

[Cite as *State v. Cotton*, 2016-Ohio-7601.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 102581

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**SYLVESTER COTTON**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
APPLICATION GRANTED

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Cuyahoga County Court of Common Pleas  
Case No. CR-14-584941-B  
Application for Reopening  
Motion No. 494663

**BEFORE:** Stewart, J., Jones, A.J., and Kilbane, J.

**RELEASED AND JOURNALIZED:** October 31, 2016

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MELODY J. STEWART, J.:

{¶1} On March 23, 2016, the applicant, Sylvester Cotton, pursuant to App.R. 26(B) and *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992), applied to reopen this court's judgment in *State v. Cotton*, 8th Dist. Cuyahoga No. 102581, 2015-Ohio-5419, in which this court affirmed Cotton's convictions for attempted murder, two counts of felonious assault, kidnapping, aggravated robbery, grand theft of an automobile, theft, petty theft, improper handling of a firearm, having a weapon while under disability, failure to comply with an officer's signal, tampering with evidence, aggravated burglary, three-year firearm specifications and repeat violent offender specifications, but reversed his conviction for attempted felony murder, and remanded. Cotton now argues that his appellate counsel was ineffective for not arguing that there was insufficient evidence to support the conviction for aggravated burglary. The state of Ohio filed its brief in opposition on April 6, 2016. For the following reasons, this court grants the application to reopen.

{¶2} App.R. 26(B)(5) provides that the application shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of appellate counsel. Generally, 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: but for counsel's error there is a reasonable probability that the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in

the outcome. *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); and *State v. Reed*, 74 Ohio St.3d 534, 660 N.E.2d 456 (1996). In the present case, Cotton, codefendant Michael Brooks, and a third man committed a series of crimes against the victim. On the night of April 25, 2014, the victim parked his car at his apartment building after doing some shopping. He used the building's backdoor because the front door was always locked. He testified that at the rear entrance the steps to the basement were on the right and to the left was a wall with a window that overlooked the parking lot. He further stated that he would have to go up a flight of steps to reach his apartment. The victim testified as follows:

I got to the backdoor, he came out the back; and I saw a guy, and around the back. And he came out the basement with another guy. I saw him around the back. (Tr. 171.)

\* \* \*

Q: Where was the defendant, Cotton, in the apartment complex when this —

A: He came around the back. When I was coming in the hallway, but then them two ran out the basement, he came running back, coming out the door. When I turned to the right, I saw him standing there. (Tr. 174-175.)

{¶3} The victim further stated that all three men had guns. They took his shopping bag and the money out of his pocket. They forced him into his truck, drove to a bank, and removed \$560 from his account using his bank card and the ATM. The men then drove him from East 220th Street to an alley by East 31st Street. There they had

him strip off all of his clothes and lie naked face-down on the ground. The victim then saw flashes of gunfire, and he was shot in the shoulder and in the back. The three men then drove his vehicle away. Fortunately, police officers nearby responded to the gunfire and took the victim to a hospital. The victim was able to describe his vehicle to the police, who spotted it and gave chase. During the chase, one of the perpetrators threw a gun out of the window. When the perpetrators crashed the vehicle, they tried to escape on foot, but the police captured Cotton and Brooks. The victim identified them in a photo lineup presented at the hospital.

{¶4} Cotton was convicted of the above listed offenses, and the trial court sentenced him to a total of 78 years in prison. On appeal, his counsel argued the following: (1) there was insufficient evidence to support the attempted murder conviction; (2) there was insufficient evidence to support the felonious assault conviction; (3) trial counsel was ineffective for failing to file a motion to suppress; and (4) the kidnapping charge should have merged with the aggravated robbery and aggravated burglary charges.

This court overruled these assignments of error but ruled that the trial court erred in not dismissing the attempted felony murder charge.

{¶5} Cotton's codefendant Brooks was convicted on similar charges. On appeal, his counsel argued that (1) the evidence was insufficient to support the convictions for attempted murder and aggravated burglary, and (2) the kidnapping charges should have merged into other crimes of similar import. This court, in a 2-1 decision, ruled that there was insufficient evidence to sustain the aggravated burglary conviction, because "there

was no testimony that the theft occurred inside the apartment building.” *State v. Brooks*, 8th Dist. Cuyahoga No. 102551, 2016-Ohio-489, ¶ 40.

{¶6} Cotton now argues that his appellate counsel was ineffective for not arguing insufficiency on the aggravated burglary charge. The victim’s testimony applied to both defendants. This court’s ruling in *Brooks*, undermines the confidence in Cotton’s conviction and appeal. The prejudice of not raising this assignment of error is apparent.

{¶7} However, the issue of appellate counsel’s deficiency is problematic. The standard for overturning a conviction on insufficient evidence is a very difficult one to fulfill: the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 263, 574 N.E.2d 492 (1991), and *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-434,54 N.E.3d 80.

{¶8} R.C. 2911.11, aggravated burglary, provides in pertinent part as follows:

No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply: (1) The offender inflicts, or attempts or threatens to inflict physical harm on another; (2) The offender has a deadly weapon or dangerous ordnance on or about the offender’s person or under the offender’s control.

{¶9} In scrutinizing the victim’s testimony, it is easy to visualize the victim coming into the building, a foyer area, seeing the two men emerge from the basement on his right, then turning to his right to meet them. Then, he sees Cotton coming through

the back door and turning to his (the victim's) right again to meet Cotton. The testimony makes sense if the victim is already through the backdoor. This scenario places all the men inside the building with the three perpetrators committing the crimes of kidnapping, felonious assault, and robbery. Thus, a lawyer in the exercise of professional judgment could conclude that in viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find all the essential elements of aggravated burglary and reject asserting the assignment of error on insufficiency of the evidence for aggravated burglary.

{¶10} In contrast, the evidence the prosecution presented did not establish exactly where the victim was when the incident occurred. Was he in the building, in a foyer area, outside the building about to open the backdoor, or in the doorway? Nor does this evidence establish where the three men were. Were they always outside the building and ambushed the victim before he entered? Where are the steps to the basement? Were two men outside, and Cotton came out of the backdoor to intercept the victim before he entered the building? Or did Cotton run around the building and approach the victim from behind? The evidence, including exhibit Nos. 107 and 108, and the victim's testimony, does not answer these questions. The corollary to this uncertainty is that the state did not establish beyond a reasonable doubt the essential element of aggravated burglary that Cotton was ever in the building with purpose to commit a crime in the building.

{¶11} The court rules that this uncertainty and the prejudice shown by this reference to this court's decision in *Brooks*, establishes a genuine issue as to whether Cotton was deprived of the effective assistance of appellate counsel. Accordingly, the court grants the application for reopening.

{¶12} Attorney Francisco E. Luttecke, Assistant State Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio, 43215, is appointed to represent Cotton. Counsel is instructed to apply for compensation within thirty days after the journalization of this court's final decision in the reopened appeal.

{¶13} The clerk of the court of appeals is instructed to reassemble the record in 8th Dist. Cuyahoga No. 102581 as it existed during the court's original review of the judgment in Cuyahoga C.P. No. CR-14-584941-B. App.R. 26(B)(7) shall govern the filing of the record and the briefs.

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MELODY J. STEWART, JUDGE

LARRY A. JONES, SR., A.J., and  
MARY EILEEN KILBANE J., CONCUR