

THE STATE OF OHIO, APPELLEE, v. PENIX, APPELLANT.

[Cite as *State v. Penix*, 1995-Ohio-13.]

Appellate procedure—Application for reopening appeal from judgment and conviction based on claim of ineffective assistance of appellate counsel—Application denied when issue is res judicata by virtue of appellate court's opinion in direct appeal.

(No. 94-2477—Submitted February 7, 1995—Decided May 24, 1995.)

APPEAL from the Court of Appeals for Jackson County, No. 461.

{¶ 1} According to the court of appeals' opinion, appellant, Jesse Penix, was indicted on two counts of kidnapping and one count of rape, felonious assault, and auto theft. The trial court dismissed one kidnapping count and the auto theft count, and a jury convicted appellant on the remaining counts.

{¶ 2} On appeal, appellant's counsel made forty-one assignments of error, but failed to argue them individually, and the court of appeals did not consider them. Appellant filed a belated brief, *pro se*, in which he argued ineffective assistance of trial and appellate counsel. The court of appeals found no evidence of ineffectiveness of trial counsel and no prejudice resulting from counsel's actions, and affirmed the convictions. *State v. Penix* (Dec. 23, 1983), Jackson App. No. 461, unreported.

{¶ 3} Subsequently, it appears, in 1994, appellant sought to reopen the appellate case, claiming ineffective assistance of appellate counsel under *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204. The court of appeals held that the issue was *res judicata* by virtue of its opinion in the direct appeal. Appellant appealed to this court.

SUPREME COURT OF OHIO

Mark A. Ochsenbein, Jackson County Prosecuting Attorney, and *Timothy E. Forshey*, Assistant Prosecuting Attorney, for appellee.

Jesse Penix, pro se.

Per Curiam.

{¶ 4} The decision of the court of appeals is affirmed for the reasons stated in its opinion.

Judgment affirmed.

MOYER, C.J., DOUGLAS, WRIGHT, RESNICK, F.E. SWEENEY, PFEIFER and COOK, JJ., concur.
