[Cite as *State v. Whitt*, 2004-Ohio-3620.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 82293

STATE OF OHIO	:	JOURNAL ENTRY
	:	AND
Plaintiff-appellee	:	OPINION
	:	
-vs-	:	
	:	
BRANDON WHITT	:	
	:	
Defendant-appellant	:	

DATE OF JOURNALIZATION: JULY 7, 2004

CHARACTER OF PROCEEDING: Applications for Reopening,
Motion Nos. 356975 & 357321
Lower Court No. CR-423618
Common Pleas Court

JUDGMENT: Applications Denied

APPEARANCES:

For Plaintiff-Appellee:

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CUYAHOGA COUNTY PROSECUTOR
BY: AMY E. VENESILE, ESQ.
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For Defendant-Appellant:

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DYKE, P.J.:

{¶1} Brandon Whitt filed a timely pro se application for reopening pursuant to App.R. 26(B) on February 4, 2004. In addition, a successive application for reopening was filed by legal counsel, pro bono, on February 17, 2004. Whitt is attempting to reopen the appellate judgment that was rendered by this court in *State v. Whitt*, Cuyahoga App. No. 82293, 2003-Ohio-5934, which affirmed his conviction for the offenses of rape (R.C. 2907.02) and kidnapping (R.C. 2905.01). For the following reasons, we decline to reopen Whitt's appeal.

{¶2} Initially, we find that the doctrine of res judicata bars the reopening of Whitt's original appeal. Errors of law that were either raised or could have been raised through a direct 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 1204. The Supreme Court of Ohio has also established that a claim of ineffective assistance of appellate counsel may be barred from further review 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, Whitt filed an appeal with the Supreme Court of Ohio. On or about April 29, 2004, the Supreme Court of Ohio dismissed Whitt's appeal since it did not involve any substantial constitutional question. Since the issues of ineffective assistance of appellate counsel or the substantive issues raised in Whitt's application for reopening were raised or could have been raised on appeal to the Supreme Court of Ohio, res judicata now bars the relitigation of these matters. *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. Whitt has also 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 the reopening of Whitt's appeal.

{¶4} Notwithstanding the application of the doctrine of res judicata, a substantive review of Whitt'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, 1O3 S.Ct. 3308. Appellate counsel cannot be considered ineffective for failing to raise every conceivable assignment of error on appeal. Id; *State v. Grimm* , 73 Ohio St.3d 413, 1995-Ohio-9, 653 N.E.2d 253; *State v. Campbell*, 69 Ohio St.3d 38, 1994-Ohio-492, 630 N.E.2d 339. Also, Whitt must establish the prejudice which results from the claimed deficient performance of appellate counsel. Finally, Whitt must demonstrate that but for the deficient performance of appellate counsel, the result of his appeal would have been different. *State v. Reed*, 74 Ohio St.3d 534, 1996-Ohio-21, 660 N.E.2d 456. Therefore, in order for this court to grant an application for reopening, Whitt 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).

{¶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). [Applicant] 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.

{¶6} "Thus, [applicant] 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."

{¶7} *State v. Spivey*, 84 Ohio St.3d 24, 1998-Ohio-704, 701 N.E.2d 696, at 25.

{¶8} Whitt, in an attempt to establish ineffective assistance of counsel, raises four proposed assignments of error:

{¶9} "THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHERE APPELLANT (SIC) COUNSEL FAILED TO RAISE AND ARGUE ON DIRECT APPEALS THE FOLLOWING ISSUES THAT CLEARLY SHOWS CONSTITUTIONAL RIGHTS VIOLATIONS DEPRIVING APPELLANT OF A FAIR TRIAL. TO WIT: 1) APPELLATE COUNSEL FAILED TO CHALLENGE THE TESTIMONY OF STATE WITNESS, MS. MITCHELL, WHERE SHE TESTIFIED THAT THE ABRASION APPEARED LESS THAN TWELVE HOURS OLD OPINING THAT THE ABRASION WAS CAUSED BY APPELLANT; 2) APPELLATE COUNSEL FAILED TO CHALLENGE THE ADMISSIBILITY OF STATE WITNESS, MS. MITCHELL'S FACTUAL TESTIMONY THAT SHE OBSERVED AN ABRASION WHERE SAID TESTIMONY MIGHT HAVE BEEN IRRELEVANT OR UNFAIRLY PREJUDICIAL WITHOUT EXPERT TESTIMONY TO EXPLAIN ITS SIGNIFICANCE; 3) APPELLATE COUNSEL FAILED TO CHALLENGE THE PROSECUTOR'S CONDUCT IN PRESENTING MS. MITCHELL'S TESTIMONY WHERE THE PROSECUTOR DELIBERATELY SOUGHT TO QUALIFY HER AS AN EXPERT AND INTRODUCE HER OPINION AND CONCLUSION DESPITE THE JUDGE'S RULING THAT SHE COULD NOT PRESENT SUCH TESTIMONY.

{¶10} "THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHERE COUNSEL FAILED TO RAISE AND ARGUE ON DIRECT APPEAL THAT THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW IN DENYING A MOTION FOR A MISTRIAL AND PERMITTING THE PROSECUTION TO INTRODUCE FOUNDATION TESTIMONY RESERVED FOR QUALIFYING A WITNESS AS AN EXPERT; PERMITTED THE PROSECUTOR TO QUALIFY A WITNESS AS AN EXPERT EVEN THOUGH IT RULED THAT THE WITNESS COULD NOT TESTIFY AS AN EXPERT WITNESS; AND PERMITTED THE PROSECUTOR TO REFER TO EXCLUDED EVIDENCE IN CLOSING ARGUMENT.

{¶11} "THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHERE COUNSEL FAILED TO ARGUE ON DIRECT APPEAL THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHERE TRIAL COUNSEL FAILED TO

PRESENT APPELLANT AS A WITNESS AFTER KNOWING THAT COUNSEL HAD NOT PRESENTED ANY OTHER EVIDENCE TO CHALLENGE THE STATE CASE.

{¶12} "THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHERE COUNSEL FAILED TO RAISE ON DIRECT APPEAL THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHERE TRIAL COUNSEL FAILED TO SEEK THE EXCLUSION OF ANY STATEMENTS MADE AT THE SCENE OTHER THAN THOSE MADE TO OFFICE (SIC) KERR AND, AFTER HE WAS RELEASED FROM THE PATROL; AND COUNSEL (SIC) FAILURE TO HAVE THE APPELLANT TESTIFY TO CHALLENGE ANY OF THE TESTIMONY CONCERNING THE FACTS OF HIS ENCOUNTERS WITH THE POLICE."

{¶13} Whitt, through his four proposed assignments of error, has failed to demonstrate a genuine issue as to whether he was deprived of the effective assistance of appellate counsel as mandated by App.R. 26(B)(5). Initially, we find no error associated with the medical testimony of Deresa Mitchell since she provided only factual testimony with regard to an abrasion observed on the victim's vaginal wall. Any other non-permissible testimony, as provided by Deresa Mitchell, was stricken by the trial court. *State v. Issa*, 93 Ohio St.3d 49, 2001-Ohio-1290, 752 N.E.2d 904. In addition, the trial court properly denied Whitt's motion for a mistrial since the objection to Deresa Mitchell's testimony, with regard to the force necessary to cause the victim's abrasion, was sustained and a curative instruction was delivered to the jury. *State v. Reynolds* (1988), 49 Ohio App.3d 27, 550 N.E.2d 490; *State v. Stout* (1987), 42 Ohio App.3d 38, 536 N.E.2d 42.

{¶14} The decision to allow Whitt to testify at trial constituted a trial tactic or strategy and did not involve a denial of effective assistance of counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45, 402 N.E.2d 1189. Finally, Whitt has failed to demonstrate with any specificity what "statements made at the scene" should have been excluded during the course of trial vis-a-vis a motion to suppress. Whitt has failed to demonstrate that the outcome of his appeal would have been different

had appellate counsel raised the issue of the failure to suppress certain unidentified statements. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164.

{¶15} Having disposed of Whitt's pro se application for reopening as filed on February 4, 2004, we now must address the application for reopening as filed by counsel, pro bono, on February 17, 2004. The Supreme Court of Ohio has held that there exists no right to file successive applications for reopening. See *State v. Richardson*, 74 Ohio St.3d 235, 1996-Ohio-258, 658 N.E.2d 273. See, also, *State v. Slagle* (May 29, 2002), Cuyahoga App. No. 55759. Since the application for reopening as filed by counsel pro bono on February 17, 2004, is a successive application for reopening, we summarily deny the second application for reopening. *State v. Slagle*, 97 Ohio St.3d 332, 2002-Ohio-6612, 779 N.E.2d 1041. It must also be noted that a substantive review of the successive application for reopening fails to establish a claim of ineffective assistance of appellate counsel since the issue raised, that of the testimony of Deresa Mitchell, has already been found to be without merit and fails to establish the claim of ineffective assistance of appellate counsel. *State v. Bryant-Bey*, 97 Ohio St.3d 87, 2002-Ohio-5450, 776 N.E.2d 480; *State v. Davie*, 96 Ohio St.3d 133, 2002-Ohio-3753, 772 N.E.2d 119.

{¶16} Accordingly, Whitt's initial application for reopening and the successive application for reopening are denied.

JAMES J. SWEENEY, J., CONCURS.

TIMOTHY E. MCMONAGLE, J., CONCURS

IN JUDGMENT ONLY