[Cite as *State v. Phillips*, 2020-Ohio-4130.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, :

No. 108423

v. :

DIONTE PHILLIPS, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: August 14, 2020

Cuyahoga County Court of Common Pleas
Case No. CR-18-632326-A
Application for Reopening
Motion No. 537663

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Brandon Piteo, Assistant Prosecuting Attorney, *for appellee.*

Dionte Phillips, *pro se*.

KATHLEEN ANN KEOUGH, J.:

{¶ 1} Dionte Phillips has filed a timely App.R. 26(B) application for reopening. Phillips is attempting to reopen the appellate judgment rendered in *State v. Phillips*, 8th Dist. Cuyahoga No. 108423, 2020-Ohio-800, that affirmed his

plea of guilty to one count of felonious assault (R.C. 2903.11(A)(1)). We decline to grant Phillips's application for reopening.

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), Phillips 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 Phillips establishes that an error by his appellate counsel was professionally unreasonable, Phillips must further demonstrate 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} A plea of guilty waives a defendant's right to challenge his or her conviction 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. Szidik*, 8th Dist. Cuyahoga No. 95644, 2011-Ohio-4093; *State v. Salter*, 8th Dist. Cuyahoga No. 82488, 2003-Ohio-5652. In *State v. Phillips*, Cuyahoga C.P. No. CR-18-632326-A, Phillips entered a plea of guilty to the offense of felonious assault. By entering a plea of guilty, Phillips waived all appealable errors that might have occurred at trial unless the errors prevented Phillips from entering a knowing and voluntary plea. Also, Phillips does not raise any jurisdictional issues in his application for reopening. *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} Once again, our review of the plea transcript clearly demonstrates that the trial court meticulously complied with the mandates of Crim.R. 11 and that

Phillips entered a knowing, intelligent, and voluntary plea of guilty to the offense of felonious assault. Specifically, the trial court informed Phillips 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 felony offense (tr. 28-29); 2) the maximum sentence and fine associated with each charged criminal offense (tr. 28-28, 31); 3) waiver of the right to a jury trial (tr. 26-27); 4) waiver of the right that the state must prove guilt beyond a reasonable doubt (tr. 27); 5) waiver of the right to confront and cross-examine each witness called by the state (tr. 27); 6) Phillips could not be compelled to testify against himself (tr. 27); 7) Phillips is presumed innocent, but a plea of guilty is a complete admission of the truth of the facts (tr. 29); and 8) the effects of violation of postrelease control (tr. 29). The trial court also informed Phillips as to the possibility of restitution. (Tr. 31.) The trial court further determined that Phillips was not under the influence of drugs, alcohol or meds, and that he was satisfied with the representation of his legal counsel. (Tr. 24-25.)

{¶ 7} Because Phillips's plea was knowingly, intelligently, and voluntarily made, and the claimed errors raised by Phillips 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 Phillips based upon appellate representation on appeal. *State v. Bates*, 8th Dist. Cuyahoga Nos. 97631, 97632, 97633, and 97634, 2015-Ohio-4176.

III. FAILURE TO PROVIDE SWORN STATEMENT

{¶ 8} Finally, Phillips has not supported the application with an affidavit averring the grounds for reopening. App.R. 26(B)(2)(d) requires a "sworn statement of the basis for the claim that appellate counsel's representation was deficient * * * and the manner in which the deficiency prejudicially affected the outcome of the appeal * * *." In *State v. Lechner*, 72 Ohio St.3d 374, 650 N.E.2d 449 (1995), the Ohio Supreme Court held that the sworn statement required by App.R. 26(B)(2)(d) is mandatory and upheld the denial of an application because that sworn statement was missing. The failure to provide the required sworn statement is a sufficient basis to deny the application for reopening. *State v. Taylor*, 8th Dist. Cuyahoga No. 104892, 2018-Ohio-264; *State v. Cosper*, 8th Dist. Cuyahoga No. 104832, 2017-Ohio-7402.

{¶ 9} Application for reopening is denied.

KATHLEEN ANN KEOUGH, JUDGE

EILEEN T. GALLAGHER, A.J., and
LARRY A. JONES, SR., J., CONCUR