson was indeed arrested on February 14, 2006. Additionally, the "Case Information Form" filed in the underlying case, Case No. CR-477406, reflects that it is a re-indictment of Case No. CR-477238. A review of the "Case Information Form" filed in Case No. CR-477238 also reflects that he was arrested on February 14, 2006. The record, therefore, does not provide a factual basis for Lawson's position. He has not demonstrated either that his appellate counsel was deficient or that he was prejudiced by the absence of an assignment of error asserting the ineffective assistance of trial counsel for failing to contest Lawson's arrest date.

{¶ 8} Similarly, the record contradicts Lawson's argument that the proceedings in the trial court violated his right to a speedy trial. The record in CR-477406 reflects that the defense made numerous requests for continuances. It is well-established that courts will not second-guess trial counsel's judgment to request continuances. *State v. Bibbs*, Cuyahoga App. No. 83955, 2004-Ohio-5604, reopening disallowed, 2006-Ohio-3018, at ¶4, quoting *State v. Fanning* (Oct. 23, 1997), Cuyahoga App. No. 71189, reopening disallowed, 2002-Ohio-4888, Motion

No. 38469, at ¶4. As a consequence, Lawson’s claim of a violation of his right to a speedy trial does not provide a basis for reopening.

{¶ 9} Lawson also asserts that his appellate counsel should have argued the ineffectiveness of trial counsel for failing to file a motion to suppress because the police made an “illegal entry” when they arrested him. The record reflects, however, that the police had a warrant for Lawson’s arrest. Lawson does not demonstrate how his appellate counsel was deficient or how he was prejudiced by the absence of an assignment of error asserting that trial counsel was ineffective for failing to challenge the propriety of Lawson’s arrest. As a consequence, Lawson’s claim that trial counsel should have filed a motion to suppress an “illegal entry” does not provide a basis for reopening.

{¶ 10} Lawson’s request for reopening is also barred by *res judicata*. “The principles of *res judicata* may be applied to bar the further litigation in a criminal case of issues which were raised previously or could have been raised previously in an appeal. See generally *State v. Perry* (1967), 10 Ohio St.2d 175, 22 N.E.2d 104, paragraph nine of the syllabus. Claims of ineffective assistance of appellate counsel in an application for reopening may be barred by *res judicata* unless circumstances render the application of the doctrine unjust. *State v. Murnahan* (1992), 63 Ohio St.3d 60, 66, 584 N.E.2d 1204.” *State v. Williams* (Mar. 4, 1991), Cuyahoga App. No. 57988, reopening disallowed (Aug. 15, 1994), Motion No. 52164.

{¶ 11} Lawson did not appeal this court’s decision to the Supreme Court of Ohio. “The issue of whether appellate counsel provided effective assistance must

be raised at the earliest opportunity to do so. *State v. Williams* (1996), 74 Ohio St.3d 454, 659 N.E.2d 1253. In this case, applicant possessed an earlier opportunity to contest the performance of his appellate counsel in a claimed appeal of right to the Supreme Court of Ohio. Applicant did not appeal the decision of this court to the Supreme Court of Ohio and has failed to provide this court with any reason for not pursuing such further appeal and/or why the application of *res judicata* may be unjust. Accordingly, the principles of *res judicata* prevent further review. *State v. Borrero* (Apr. 29, 1996), Cuyahoga App. No. 69289, unreported, reopening disallowed (Jan. 22, 1997), Motion No. 72559.” *State v. Bugg* (Oct. 12, 1999), Cuyahoga App. No. 74847, reopening disallowed (Apr. 7, 2000), Motion No. 13465, at 6. See also *State v. Cvijetinovic*, Cuyahoga App. No. 81534, 2003-Ohio-563, reopening disallowed, 2005-Ohio-380, at ¶4.

{¶ 12} The application is also defective. Lawson’s failure to support his application with a sworn statement requires that we deny the application. *State v. Young* (Apr. 12, 2001), Cuyahoga App. No. 78058, reopening disallowed, 2007-Ohio-6481, Motion No. 401881, ¶5. See App.R. 26(B) (2) (d) .

{¶ 13} Accordingly, the application for reopening is denied.

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ANTHONY O. CALABRESE, JR., JUDGE

MARY EILEEN KILBANE, P.J., and  
MARY J. BOYLE, J., CONCUR