

[Cite as *State v. Hunter*, 2009-Ohio-2700.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90126

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ISAAC HUNTER

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 411784
LOWER COURT NO. CR-481324
COMMON PLEAS COURT

RELEASE DATE: June 10, 2009

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JUDGE ANN DYKE:

{¶ 1} On July 31, 2008, the applicant, Isaac Hunter, 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. Isaac Hunter*, Cuyahoga App. No. 90126, 2008-Ohio-3138, in which this court affirmed Hunter's convictions for aggravated robbery. He argues that his appellate counsel was ineffective for not arguing that the indictments for robbery were defective because they did not include a mens rea element per *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885

N.E.2d 917. On December 19, 2009, the State of Ohio filed its brief in opposition. For the following reasons, this court denies 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. In the present case appellate counsel was not deficient.

{¶ 3} On July 11, 2007, appellate counsel moved for a delayed appeal, and this court granted that motion on July 13, 2007. After receiving several extensions of time, appellate counsel filed Hunter's brief on October 25, 2007, and the State of Ohio filed its brief on January 18, 2009. Appellate counsel did not file a reply brief, and this court scheduled the oral argument for May 21, 2008.

{¶ 4} The Supreme Court of Ohio decided *Colon* on April 9, 2008. On May 9, 2008, approximately two weeks before oral argument, appellate counsel moved this court for leave to file a supplemental assignment of error and notice of supplemental authority. In these filings appellate counsel sought to bring the *Colon* issue before the court. In fact, the proposed assignment of error was as follows: "The indictment charging Isaac Hunter with aggravated robbery failed to contain a culpable mental state and because the mental state is an element of the crime, the omission rendered the indictment fatally flawed and makes Mr. Hunter's conviction voidable."

Appellate counsel then argued this assignment of error in a thoughtful, well-written six-page supplemental brief. However, this court denied the request to supplement on May 15, 2008. It issued its opinion which did not address *Colon* on July 7, 2008.

{¶ 5} Appellate counsel identified the *Colon* issue, saw its possible relevance to Hunter’s case and followed the appropriate procedure in a timely manner to bring the issue before the court in the rare procedural posture of the issue arising between the time of briefing and oral argument. Appellant counsel was not deficient.

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

ANN DYKE, JUDGE

PATRICIA A. BLACKMON, P. J., and
LARRY A. JONES, J., CONCUR