

[Cite as *State v. McCuller*, 2009-Ohio-2485.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 86592

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

CHARLES MCCULLER

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 409977
LOWER COURT NO. CR-455941
COMMON PLEAS COURT

RELEASE DATE: May 22, 2009

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JUDGE MARY EILEEN KILBANE:

{¶ 1} On June 11, 2008, the applicant, Charles McCuller, pursuant to App.R. 26(B) and *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, applied to reopen this court's judgment in *State of Ohio v. Charles McCuller*, Cuyahoga App. No. 86592, 2006-Ohio-302, in which this court affirmed McCuller's convictions for robbery and drug possession. McCuller argues his appellate counsel was ineffective because he did not argue that the indictment was defective for not stating a mens rea element. *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917.

On November 12, 2008, the State of Ohio filed a brief in opposition. For the following reasons, this court denies the application.

{¶ 2} App.R. 26(B)(1) and (2)(b) require applications claiming ineffective assistance of appellate counsel to be filed within ninety days from journalization of the decision unless the applicant shows good cause for filing at a later time. In the instant case, this court journalized its decision on February 6, 2006. Thus, McCuller's June 2008 application is untimely on its face.

{¶ 3} McCuller tries to show good cause by asserting that he relied on his attorney's poor performance, i.e., his lawyer told him he could not appeal any further and his lawyer failed to argue the "dead bang winner" of *Colon*. However, in *State v. White* (Jan. 31, 1991), Cuyahoga App. No. 57944, reopening disallowed (Oct. 19, 1994), Motion No. 49174 and *State v. Allen* (Nov. 3, 1994), Cuyahoga App. No. 65806, reopening disallowed (July 8, 1996), Motion No. 67054, this court rejected reliance on counsel as showing good cause. In *State v. Rios* (1991), 75 Ohio App.3d 288, 599 N.E.2d 374, reopening disallowed (Sept. 18, 1995), Motion No. 66129, Rios maintained that the untimely filing of his application for reopening was primarily caused by the ineffective assistance of appellate counsel; again, this court rejected that excuse. Cf. *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861; *State v. Lamar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970; *State v. Moss* (May 13, 1993), Cuyahoga App. Nos. 62318 and 62322, reopening disallowed (Jan. 16, 1997), Motion No. 75838; *State v. McClain* (Aug. 3, 1995),

Cuyahoga App. No. 67785, reopening disallowed (Apr. 15, 1997), Motion No. 76811; and *State v. Russell* (May 9, 1996), Cuyahoga App. No. 69311, reopening disallowed (June 16, 1997), Motion No. 82351. Accordingly, this application is properly dismissed as untimely.

{¶ 4} Moreover, the Supreme Court of Ohio decided *Colon* on April 9, 2008, more than two years after this court's opinion in *McCuller*. Appellate counsel is not deficient for failing to anticipate developments in the law or failing to argue such an issue. *State v. Williams* (1991), 74 Ohio App.3d 686, 600 N.E.2d 298; *State v. Columbo* (Oct. 7, 1987), Cuyahoga App. No. 52715, reopening disallowed (Feb. 14, 1995), Motion No. 55657; *State v. Munici* (Nov. 30, 1987), Cuyahoga App. No. 52579, reopening disallowed (Aug. 21, 1996), Motion No. 71268, at 11-12: "appellate counsel is not responsible for accurately predicting the development of the law in an area marked by conflicting holdings." *State v. Harey* (Nov. 10, 1997), Cuyahoga App. No. 71774, reopening disallowed (July 7, 1998), Motion No. 90859; *State v. Sanders* (Oct. 20, 1997), Cuyahoga App. No. 71382, reopening disallowed, (Aug. 25, 1998), Motion No. 90861; *State v. Bates* (Nov. 20, 1997), Cuyahoga App. No. 71920, reopening disallowed (Aug. 19, 1998), Motion No. 91111; and *State v. Whittaker* (Dec. 22, 1997), Cuyahoga App. No. 71975, reopening disallowed, (July 28, 1998), Motion No. 92795. Additionally, the Supreme Court of Ohio in *Colon II*, *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169, held that *Colon I* is prospective in nature and applies only to those cases pending on the date

Colon I was announced. *State v. Sharp*, Cuyahoga App. No. 87709, 2006-Ohio-6413, reopening disallowed, 2006-Ohio-5096. Therefore, McCuller's appellate counsel was not ineffective for not arguing the issue.

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

MARY EILEEN KILBANE, JUDGE

KENNETH A. ROCCO, P.J., and
LARRY A. JONES, J., CONCUR