[Cite as *State v. Hennings*, 2020-Ohio-4055.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	
v.	:	Nos. 108043, 108044, and 108045
KAREEM HENNINGS,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: August 7, 2020

Cuyahoga County Court of Common Pleas
Case No. CR-17-623399-A
Application for Reopening
Motion No. 536048

Appearances:

Mary Catherine Corrigan and Allison F. Hibbard, *for appellant*.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Kristen L. Sobieski, Assistant Prosecuting Attorney, *for appellee*.

RAYMOND C. HEADEN, J.:

{¶ 1} Kareem Hennings has filed a timely App.R. 26(B) application for reopening. Hennings is attempting to reopen the appellate judgment rendered in

State v. Hennings, 8th Dist. Cuyahoga Nos. 108043, 108044, and 109045, 2019-Ohio-3771, that affirmed his pleas of guilty and the imposed sentences with regard to four counts of trafficking in drugs (R.C. 2925.03) and one count of failure to comply with order or signal of police officer (R.C. 2912.331). We decline to grant Henning's application for reopening because he has failed to establish that he was prejudiced by the performance of his appellate counsel on appeal.

I. Standard of review applicable to App.R. 26(B) application for reopening

{¶ 2} In order to establish a claim of ineffective assistance of appellate counsel under App.R. 26(B), Hennings 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. 688, 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 767 (1990).

{¶ 3} In *Strickland*, the United States Supreme Court held that a court's scrutiny of an attorney's work must be highly deferential. The court further stated that it is all too tempting for a defendant to second-guess his attorney after conviction and that it would be too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Thus, a court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must

overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*.

{¶ 4} Moreover, even if Hennings establishes that an error by his appellate counsel was professionally unreasonable, Hennings must further establish that he was prejudiced; but for the unreasonable error there exists a reasonable probability that the results of his appeal would have been different. Reasonable probability, with regard to an application for reopening, is defined as a probability sufficient to undermine confidence in the outcome of the appeal. *State v. May*, 8th Dist. Cuyahoga No. 97354, 2012-Ohio-5504.

II. Effect of Plea of Guilty on App.R. 26(B)

{¶ 5} In *State v. Hennings*, Cuyahoga C.P. Nos. CR-17-623399-A, CR-17-623410-A, and CR-18-627094-A, Hennings entered pleas of guilty to the offenses of trafficking in drugs and failure to comply with order or signal of police officer. A plea of guilty waives a defendant's right to challenge his or her conviction and sentence on all potential issues except for jurisdictional issues and the claim that ineffective assistance of counsel caused the guilty plea to be less than knowing, intelligent, and voluntary. *Montpelier v. Greeno*, 25 Ohio St.3d 170, 495 N.E.2d 581 (1986); *State v. Vihtelic*, 8th Dist. Cuyahoga No. 105381, 2017-Ohio-5818; *State v. May*, 8th Dist. Cuyahoga No. 97354, 2012-Ohio-5504; *State v. Szidik*, 8th Dist. Cuyahoga No. 95644, 2011-Ohio-4093; *State v. Salter*, 8th Dist. Cuyahoga No. 82488, 2003-Ohio-5652. By entering pleas of guilty, Hennings waived all appealable errors that might have occurred at trial unless the errors prevented

Hennings from entering a knowing and voluntary plea. *State v. Kelley*, 57 Ohio St.3d 127, 566 N.E.2d 658 (1991); *State v. Barnett*, 73 Ohio App.3d 244, 596 N.E.2d 1101 (2d Dist. 1991).

{¶ 6} Our review of the plea transcript clearly demonstrates that the trial court meticulously complied with the mandates of Crim.R. 11 and that Hennings entered a knowing, intelligent, and voluntary plea of guilty. Specifically, the trial court informed Hennings that he would be waiving numerous constitutional rights and further informed him of the potential sentence and fine associated with each charged offense: 1) the degree of each charged offense (tr. 14-15); 2) the maximum sentence and fine associated with each charged offense (tr. 16-17 and 46-47); 3) waiver of the right to a jury or bench trial (tr. 13); 4) waiver of the right that the state must prove guilt beyond a reasonable doubt (tr. 13); 5) waiver of the right to confront and cross-examine each witness called by the state (tr. 13); 6) Hennings could not be compelled to testify against himself (tr. 13-14); 7) mandatory and permissive imposition of postrelease control (tr. 18-20); and 8) the effects of violation of postrelease control (tr. 20). The trial court also inquired as to whether any threats or promises had been made to encourage the entry of a guilty plea. (Tr. 20). The trial court further determined that Hennings was not under the influence of drugs, alcohol, or meds and that he was satisfied with the representation of his legal counsel. (Tr. 12).

{¶ 7} Because Hennings's plea was knowingly, intelligently, and voluntarily made, and the claimed errors raised by Hennings are not based upon any

jurisdictional defects, the raised proposed assignment of error is waived. We further find that no prejudice can be demonstrated by Hennings based upon appellate representation on appeal. *State v. Bates*, 8th Dist. Cuyahoga No. 100365, 2015-Ohio-297.

III. Proposed Assignment of Error

{¶ 8} Finally, even if this court were to review Hennings's one proposed assignment of error, we find that he has failed to establish any prejudice that resulted from the conduct of appellate counsel on appeal. Hennings's sole proposed assignment of error is:

> The Trial Court erred by failing to consider the factors enumerated in R.C. 2921.331(C)(5)(b) when sentencing Mr. Hennings.

{¶ 9} Hennings, through his proposed assignment of error, argues that the trial court failed to consider the factors enumerated within R.C. 2921.35(C)(5)(b), which includes, inter alia, duration of the pursuit, distance of pursuit, rate of speed, failure to stop for traffic lights, did offender operate the vehicle, number of moving violations committed during pursuit, and any other relevant factors.

{¶ 10} A review of the transcript clearly shows that the trial court intended and did comply with the plea agreement as entered into between Hennings and the Cuyahoga County prosecutor. Hennings was not prejudiced by the alleged failure of the trial court to review the factors enumerated within R.C. 2921.35(C)(B)(5), because he received the exact sentence that was negotiated. In addition, when a trial court promises a certain sentence, the promise becomes an inducement to enter a

plea, and unless that sentence is given, the plea is not voluntary. *State v. Triplett*, 8th Dist. Cuyahoga No. 69237, 1997 Ohio App. LEXIS 493 (Feb. 13, 1997). Accordingly, a trial court commits reversible error when it participates in plea negotiations but fails to impose the promised sentence. *Id.*; *State v. Walker*, 61 Ohio App.3d 768, 573 N.E.2d 1158 (8th Dist. 1989); *State v. Bonnell*, 12th Dist. Clermont No. CA2001-12-094, 2002-Ohio-5882.

{¶ 11} Finally, R.C. 2953.08(D)(1) provides that "[a] sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." Because the sentence imposed by the trial court was the sentence contained within the plea agreement between Hennings and the prosecution, and was authorized by law, appellate counsel was not permitted to argue on appeal any potential sentencing error. *State v. Witcher*, 8th Dist. Cuyahoga No. 107337, 2019-Ohio-1351; *State v. Patterson*, 8th Dist. Cuyahoga No. 106655, 2018-Ohio-4114, ¶ 10, citing *State v. Grant*, 2018-Ohio-1759, 111 N.E. 3d 791 (8th Dist.). Moreover, the limitation applies to cases in which the sentence includes nonmandatory consecutive sentences, regardless of whether there is any specific agreement to nonmandatory consecutive sentences. *Id.* at ¶ 10, citing *Grant* at ¶ 24 and *State v. Glaze*, 8th Dist. Cuyahoga No. 105519, 2018-Ohio-2184. *See also State v. Sergent*, 148 Ohio St.3d 94, 2016-Ohio-2696, 69 N.E.3d 627.

{¶ 12} Application for reopening is denied.

RAYMOND C. HEADEN, JUDGE

EILEEN T. GALLAGHER, A.J., and
SEAN C. GALLAGHER, J., CONCUR