

[Cite as *State v. Segines*, 2009-Ohio-2698.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89915

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

RICHARD SEGINES

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION GRANTED

APPLICATION FOR REOPENING
MOTION NO. 411845
LOWER COURT NO. CR-487410
COMMON PLEAS COURT

RELEASE DATE: June 8, 2009

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MELODY J. STEWART, J.:

{¶ 1} On August 4, 2008, the applicant, Richard Segines, pursuant to App.R. 26(B) and *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, applied to reopen this court's judgment in *State of Ohio v. Richard Segines*, Cuyahoga App. No. 89915, 2008-Ohio-2041, in which this court affirmed Segines' convictions for murder and two counts of aggravated robbery. Segines asserts that his appellate

counsel was ineffective for not timely raising the issue that his indictments for aggravated robbery were fatally defective because they did not aver a mens rea element per *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917. On November 10, 2008, upon receiving leave to file instant, the State of Ohio filed its brief in opposition. For the following reasons, this court grants the application.

{¶ 2} In order to establish a claim of ineffective assistance of appellate counsel, the applicant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, cert. denied (1990), 497 U.S. 1011, 110 S.Ct. 3258.

{¶ 3} In the present case Segines and Harry Briscoe were indicted on two counts of aggravated murder; one count of aggravated robbery pursuant to R.C. 2911.01(A)(1), robbery while possessing a firearm; and one count of aggravated robbery pursuant to R.C. 2911.01(A)(3), robbery while inflicting physical harm, all with firearm specifications. Both men were tried together. The jury found both men not guilty of aggravated murder in count two, but guilty of the lesser included offense of murder under R.C. 2903.02(B),¹ and guilty of both counts of aggravated

¹ The State nolleed the first count of aggravated murder. The judge's

robbery.² On May 21, 2007, the trial court sentenced both men to three years on the firearm specifications, fifteen years to life for murder and ten years on each of the aggravated robbery charges to be served concurrently to each other, but consecutively to the murder charge, for an aggregate total of twenty-eight years to life.

{¶ 4} Segines timely appealed and filed his brief on October 22, 2007. The State filed its appellee’s brief on January 1, 2008, and Segines did not file a reply brief. This court scheduled oral argument for April 16, 2008.

{¶ 5} On April 9, 2008, the Supreme Court of Ohio decided *State v. Colon*, 77 Ohio St.3d 172, 1996-Ohio-366, 672 N.E.2d 638. The court held that the indictment for robbery under R.C. 2911.02(A)(2) was fatally defective because it did not include a mens rea element. The court further ruled that because the robbery statute did not explicitly state what the mens rea element is, recklessness is the proper mens rea pursuant to R.C. 2901.21(B), which provides that recklessness is

instruction for the lesser included offense was that to constitute murder the state had to prove beyond a reasonable doubt that the defendant(s) caused the death of the victim as a proximate result of committing or attempting to commit or while fleeing immediately after committing or attempting to commit aggravated robbery. (Tr. Pg. 1650.)

² The evidence showed that in September 2006, Briscoe had his girlfriend drive him and Segines to an apartment building where a man was selling clothes from a van. Segines and Briscoe ended up fighting with the man, and during the altercation one of them shot and killed the man. Briscoe and Segines fled the scene with, inter alia, clothing, the man’s cell phone and \$200 in cash. Briscoe’s girlfriend

the default culpable mental state. Furthermore, in *Colon* the failure to include a mens rea element was a structural error because it allowed the defect to permeate the entire trial, including not giving notice to Colon of each and every element, not allowing him to prepare a defense to a culpable mental state, compromising the jury instructions and allowing the prosecutor to imply that the state did not need to prove a culpable mental state for the robbery charge. Moreover, a structural error mandates a finding of per se prejudice and is not waived by the failure to raise it at the trial court level.

{¶ 6} The indictments in the present case did not specify a mens rea element for the aggravated robbery charges, and the trial judge did not instruct on a mens rea element for count 4. Segines' counsel did not argue this issue in his brief and did not move to supplement the brief with such an argument.

{¶ 7} On May 1, 2008, this court announced its decision rejecting all of Segines' assignments of error and affirming the convictions. The court journalized this decision on May 12, 2008. On May 21, 2008, Segines' appellate counsel filed an App.R. 26(A) motion for reconsideration, raising the *Colon* issue for the first time. On June 11, 2008, this court denied the motion for reconsideration because it was untimely filed and noted that Segines could file an App.R. 26(B) application to reopen.

pleaded guilty to lesser offenses before the trial.

{¶ 8} Briscoe also timely filed an appeal, but his appellate counsel did not file the brief until June 4, 2008, and exclusively argued *Colon*. In *State v. Briscoe*, Cuyahoga App. No. 89979, 2008-Ohio-6276, this court ruled that *Colon* had no application to an indictment for aggravated robbery under R.C. 2911.01(A)(1), because pursuant to *State v. Wharf* (1999), 86 Ohio St.3d 375, 1999-Ohio-112, 715 N.E.2d 172, that offense is a strict liability offense. However, under count 4, aggravated robbery under R.C. 2911.01(A)(3), the failure to include a mens rea element in the indictment rendered the indictment fatally defective. Moreover, the court ruled that the failure to include the mens rea element in the indictment for count 4, led to the same accumulation of errors in the present case as it did in *Colon*. Thus, this error was a structural error, and this court reversed the conviction for count 4. In Briscoe's other assignment of error, he argued that the failure to include a mens rea element for the aggravated robbery charges necessarily compromised the murder verdict, because it was based on causing the death of the victim while committing aggravated robbery. This court rejected that argument because the finding of guilty under count 3, the strict liability version of aggravated robbery, upheld the murder conviction. Accordingly, this court affirmed in part, reversed in part and remanded for further proceedings consistent with the opinion.

{¶ 9} Briscoe timely appealed to the Supreme Court of Ohio. On May 6, 2009, the Supreme Court of Ohio accepted the appeal, *State v. Briscoe*, Supreme

Court of Ohio Case No. 2009-0089, and then stayed the case pending the decision in *State v. Lester*. Supreme Court of Ohio Case No. 2008-1725. This court notes that *Lester* concerns the appropriate mens rea for R.C. 2911.01(A)(1).

{¶ 10} Because *Segines* is identical to *Briscoe*, this court rules that Segines’ appellate counsel was deficient for not timely raising the *Colon* issues, and that had he done so, this court would have reversed the conviction for count 4. Accordingly, this court grants the application to reopen and reinstates this appeal to the regular docket. This court appoints David Doughten as counsel for Richard Segines in this case. The court directs counsel to inform this court of the status of the relevant cases before the Supreme Court of Ohio and what actions should be taken when that court renders its opinions on those cases.

MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., and
ANN DYKE, J., CONCUR