

[Cite as *Cleveland Hts. v. Jackson*, 2004-Ohio-2153.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 82958

CITY OF CLEVELAND HEIGHTS)	
)	
Plaintiff-Appellee)	JOURNAL ENTRY
)	
-VS-)	AND
)	
EMMITT K. JACKSON)	OPINION
)	
Defendant-Appellant)	

Date of Journalization: APRIL 23, 2004

Character of Proceeding: Application for Reopening
Motion No. 355680
Lower Court No. CRB-0200388
Cleveland Heights Municipal
Court

Judgment: Application denied.

Appearances:

For Plaintiff-Appellee:

KIM T. SEGEBARTH, ESQ.
City of Cleveland Heights
40 Severance Circle
Cleveland Hts., Ohio 44118

For Defendant-Appellant:

EMMITT K. JACKSON, PRO SE
1589 Coventry Road
Apt. No. 11A
East Cleveland, Ohio 44118

JAMES J. SWEENEY, J. :

{¶1} Emmitt K. Jackson has filed an application for reopening pursuant to App.R. 26(B). Jackson is attempting to reopen the appellate judgment that was rendered by this court in *City of Cleveland Heights v. Jackson*, Cuyahoga App. No. 82958, 2003-Ohio-6486, which affirmed his conviction for the offense of menacing, a violation of R.C. 2903.22(A). For the following reasons, we decline to reopen Jackson's appeal.

{¶2} The doctrine of res judicata prevents this court from reopening Jackson's appeal. Errors of law that were either previously raised or could have been raised through an appeal may be barred from further review vis-a-vis the doctrine of res judicata. See, generally, *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104. The Supreme Court of Ohio has also established that a claim of ineffective assistance of appellate counsel may be barred by the doctrine of res judicata unless circumstances render the application of the doctrine unjust. *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204.

{¶3} Herein, Jackson possessed a prior opportunity to raise and argue the claim of ineffective assistance of appellate counsel upon appeal to the Supreme Court of Ohio. Jackson, however, failed to file an appeal with the Supreme Court of Ohio and has further failed to provide this court with any reason as to why no such appeal was taken to the Supreme Court of Ohio. *State v. Hicks* (Oct. 28, 1982), Cuyahoga App. No. 44456, reopening disallowed (Apr. 19, 1994), Motion No. 50328, affirmed (Aug. 3, 1994), 70 Ohio St.3d 1408. In addition, Jackson has failed to demonstrate why the circumstances of his appeal render the application of the doctrine of res judicata unjust. Thus, we find that the doctrine of res judicata prevents this court from reopening Jackson's appeal.

{¶4} In addition, a substantive review of Jackson’s brief in support of his application for reopening fails to establish the claim of ineffective assistance of appellate counsel. It is well settled that appellate counsel is not required to raise and argue assignments of error that are meritless. *Jones v. Barnes* (1983), 463 U.S. 745, 77 L.Ed.2d 987, 103 S.Ct. 3308. Appellate counsel cannot be considered ineffective for failing to raise every conceivable assignment of error on appeal. *Id*; *State v. Grimm* (1995), 73 Ohio St.3d 413, 653 N.E.2d 253; *State v. Campbell* (1994), 69 Ohio St.3d 38, 630 N.E.2d 339. Jackson must establish the prejudice which results from the claimed deficient performance of appellate counsel. Jackson must also demonstrate that but for the deficient performance of appellate counsel, the result of his appeal would have been different. *State v. Reed* (1996), 74 Ohio St.3d 534, 660 N.E.2d 456. Therefore, in order for this court to grant an application for reopening, Jackson must establish that “there is a genuine issue as to whether the applicant was deprived of the assistance of counsel on appeal.” App.R. 26(B)(5).

In *State v. Reed* (1996), 74 Ohio St.3d 534, 535, 660 N.E.2d 456, 458, we held that the two prong analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, is the appropriate standard to assess a defense request for reopening under App.R. 26(B)(5). [Spivey] must prove that his counsel were deficient for failing to raise the issue he now presents, as well as showing that had he presented those claims on appeal, there was a “reasonable probability” that he would have been successful. Thus, [Spivey] bears the burden of establishing that there was a “genuine issue” as to whether he was a “colorable claim” of ineffective assistance of counsel on appeal.

State v. Spivey (1998), 84 Ohio St.3d 24, 701 N.E.2d 696, at 25.

{¶5} Herein, Jackson has failed to demonstrate the existence of ineffective assistance of appellate counsel. Jackson alleges five separate examples of deficient conduct on the part of appellate counsel in support of his claim of ineffective assistance of

appellate counsel: (1) “Affiants’ (sic) counsel failed to consult with affiant about trial prior to the filing of the Appeal rejecting affiant’s written request that appeal be based on ineffective assistance of counsel”; (2) “affiants’ (sic) counsel states affiant requested a jury trial”; (3) “Affiants’ (sic) counsel wrote assignment of error without record support”; (4) “Affiants’ (sic) counsel represented to the Court of Appeals that the appeal ‘lack[s] any appealable issues’ and fail[s] to present obvious and significant issues”; and (5) “Affiants’ (sic) counsel may have assigned an assignment of error lacking support.”

{¶6} After reviewing Jackson’s issues, we find that he has failed to raise a genuine issue as to whether he was deprived of the effective assistance of appellate counsel, as required by App.R. 26(B)(5). Appellate counsel possesses the necessary discretion to decide which issues are most fruitful and should be raised on appeal. *Jones v. Barnes*, supra. Consideration of the five issues as raised by Jackson would not have resulted in a reversal of Jackson’s conviction for the offense of menacing. In addition, the issue of jury waiver was previously raised and addressed upon appeal and thus barred from further review by the doctrine of res judicata. *Strickland v. Washington*, supra; *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164.

{¶7} Accordingly, Jackson’s application for reopening is denied.

ANN DYKE, P.J., and

DIANE KARPINSKI, J., CONCUR.

JAMES J. SWEENEY
JUDGE