

[Cite as *State v. Gaston*, 2009-Ohio-4715.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92242

STATE OF OHIO

APPELLEE

VS.

CARL GASTON

APPELLANT

**JUDGMENT:
APPLICATION DENIED**

APPLICATION FOR REOPENING
MOTION NO. 425628
CUYAHOGA COUNTY COMMON
PLEAS COURT NO. CR-401570

RELEASE DATE: September 9, 2009

ATTORNEYS FOR APPELLEE

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Cuyahoga County Prosecutor

By: Diane Smilanick
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FOR APPELLANT

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MARY EILEEN KILBANE, J.:

{¶ 1} On August 26, 2009, the applicant, Carl Gaston, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Gaston*, Cuyahoga App. No. 92242, 2009-Ohio-3080, in which this court affirmed the denial of a motion for delayed postconviction relief and petition to vacate or set aside the judgment of conviction or sentence in the underlying case, *State v. Gaston*, Cuyahoga

County Common Pleas Court Case No. CR-401570.¹ This court denies the application, sua sponte.

{¶ 2} App. R. 26(B)(1) states in pertinent part: “A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel.” Because Gaston represented himself in the present appeal, he is now precluded from arguing ineffective assistance of appellate counsel. *State v. Boone* (1996), 114 Ohio App.3d 375, 683 N.E.2d 67; *State v. Vines* (Sept. 14, 1989), Cuyahoga App. No. 55693 and (Nov. 3, 2000), Cuyahoga App. No. 78691, reopening disallowed (June 5, 2003), Motion No. 347277; *State v. Smith* (Dec. 10, 2001), Cuyahoga App. No. 79292, reopening disallowed (Mar. 8, 2002), Motion No. 36058 and *State v. Jackson*, Cuyahoga App. No. 80118, 2002-Ohio-5461. As the United States Supreme Court noted in *Faretta v. California* (1975), 422 U.S.

¹ In the underlying case in 2001, Gaston pled guilty to aggravated robbery, kidnapping, theft and failure to comply with the order or signal of a police officer; the trial court sentenced him to 25 years in prison. In *State v. Gaston*, Cuyahoga App. No. 79626, 2002-Ohio-506, he appealed the sentence, and this court affirmed. In September 2002, Gaston filed a motion to withdraw his guilty plea on the grounds of improper judicial influence and ineffective assistance of trial counsel, as well as improprieties in the sentence. The trial court denied the motion, and this court affirmed in *State v. Gaston*, Cuyahoga App. No. 82628, 2003-Ohio-5825. Subsequently, Gaston, pursuant to App.R. 26(B), applied to reopen his original appeal; this court denied the application. *State v. Gaston*, Cuyahoga App. No. 79626, 2007-Ohio-155.

In July 2008, Gaston filed the subject motion for postconviction relief on the grounds that the indictments for aggravated robbery and kidnapping were defective because they failed to allege a mens rea under *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917. The trial court denied the motion, and Gaston, pro se, appealed. This court affirmed, because a guilty plea waives any defect in the indictment. *State v. Gaston*, Cuyahoga App. No. 92242, 2009-Ohio-3080.

806, 834, fn.46, 95 S.Ct. 2525, “a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of ‘effective assistance of counsel.’”

{¶ 3} Next, this application is not really an effort to reopen the appeal of a conviction and sentence. It is an effort to reopen the appeal of a postconviction motion. Thus, this effort is beyond the scope of App.R. 26(B). In *State v. Halliwell* (Dec. 30, 1996), Cuyahoga App. No. 70369, reopening disallowed (Jan. 28, 1999), Motion No. 70369, this court ruled that App.R. 26(B) does not apply to appeals from an adverse ruling on a motion to vacate a guilty plea. See, also *State v. Shurney* (Mar. 10, 1994), Cuyahoga App. No. 64670, reopening disallowed (May 15, 1995), Motion No. 60758 - App.R. 26(B) applies only to the direct appeal of a criminal conviction; it does not apply to subsequent postconviction proceedings, including motions to vacate sentence and hearings to determine the propriety of guilty pleas; and *State v. Loomer*, 76 Ohio St.3d 398, 196-Ohio-59, 667 N.E.2d 1209 - App.R. 26(B) applies only to appeals from the judgment of conviction and sentence and not other collateral matters arising in a criminal case, including the reversal of a motion to dismiss. *State v. White* (Jan. 7, 2002), Cuyahoga App. No.78190, reopening disallowed, (May 13, 2004), Motion No. 357536.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

MELODY J. STEWART, J., and
LARRY A. JONES, J., CONCUR