

[Cite as *State v. Washington*, 2015-Ohio-3669.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
Nos. 101157 and 101170

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**BRIAN K. WASHINGTON**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
APPLICATION GRANTED

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Cuyahoga County Court of Common Pleas  
Case Nos. CR-10-542057-B and CR-10-535298-B  
Application for Reopening  
Motion No. 483078

**RELEASE DATE:** September 9, 2015

## **ATTORNEY FOR APPELLANT**

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## **ATTORNEYS FOR APPELLEE**

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TIM McCORMACK, J.:

{¶1} Applicant Brian Washington filed a timely application to reopen this court's judgment in *State v. Washington*, 8th Dist. Cuyahoga Nos. 101157 and 101170, 2015-Ohio-305.<sup>1</sup> The state has not opposed the application. This court affirmed the trial court's judgment that extended Washington's term of community control sanctions for convictions in Cuyahoga C.P. Nos. CR-10-535298-B and CR-10-542057-B. For the reasons that follow, we grant the application to reopen.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Washington is required to establish that the performance of his appellate counsel was deficient and the deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768. In order for the court to grant the application for reopening, there must be "a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5).

{¶3} The basis of Washington's application is that the plea and sentence in CR-10-542057-B are invalid because he never pled guilty and was not sentenced in court

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<sup>1</sup>Washington filed an application to reopen the appeal in App. No. 101157 only in order to address an issue regarding Cuyahoga C.P. No. CR-10-542057-B.

and that his appellate attorney was ineffective for failing to raise this issue in the direct appeal. Washington asserts his constitutional right to due process was violated because the court issued plea and sentencing entries reflecting a conviction in CR-542057-B but the record does not include a plea hearing or sentencing hearing for that conviction. Washington attached correspondence from his appellate counsel recognizing that an error could be raised that Washington was improperly sentenced in CR-542057-B because “it appears that the judge never took a plea in that case.” The post-decision correspondence does not indicate why appellate counsel did not raise the issue in the direct appeal.

{¶4} Unless all of the procedural requirements of Crim.R.11 are adhered to, a guilty plea is invalid. *State v. Buchanan*, 43 Ohio App.2d 93, 334 N.E.2d 503 (8th Dist.1974).

“In felony cases the court \* \* \* shall not accept a plea of guilty \* \* \* without first addressing the defendant personally and \* \* \* [d]etermining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing. \* \* \*”

*State v. Rogers*, 8th Dist. Cuyahoga No. 99246, 2013-Ohio-3246, ¶ 31, quoting Crim.R. 11(C)(2)(a). This court has held that “[a] court may not convict and sentence a defendant where no plea has been entered upon the record.” *Cleveland v. Wainwright*, 8th Dist. Cuyahoga No. 36623, 1977 Ohio App. LEXIS 8284 (Nov. 17, 1977); *see also State v. Miller*, 8th Dist. Cuyahoga No. 96022, 2011-Ohio-5158, ¶ 6, citing *State v. Smith*, 8th Dist. Cuyahoga Nos. 58334, 58418, and 58443 (Mar. 28, 1991).

{¶5} The transcripts in the record do not include any indication that Washington ever entered a guilty plea, or a sentence for the conviction, in CR-542057-B at all. Without any opposition from the state, Washington's application to reopen has presented at least a colorable claim that the failure to raise this argument in the direct appeal resulted in prejudice to him. Therefore, App.R. 26(B)(5) mandates reopening. Accordingly, Washington's application to reopen filed on February 25, 2015, is granted.

{¶6} Attorney Nancy Schieman is appointed pursuant to App.R. 26(B)(6)(a) to represent applicant-appellant. The issue in the reopened appeal is limited pursuant to App.R. 26(B)(7) to whether appellate counsel was ineffective for failing to assign as error the alleged invalidity of the plea, conviction, and sentence in CR-542057-B as discussed herein. No other assignments of error or issues shall be addressed by this court. Counsel is instructed to apply for compensation within 30 days after the journalization of this court's final decision in the reopened appeal.

{¶7} The clerk of the Eighth District Court of Appeals is instructed to reassemble the complete record in 8th Dist. Cuyahoga Nos. 101157 and 101170 as it existed during this court's original review of the judgment in Cuyahoga C.P. Nos. CR-10-542057-B and CR-10-535298-B.

{¶8} Brief of applicant-appellant is due within 20 days of the date of this entry; answer brief of appellee is due within 20 days of filing of applicant's brief; and the reply brief of applicant is due within ten days of the filing of appellee's answer brief.

{¶9} The clerk shall serve notice of journalization of this entry on the parties and on the clerk of the trial court as required by App.R. 26(B)(6).

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TIM McCORMACK, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and  
EILEEN T. GALLAGHER, J., CONCUR