

[Cite as *State v. Hanni*, 2009-Ohio-6631.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91014

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ADRIAN HANNI

DEFENDANT-APPELLANT

**JUDGMENT:
APPLICATION DENIED**

Application for Reopening
Motion No. 420920
Cuyahoga County Common Pleas Court
Case No. CR-500087

RELEASE DATE: December 14, 2009

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PATRICIA A. BLACKMON, J.:

In *State v. Hanni*, Cuyahoga County Court of Common Pleas Case No. CR-500087, applicant, Adrian Hanni, was convicted of: two counts of rape both with notice of prior conviction and repeat violent offender specification; and one count of kidnapping with notice of prior conviction as well as repeat violent offender and sexual motivation specifications. This court affirmed in part, reversed in part and remanded the case for correction of the sentencing entry.¹ The Supreme Court of Ohio denied leave to appeal.²

¹ *State v. Hanni*, Cuyahoga App. No. 91014, 2009-Ohio-139.

² *State v. Hanni*, 122 Ohio St.3d 1521, 2009-Ohio-4776.

Hanni has filed with the clerk of this court a timely application for reopening. He asserts that he was denied the effective assistance of appellate counsel because the trial court lacked the authority to impose additional prison terms for the repeat violent offender specifications. We deny the application for reopening. As required by App.R. 26(B)(6), the reasons for our denial follow.

Having reviewed the arguments set forth in the application for reopening in light of the record, we hold that Hanni has failed to meet his burden to demonstrate that “there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.”³ The Supreme Court of Ohio has 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.”⁴ Hanni cannot satisfy

³ App.R. 26(B)(5).

⁴ *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998-Ohio-704, 701 N.E.2d 696.

either prong of the *Strickland* test. We must, therefore, deny the application on the merits.

Hanni argues that appellate counsel was ineffective for failing to raise two assignments of error:

1. “The trial court violated Mr. Hanni’s right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution when it imposed prison terms under the Repeat Violent Offender specifications, because the Ohio Supreme Court severed the statute authorizing such additional terms in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. (T.p. 744-747; January 23, 2008 Sentencing Entry).” Application at 4.
2. “Trial counsel rendered constitutionally deficient performance when he failed to object to the erroneous imposition of an additional ten-year prison term under the repeat violent offender specification. (T.p. 744-747; January 23, 2008 Sentencing Entry).” Id. at 6.

Hanni bases both of his proposed assignments of error on the Supreme Court’s holding in *Foster*, supra. That is, *Foster* held, in part: “Because the specifications contained in R.C. 2929.14(D)(2)(b) and (D)(3)(b) require judicial fact-finding before repeat-violent-offender and major-drug-offender penalty enhancements are imposed, they are unconstitutional. (*Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, and *Blakely v.*

Washington (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, followed.)”⁵ The Supreme Court also severed R.C. 2929.14(D)(2)(b) and (D)(3)(b).⁶ Hanni argues, therefore, that the additional ten-year sentence for the repeat violent offender specifications is unconstitutional.

As explained recently by the Supreme Court, however, Hanni’s argument misconstrues *Foster*. “Our opinions in *Foster* and *Mathis*⁷ patently demonstrate our intent to excise only the portions of former R.C. 2929.14(D)(2)(b) that required judicial fact-finding in violation of the Sixth Amendment and the United States Supreme Court’s decisions in *Apprendi* and *Blakely*. We never specifically precluded a trial court from imposing enhanced penalties for a repeat violent offender specification, nor did we excise the definition of a repeat violent offender as set forth in former R.C. 2929.01(DD). Furthermore, none of our decisions after *Foster* indicate that this specification no longer exists. Thus, *Foster* excised judicial fact-finding from former R.C. 2929.14(D)(2) but did not eliminate the repeat violent offender specification, as defined in former R.C. 2929.01(DD). Accordingly, [defendant/appellant’s] argument that *Foster* eliminated the repeat violent offender specification is not well taken.”⁸

⁵ *Foster*, supra, paragraph 5 of the syllabus.

⁶ *Id.* at paragraph 6 of the syllabus.

⁷ *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1.

⁸ *State v. Hunter*, 123 Ohio St.3d 164, 2009-Ohio-4147, 915 N.E.2d 292, at ¶127.

In *Hunter*, the Supreme Court affirmed the judgment which resulted in a consecutive sentence for a repeat violent offender specification. This court has also affirmed post-*Foster* sentences imposing consecutive sentences under repeat violent offender specifications.⁹

In light of this precedent, we cannot conclude that appellate counsel was deficient by failing to assign as error that Hanni's right to due process was violated by the imposition of a consecutive term for the repeat violent offender specifications. Likewise, we cannot conclude that appellate counsel was deficient for failing to raise ineffective assistance of trial counsel for failing to object to the consecutive term. We also cannot conclude that Hanni was prejudiced by the absence of these two assignments of error. Additionally, we note that Hanni waived his right to a jury trial on the notice of prior conviction and repeat violent offender specification.¹⁰ As a consequence, Hanni has not met the standard for reopening.

Accordingly, the application for reopening is denied.

⁹ *State v. Vaughn*, Cuyahoga App. No. 90136, 2008-Ohio-3027; *State v. Douglas*, Cuyahoga App. No. 91029, 2009-Ohio-1068.

¹⁰ Defendant's Waiver of Jury Trial of All Repeat Violent Offender Specifications & Notice of Prior Conviction, filed December 17, 2007. See also *Hunter*, supra, at ¶¶30-31 (Hunter "chose to submit that determination [of his status as a repeat violent offender] to the court to avoid presenting evidence of his prior conviction for felonious assault to the jury at trial. Therefore, Hunter has waived whatever right he had with respect to the repeat violent offender specification." *Id.* at ¶31, citation deleted).

PATRICIA A. BLACKMON, JUDGE

SEAN C. GALLAGHER, P.J., and
MELODY J. STEWART, J., CONCUR