

[Cite as *State v. Brady*, 2010-Ohio-6014.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92510

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

ERIC BRADY

DEFENDANT-APPELLANT

**JUDGMENT:
APPLICATION GRANTED IN PART**

Cuyahoga County Common Pleas Court
Case No. CR-516655
Application for Reopening
Motion No. 432808

RELEASE DATE: December 8, 2010

FOR APPELLANT

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ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Thorin Freeman
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MARY J. BOYLE, J.:

In *State v. Brady*, Cuyahoga County Court of Common Pleas Case No. CR-516655, applicant, Eric Brady, was convicted of R.C. 2923.161(A)(1), improperly discharging a firearm at or into habitation with one-year and three-year firearm specifications. The trial court merged the firearm specifications and imposed a three-year sentence on the firearm specifications as well as an additional three years on the base charge. This court affirmed that judgment in *State v. Brady*, Cuyahoga App. No. 92510, 2010-Ohio-242.

Brady has filed with the clerk of this court an application for reopening. He asserts that he was denied the effective assistance of appellate counsel. He contends that his appellate counsel failed to assign as error that Brady could not be convicted of the firearm specification because use of a firearm is also an element of improperly discharging a firearm at or into habitation. For the reasons stated below, we grant the application for reopening in part.

In an application for reopening, applicant has the burden of demonstrating 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*, 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.

In *State v. Elko*, Cuyahoga App. No. 83641, 2004-Ohio-5209, this court agreed with the argument of the defendant-appellant that the trial court erred by convicting and sentencing him on the three-year firearm specification in a count of improperly discharging a firearm into habitation. “R.C. 2923.161 [improperly discharging a firearm at or into habitation] specifically requires that a firearm be used to commit the crime; therefore, we agree with appellant that a firearm is an element of the underlying offense, and it was error for him to have been convicted and sentenced to a three-year firearm specification.” *Id.* ¶95. The court held, however, that the error was harmless because Elko had also been convicted of three counts of felonious assault with a three-year firearm specification and merged all the firearm specifications for purposes of sentencing. *Id.* ¶95-97.

Brady argues that *Elko* requires that we reopen his appeal. The state acknowledges that “[appellate c]ounsel was ineffective and Brady’s [application for] reopening has merit.” State’s Memorandum of Law in Response to Brady’s Application, at 3. Nevertheless, the state argues that this court should overrule *Elko* and adopt the holding of the Fifth District Court of Appeals in *State v. Ford*, Licking App. No. 2008 CA 158, 2009-Ohio-6725, at ¶48-65 (overruling appellant’s assignment of error that “the court erred in sentencing him consecutively on the offense of discharging a firearm at or into a habitation and on the firearm specification, as the offenses are allied offenses of similar import and consecutive sentencing, therefore, constitutes double jeopardy,” at ¶48). See also *State v.*

Reid, Montgomery App. No. 23409, 2010-Ohio-1686 [Second Dist.] (“As for defendant's contention that his conviction and consecutive sentencing on the underlying offenses and the firearm specification violates the allied offenses doctrine and double jeopardy, a firearm specification does not charge a separate criminal offense” citing *Ford* and observing “A firearm specification is merely a sentencing provision that requires an enhanced penalty. *Id.*”, at ¶47).

As stated above, Brady has the burden of demonstrating that there is a genuine issue as to whether he was deprived of the effective assistance of counsel on appeal. Appropriately, the state has recognized that, given the holding of *Elko*, appellate counsel was deficient and Brady was prejudiced.

Based upon our disposition of Brady's proposed assignment of error, we grant Brady's application for reopening in part and reopen Brady's original appeal as filed in Cuyahoga App. No. 92510. See App.R. 26(B)(5). Pursuant to App.R. 26(B)(6)(a), attorney Susan J. Moran, Registration No. 0067094, is appointed to represent Brady. The reopened appeal, however, is limited to one assignment of error that deals with the issue of whether the trial court properly convicted and sentenced Brady on the three-year firearm specification. See App.R. 26(B)(7). No other assignments of error or issues shall be addressed by this court.

Application granted in part.

MARY J. BOYLE, JUDGE

SEAN C. GALLAGHER, A.J., and
LARRY A. JONES, J., CONCUR