

COPY

STATE OF OHIO)
)
COUNTY OF SUMMIT)

COURT OF APPEALS
SANDRA KURT

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

2016 MAY 31 PM 1:38

STATE OF OHIO

SUMMIT COUNTY
CLERK OF COURTS

C.A. Nos. 27132

Appellee

v.

HARRY E. JACKSON

Appellee

JOURNAL ENTRY

Appellant has filed an application to reopen this Court's December 16, 2015 judgment, affirming his convictions for aggravated trafficking and aggravated possession.

The State has responded to the application for reopening.

Pursuant to App.R. 26(B), to justify reopening of an appeal, the applicant has the burden of establishing a "genuine issue" of ineffective assistance of appellate counsel. *State v. Sanders*, 94 Ohio St.3d 150, 151 (2002). The analysis found in *Strickland v. Washington*, 466 U.S. 668 (1984), is the appropriate standard to assess whether an applicant has raised a "genuine issue" of ineffective assistance of appellate counsel. *Id.* To demonstrate ineffective assistance of counsel, the applicant must show that "counsel's representation fell below an objective standard of reasonableness" and that, but for the deficient representation, there is a reasonable probability that the movant would have been successful on appeal. *Id.* See also *State v. Hill*, 90 Ohio St.3d 571, 572 (2001), citing *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph three of the syllabus.

Appellant's convictions stem from his possession and sale of a product that contained Pentadrone. At the time of his offenses, Pentadrone was listed as a controlled substance

analog. Appellant argues that he received ineffective assistance of appellate counsel because his attorney failed to assign as error that, on the date of his alleged offenses, the General Assembly had not yet criminalized the acts of selling or possessing controlled substance analogs. He relies upon case law from the Tenth District and argues that he was prejudiced when his attorney failed to present this Court with that case law in a properly-framed argument on direct appeal. *See State v. Smith*, 10th Dist. Franklin Nos. 14AP-154 & 14AP-155, 2014-Ohio-5303; *State v. Mobarak*, 10th Dist. Franklin No. 14AP-517, 2015-Ohio-3007. *See also State v. Jackson, et al.*, 9th Dist. Summit Nos. 27132, 27133, 27158 & 27200, 2015-Ohio-5246, ¶ 38 (declining to address the Tenth District cases on direct appeal).

Having reviewed the application for reopening, we cannot conclude that Appellant has demonstrated prejudice as a result of his attorney's failure to raise an assignment of error on the basis of Tenth District case law. Unlike the defendants in those cases, Appellant never sought to dismiss his indictment on the basis that it failed to charge him with an offense. *Compare Smith* at ¶ 3; *Mobarak* at ¶ 3. In fact, he never raised the foregoing argument at the trial court level in any fashion. *See State v. Awan*, 22 Ohio St.3d 120 (1986), syllabus ("Failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue * * * and therefore need not be heard for the first time on appeal."). Even assuming that Appellant's attorney could have raised the foregoing argument on direct appeal under a theory of plain error, this Court is not bound by a decision from another appellate district. Appellant has not shown that the result of his appeal would have been

different had his attorney raised the foregoing argument for the first time on appeal and supported the argument with strictly persuasive authority. As such, his application for reopening is denied.



Judge

Concur:
Hensal, P. J.
Whitmore, J.