

[Cite as *State v. Fortson*, 2011-Ohio-698.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92337

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHNNY FORTSON

DEFENDANT-APPELLANT

**JUDGMENT:
APPLICATION DENIED**

Cuyahoga County Common Pleas Court
Case No. CR-511654
Application for Reopening
Motion No. 436852

RELEASE DATE: February 15, 2011

FOR APPELLANT

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ATTORNEYS FOR APPELLEE

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By: T. Allan Regas
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COLLEEN CONWAY COONEY, J.:

{¶ 1} On August 24, 2010, the applicant, Johnny Fortson, pursuant to App.R.26(B), applied to reopen this court's judgment in *State v. Fortson*, Cuyahoga App. No. 92337, 2010-Ohio-2337, appeal not allowed, 127 Ohio St.3d 1447, 2010-Ohio-5762, in which this court affirmed Fortson's convictions and sentences for three counts of rape and three counts of gross sexual imposition, but merged the convictions for three counts of sexual battery into the

rape convictions and thereby modified the sentence.¹ Fortson argues that his appellate counsel was ineffective for failing to argue various issues. The state of Ohio filed a brief in opposition. For the following reasons, this court denies the application to reopen.

{¶ 2} App.R. 26(B)(2)(d) requires an applicant to include a “sworn statement of the basis for the claim that appellate counsel’s representation was deficient with respect to the assignments of error or arguments raised * * * and the manner in which the deficiency prejudicially affected the outcome of the appeal.” Fortson submitted no sworn statement. In *State v. Lechner*, 72 Ohio St.3d 374, 1995-Ohio-25, 650 N.E.2d 449, the Ohio Supreme Court affirmed the denial of Lechner’s application solely on the basis of his failure to comply with App.R. 26(B)(2)(d). The Ohio Supreme Court ruled that the inclusion of the sworn statement is mandatory. Thus, its omission is sufficient reason to deny the application. *State v. Tierney*, Cuyahoga App. No. 78847, 2002-Ohio-2607, reopening disallowed, 2002-Ohio-6618; *State v. Fussell*, (June 1, 1999), Cuyahoga App. No. 73713, reopening disallowed (Dec. 17, 1999), Motion No. 309186; and *State v. Phillips* (Dec. 28, 2001), Cuyahoga App. No. 79192, reopening disallowed (Mar. 8, 2002), Motion No. 335540. Moreover, as the Ohio Supreme Court noted in *Lechner*, many of the proposed assignments of error had been previously raised in the direct appeal.

¹The State conceded that the court should not have sentenced Fortson for the rape and sexual battery counts as indicted. Id. at _92.

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

COLLEEN CONWAY COONEY, JUDGE

KENNETH A. ROCCO, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR