

[Cite as *State v. Carley*, 2004-Ohio-5479.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 81001

STATE OF OHIO

Plaintiff-Appellee

vs.

RICHARD E. CARLEY

Defendant-Appellant

DATE OF JOURNALIZATION

CHARACTER OF PROCEEDINGS

JUDGMENT

APPEARANCES:

For plaintiff-appellee:

WILLIAM D. MASON

Cuyahoga County Prosecutor

BY: KERRY A. SOWUL

Assistant County Prosecutor

Justice Center - 9th Floor

1200 Ontario Street

Cleveland, OH 44113

For defendant-appellant:

RICHARD E. CARLEY

Inmate No. 356-102

P.O. Box 788

Mansfield Correctional Institution

Mansfield, Ohio 44901

:

:

:

:

:

:

:

:

:

:

:

:

:

:

:

:

:

:

:

Administrative Judge Michael Corrigan:

{¶ 1} On July 12, 2004, Richard Carley filed a timely application for reopening pursuant to App.R. 26(B). He is attempting to reopen the appellate judgment that was rendered by this court in *State v. Carley*, Cuyahoga App. No. 81001, 2004-Ohio-1901. In that opinion, we affirmed defendant's guilty plea to two counts of murder with firearm specifications. For the following reasons, we decline to reopen Carley's original appeal:

{¶ 2} The doctrine of res judicata prohibits this court from reopening the 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 further established that a claim for ineffective assistance of 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, Carley filed an appeal with the Supreme Court of Ohio which denied his request and dismissed the appeal. Because the issues of ineffective assistance of appellate counsel or the substantive issues listed in the application for reopening were raised or could have been raised, res judicata bars re-litigation of these matters. We further find that the application of res judicata would not be unjust.

{¶ 4} Notwithstanding the above, Carley fails to establish that his appellate counsel was ineffective. In regard to claims of ineffective assistance of appellate counsel, the United States Supreme Court has upheld an appellate attorney's discretion to decide which issues he or she

believes are the most fruitful arguments. “Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue, if possible, or at most on a few key issues.” *Jones v. Barnes* (1983), 463 U.S. 745, 77 L.Ed.2d 987, 103 S.Ct. 3308. Additionally, appellate counsel is not required to argue assignments of error which are meritless. *Barnes*, supra.

{¶ 5} Thus, in order for the Court to grant the application for reopening, Carley must establish that “there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.” App.R. 26(B)(5). “In *State v. Reed*, 74 Ohio St.3d 534, 1996-Ohio-21, 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. Thus, [applicant] bears the burden of establishing that there was a ‘genuine issue’ as to whether there was a ‘colorable claim’ of ineffective assistance of counsel on appeal.” *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998-Ohio-704, 701 N.E.2d 696.

{¶ 6} To establish such claim, applicant must demonstrate that counsel’s performance was deficient and that deficiency prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 688, 80 L.Ed.2d 674, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, cert. denied (1990), 497 U.S. 1011, 110 S.Ct. 3258. Cook fails to establish any such deficiency.

{¶ 7} Nevertheless, a substantive review of the application to reopen fails to

demonstrate that there exists any genuine issue as to whether applicant was deprived of the effective assistance of appellate counsel on appeal. In his application, Carley raises the following assignments of error:

- I. THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 10 OF THE OHIO CONSTITUTION FOR COUNSEL’S FAILURE TO RAISE THE ISSUE THAT THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO DISMISS HIS CASE FOR LACK OF SPEEDY TRIAL MAKING HIS GUILTY PLEA INVOLUNTARY.
- II. THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENT UNDER THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 10 OF THE OHIO CONSTITUTION FOR FAILING TO RAISE THE ISSUE THAT THE TRIAL COURT ABUSED ITS DISCRETION WHEN SENTENCING APPELLANT TO CONSECUTIVE SENTENCES WITHOUT GIVING ADEQUATE REASONS FOR THE SENTENCE.
- III. THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 10 OF THE OHIO CONSTITUTION FOR COUNSEL’S FAILURE TO RAISE THE ISSUE THAT APPELLANT’S GUILTY PLEA WAS INVOLUNTARY AND UNKNOWINGLY MADE BECAUSE OF JURY MISCONDUCT.

{¶ 8} In his first proposed assignment of error, Carley claims that the court abused its discretion when it failed to dismiss his case for lack of speedy trial. A review of the record demonstrates that Carley initially plea bargained with the State before his trial and received a sentence of thirty years to life imprisonment from a three-judge panel. However, this court reversed

because the panel lacked subject matter jurisdiction. *State v. Carley* (2000), 139 Ohio App.3d 841, 745 N.E.2d 1122.

{¶ 9} In Carley’s retrial, Carley was found guilty by a jury of two counts of aggravated murder and robbery with specifications. However, before he was sentenced, Carley again plea bargained and pled guilty to two counts of murder with firearm specifications. Carley was then sentenced to 15 years to life on each count of murder which were ordered to run consecutive, and three years on the firearm specifications which were to run prior to and consecutive to the murder sentences for an aggregate sentence of 33 years.

{¶ 10} In this matter, we find that counsel was not ineffective for failing to raise this issue. As asserted by the State of Ohio, a speedy trial claim under R.C. 2945.71 is waived by a defendant’s plea of guilty. *Village of Montpelier v. Greeno* (1986), 25 Ohio St.3d 170, 495 N.E.2d 581. Furthermore, speedy trial statutes do not apply to retrials ordered upon reversal of conviction and remand. *State v. Turner* (1982), 4 Ohio App.3d 305, 448 N.E.2d 516. We further find that Carley failed to demonstrate that he has a valid claim as to the alleged violation of his constitutional right to a speedy trial.

{¶ 11} In his second proposed assignment of error, Carley states that the trial court erred in sentencing him to consecutive sentences without giving adequate reasons for the sentence. We disagree. A review of the sentencing transcript indicates that the trial court complied with the sentencing factors as set forth in R.C. 2929.14(E)(4) and stated findings justifying consecutive sentences on the record.

{¶ 12} In his third proposed assignment of error, Carley asserts that his guilty plea was involuntary and unknowingly made because of jury misconduct. We initially note that, in his direct

appeal, Carley raised the issue that his plea was not knowingly and intelligently made because of ineffective assistance of counsel. In rejecting that argument, this court concluded that the trial court complied with Crim.R. 11 and that Carley failed to establish that he was coerced or induced into making his plea.

{¶ 13} In reviewing Carley’s new argument, we see no reason to overturn this court’s previous finding that the trial court complied with Crim.R. 11. Furthermore, as argued by the State of Ohio in their brief in opposition, Carley was present in the court and was aware of the issues concerning the jury before he changed his plea. To argue now that his plea was not knowingly made because of the alleged jury misconduct is not persuasive. Accordingly, Carley’s application to reopen is denied.

MICHAEL J. CORRIGAN
ADMINISTRATIVE JUDGE

PATRICIA A. BLACKMON, J., CONCURS

FRANK D. CELEBREZZE, JR., J., CONCURS