[Cite as *State v. Robinson*, 2020-Ohio-98.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 107598
v.	:	
MICHAEL D. ROBINSON,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: January 13, 2020

Cuyahoga County Court of Common Pleas
Case No. CR-18-628485-A
Application for Reopening
Motion No. 531338

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Anthony T. Miranda, Assistant Prosecuting Attorney, *for appellee.*

Michael D. Robinson, *pro se.*

EILEEN T. GALLAGHER, A.J.:

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

State v. Robinson, 8th Dist. Cuyahoga No. 107598, 2019-Ohio-2330, that affirmed the consecutive sentences of incarceration imposed by the trial court with regard to Count 3 (having weapons while under disability) and Count 7 (drug possession) of the indictment. We decline to grant Robinson'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), Robinson 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 Robinson establishes that an error by his appellate counsel was professionally unreasonable, Robinson 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. Robinson*, Cuyahoga C.P. No. CR-18-628485, Robinson entered a plea of guilty to the charged offenses of assault on a police officer, resisting arrest, having weapons while under disability, carrying a concealed weapon, improper handling of a firearm in a motor vehicle, receiving stolen property, and drug possession. 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; and *State v. May*, 8th Dist. Cuyahoga No. 97354, 2012-Ohio-2766, *reopening disallowed*, 2012-Ohio-5504.

{¶ 6} By entering a plea of guilty, Robinson waived all appealable errors that might have occurred at trial unless the errors prevented Robinson 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).

{¶ 7} Our review of the plea transcript clearly demonstrates that the trial court meticulously complied with the mandates of Crim.R. 11 and that Robinson entered a knowing, intelligent, and voluntary plea of guilty. Specifically, the trial court informed Robinson 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. 11); 2) the maximum sentence and fine associated with each charged criminal offense (tr. 12); 3) waiver of the right to a jury or bench trial (tr. 10); 4) waiver of the right that the state must prove guilt beyond a reasonable doubt (tr. 11); 5) waiver of the right to confront and cross-examine each witness called by the state (tr. 10); 6) Robinson could not be compelled to testify against himself (tr. 11); 7) the court could immediately proceed with judgment and the imposition of sentence upon Robinson entering a plea of guilty (tr. 11); 8) the possibility of consecutive sentences with a maximum sentence as to each count (tr. 12); 9) imposition of restitution, fees, and costs (Tr. 15); 10) mandatory and permissive imposition of postrelease control (tr. 16); 11) the effects of violation of postrelease control (tr. 16); and 12) the possibility of a driver's license suspension. (tr. 15.) The trial court also queried Robinson as to

whether any threats or promises had been made to encourage the entry of a guilty plea. (tr. 17.) The trial court further determined that Robinson was not under the influence of drugs, alcohol, or medications and that he was satisfied with the representation of his legal counsel. (tr. 7 and 8.)

{¶ 8} Because Robinson's plea was knowingly, intelligently, and voluntarily made, and the claimed errors raised by Robinson are not based upon any jurisdictional defects, the raised proposed assignments of error are waived. We further find that no prejudice can be demonstrated by Robinson based upon appellate representation on appeal. *State v. Bates*, 8th Dist. Cuyahoga No. 100365, 2015-Ohio-297.

III. Proposed assignments of error

{¶ 9} Finally, even if this court were to review Robinson's two proposed assignments of error, we find that he has failed to establish any prejudice that resulted from the conduct of appellate counsel on appeal. Robinson's two proposed assignments of error are:

> Appellate counsel failed to argue the validity of the drug possession charge.
>
> Appellant's attorney failed to argue prosecutorial misconduct for the state's promise to reindict on more serious charges if appellant did not plea to the current indictment [under] the legal fiction of Count 7.

{¶ 10} Robinson, through his first proposed assignment of error, argues that there existed no evidence to support the charged offense of drug possession under Count 7, which appellate counsel was required to challenge on appeal. Through his second proposed assignment of error, Robinson argues that his appellate counsel

was required to argue on appeal prosecutorial misconduct based upon the plea of guilty to Count 7, because the prosecutor indicated that the state agreed to forego a reindictment that would include a first-degree felony charge and a firearm specification in exchange for a plea of guilty to Count 7. Central to both of the two proposed assignments of error is that Robinson entered a plea of guilty to Count 7 of the original indictment versus a reindictment that involved a more serious offense and an added firearm specification. This court, on direct appeal, has already addressed the issues of Robinson's plea of guilty to Count 7 and possible reindictment:

> Robinson pleaded guilty to all the charges in the indictment. The prosecutor explained at the plea hearing that the plea agreement did not include a reduction in the charges. Instead, the state agreed to forego a reindictment that would include a first-degree felony charge and firearm specification in exchange for Robinson's agreement to plead guilty to the current indictment. The prosecutor further explained that if the case were re-presented to the grand jury, the state would omit the drug possession charge alleged in Count 7 because "the labs came back negative on that count." (Tr. 4.) The prosecutor concluded that even though there was no reduction in charges, "the defendant is essentially getting a benefit by pleading guilty to the indictment as currently charged rather than face reindictment." (Tr. 4.) Robinson indicated that he understood the terms of the plea agreement. (Tr. 14.) He also denied that any threats or promises had been made against him to induce his guilty pleas. (Tr. 8, 17.)
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> Moreover, Robinson accepted the state's offer and knowingly, intelligently, and voluntarily pleaded guilty to the indictment, even though the state conceded it could not prove the drug possession charge alleged in Count 7. To now claim prejudice because the court imposed consecutive sentences on the drug possession conviction, after he received the benefit of the negotiated plea bargain, is invited error. *See State v. Brawley*, 8th Dist. Cuyahoga No. 79705, 2002-Ohio-3115,

> ¶ 20 (A plea to a nonexistent crime is invited error.). Under the invited error doctrine, a party is not "permitted to take advantage of an error which he himself invited or induced the trial court to make." *State ex rel. Bitter v. Missig*, 72 Ohio St.3d 249, 254, 1995-Ohio147, 648 N.E.2d 1355 (1995).

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{¶ 11} Because the issues of pleading guilty to Count 7 and a negotiated plea have already been addressed by this court on direct appeal, the doctrine of res judicata prevents further review of the issues raised in Robinson's proposed two assignments of error. The principles of res judicata may be applied to bar the further litigation in a criminal case of issues that were raised previously or could have been raised previously in an appeal. *See generally State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967). Claims of ineffective assistance of appellate counsel in an application for reopening may be barred by res judicata unless circumstances render the application of the doctrine unjust. *State v. Murnahan*, 63 Ohio St.3d 60, 66, 584 N.E.2d 1204 (1992); *State v. Williams*, 8th Dist. Cuyahoga No. 57988, 1991 Ohio App. LEXIS 757 (Mar. 4, 1991), *reopening disallowed*, Motion No. 52164 (Aug. 15, 1994). We further find that the circumstances of this appeal do not render the application of the doctrine of res judicata unjust.

{¶ 12} Finally, it must be noted that this court, as well as numerous other courts, have affirmed convictions based on guilty pleas to offenses the state could not prove where the defendant knowingly, intelligently, and voluntarily entered a guilty plea as part of a "negotiated plea agreement." *See, e.g., State v. Lester*, 8th

Dist. Cuyahoga No. 106850, 2018-Ohio-4893; *Brawley*; *State v. Wickham*, 5th Dist. Muskingum No. CA 76-40, 1977 Ohio App. LEXIS 10210 (Sept. 28, 1977).

{¶ 13} Application for reopening is denied.

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EILEEN T. GALLAGHER, ADMINISTRATIVE JUDGE

EILEEN A. GALLAGHER, J., and
RAYMOND C. HEADEN, J., CONCUR