[Cite as *State v. Hughes*, 2004-Ohio-5480.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 81768

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	AND
	:	OPINION
vs.	:	
	:	
TOMMY HUGHES	:	
	:	
Defendant-Appellant	:	
	:	
	:	
DATE OF JOURNALIZATION	:	OCTOBER 8, 2004
CHARACTER OF PROCEEDINGS	:	Application for Reopening,
	:	Motion No. 357347
	:	Lower Court No. CR-416229
	:	Common Pleas Court
JUDGMENT	:	APPLICATION DENIED.

APPEARANCES:

For plaintiff-appellee: WILLIAM D. MASON
Cuyahoga County Prosecutor
BY: RENEE L. SNOW
Assistant County Prosecutor
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

For defendant-appellant: TOMMY HUGHES, pro se
Inmate No. 433614
Marion Correctional Institution
P. O. Box No. 57
Marion, Ohio 43301-0057

KENNETH A. ROCCO, J.:

{¶ 1} In *State v. Hughes*, Cuyahoga County Court of Common Pleas Case No. CR-416229, applicant, Tommy Hughes, was convicted of robbery. This court affirmed that judgment in *State v. Hughes*, Cuyahoga App. No. 81768, 2003-Ohio-2307. Hughes did not appeal this court's decision to the Supreme Court of Ohio.

{¶ 2} Hughes has filed with the clerk of this court an application for reopening. He asserts that he was denied the effective assistance of appellate counsel because his appellate counsel did not challenge on direct appeal the propriety of the trial court's inclusion of post-release control in his sentence and the propriety of the state's cross-examination regarding his prior convictions. We deny the application for reopening. As required by App.R. 26(B)(6), the reasons for our denial follow.

{¶ 3} Initially, we note that App.R. 26(B)(1) provides, in part: "An application for reopening shall be filed *** within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time." App.R. 26(B)(2)(b) requires that an application for reopening include "a showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment."

{¶ 4} This court's decision affirming applicant's conviction was journalized on May 19, 2003. The application was filed on February 18, 2004, clearly in excess of the ninety-day limit. Hughes argues that there is good cause for the delay in his filing the application because he sought the assistance of the Ohio Public Defender's Office, which was denied by letter dated June 4, 2003. Hughes also argues that the Bureau of Criminal Identification & Investigation did not prepare a copy of his validated criminal history record ("rap sheet") until October 27, 2003. Hughes also states that, in June 2003, he requested a copy of his sentencing entry in the underlying case from the clerk's office.

{¶ 5} "This court and the Supreme Court of Ohio have firmly established that a lack of legal knowledge and lack of legal counsel are not viable grounds for establishing "good cause" for the untimely filing of an application for reopening. *State v. Klein* (Mar. 28, 1991), 1991 Ohio App. LEXIS 1346, Cuyahoga App. No. 58389, unreported, reopening disallowed (Mar. 15, 1994), Motion No. 49260, affirmed (1994), 69 Ohio St.3d 1481, 634 N.E.2d 1027; *State v. Trammell* (July 13, 1995), 1995 Ohio App. LEXIS 2962, Cuyahoga App. No. 67834, unreported, reopening disallowed (Apr. 22, 1996), Motion No. 70493; *State v. Travis* (April 5, 1990), 1990 Ohio App. LEXIS 1356, Cuyahoga App. No. 56825, unreported, reopening disallowed (Nov. 2, 1994), Motion No. 51073, affirmed (1995), 72 Ohio St.3d 317, 649 N.E.2d 1226."

{¶ 6} "Similarly, the lack of transcripts and other legal records does not establish good cause. *State v. Houston* (Jan. 13, 1994), 1994 Ohio App. LEXIS 52, [*4] Cuyahoga App. No. 64574, unreported, reopening disallowed (Feb. 15, 1995), Motion No. 59344; and *State v. Booker* (July 24, 1993), 1993 Ohio App. LEXIS 3196, Cuyahoga App. No. 62841, unreported, reopening disallowed (Dec. 30, 1996), Motion No. 78561."

{¶ 7} *State v. Sanchez* (June 9, 1994), Cuyahoga App. No. 62797, reopening disallowed, 2002-Ohio-2011, Motion No. 36733, at ¶4-5. Likewise, Hughes has failed to demonstrate good cause. The delays resulting from his efforts to contact counsel and acquire various records are not a sufficient basis for establishing good cause for the untimely filing of the application. His failure to demonstrate good cause is a sufficient basis for denying the application for reopening.

{¶ 8} Applicant's request for reopening is also barred by res judicata. "The principles of *res judicata* may be applied to bar the further litigation in a criminal case of issues which were raised previously or could have been raised previously in an appeal. See generally *State v. Perry* (1967), 10 Ohio St.2d 175, 22 N.E.2d 104, paragraph nine of the syllabus. 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* (1992), 63 Ohio St.3d 60, 66, 584 N.E.2d 1204." *State v. Williams* (Mar. 4, 1991), Cuyahoga App. No. 57988, reopening disallowed (Aug. 15, 1994), Motion No. 52164.

{¶ 9} Hughes did not appeal this court's decision to the Supreme Court of Ohio. "The issue of whether appellate counsel provided effective assistance must be raised at the earliest opportunity to do so. *State v. Williams* (1996), 74 Ohio St.3d 454, 659 N.E.2d 1253. In this case, applicant possessed an earlier opportunity to contest the performance of his appellate counsel in a claimed appeal of right to the Supreme Court of Ohio. He did not appeal the decision of this court to the Supreme Court of Ohio and has failed to provide this court with any reason for not pursuing such further appeal and/or why the application of *res judicata* may be unjust. Accordingly, the principles of *res judicata* prevent further review. *State v. Borrero* (Apr. 29, 1996), Cuyahoga App. No. 69289, unreported, reopening disallowed (Jan. 22, 1997), Motion No. 72559." *State v. Bugg* (Oct. 12, 1999), Cuyahoga App. No. 74847, reopening disallowed (Apr. 7, 2000), Motion No. 13465, at 6. Similarly, Hughes has not demonstrated that the application of res judicata is unjust.

{¶ 10} We also deny the application on the merits. Having reviewed the arguments set forth in the application for reopening in light of the record, we hold that applicant has failed to meet his burden to demonstrate 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. Spivey* (1998), 84 Ohio St.3d 24, 1998-Ohio-704, 701 N.E.2d 696, the Supreme Court specified the proof required of an applicant.

{¶ 11} "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 issues 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 he has a 'colorable claim' of ineffective assistance of counsel on appeal."

{¶ 12} Id. at 25. Applicant cannot satisfy either prong of the *Strickland* test. We must, therefore, deny the application on the merits.

{¶ 13} In his first two assignments of error, Hughes complains that his appellate counsel was ineffective for failing to assign as error that the trial court did not comply with the statutory requirements for imposing post-release control. Hughes was convicted of robbery under R.C. 2911.02, a second degree felony. The sentencing entry states: "Post release control is part of this prison sentence for the maximum period allowed for the above felony(s) under R.C. 2967.28." R.C. 2967.28(B)(2) requires that the period of post-release control for a second degree felony is three years. Hughes contends that the trial court did not comply with R.C. 2929.19(B)(3)(e) which requires that the court notify him at sentencing that, if he violates post-release control, the parole board has the authority to impose a prison term for "up to one-half of the stated prison term originally imposed ***." The trial court imposed a sentence of six years and concluded the sentencing hearing by stating: "Sir, upon your release, you will be subjected to post release control for a period of three years."

{¶ 14} Hughes's challenge to the propriety of imposing post-release control is based on his contention that the failure to comply with R.C. 2929.19(B)(3)(e) requires that the case be remanded to the trial court for resentencing. Nevertheless, "there is a difference of opinion, even within this district, on whether an erroneous imposition of post-release should be remanded for correction or whether post-release controls are forever foreclosed. See *State v. Finger*, Cuyahoga App. No. 80691, 2003-Ohio-402, discretionary appeal allowed 99 Ohio St. 3d 1470, 2003-Ohio-3801, 791 N.E.2d 985." *State v. Fisher*, Cuyahoga App. No. 83098, 2004-Ohio-3123, at ¶37. The *Fisher* court ordered that the case be remanded for resentencing after acknowledging that the weight of authority in the district is in favor of remanding for resentencing.

{¶ 15} Yet, for purposes of reviewing an application for reopening, we must consider that appellate counsel had the discretion to determine whether the best strategy was to challenge the imposition of post-release controls. It is well-established that this court may not second-guess appellate counsel's decisions. See, e.g., *State v. Burns* (Aug. 8, 1996), Cuyahoga App. No. 69676, reopening disallowed (Aug. 3, 2000), Motion No. 13052, 8-9. Applicant's first two assignments of error are not, therefore, well-taken.

{¶ 16} During trial, the prosecution cross-examined Hughes regarding his prior convictions. In his third assignment of error, Hughes argues that appellate counsel was ineffective for failing to assign as error trial counsel's failure to object to the use of impeaching evidence without providing notice under Evid.R. 609(B). In his fourth assignment of error, Hughes argues that appellate counsel was ineffective for failing to assign as error trial counsel's failure to object to the state's cross-examination of Hughes regarding his prior convictions for defrauding a livery and tampering with evidence.

{¶ 17} The state observes that, on direct appeal, appellate counsel challenged the propriety of the prosecution's cross-examination of Hughes.

{¶ 18} "We note that Hughes' credibility is central to the jury's evaluation of the evidence in this case: he gave an account of the incident entirely different from that given by the state's witnesses. Therefore, the trial court acted within its discretion when it allowed the state to impeach him by questioning him extensively on his prior convictions as authorized by Evid.R. 609."

{¶ 19} *State v. Hughes*, Cuyahoga App. No. 81768, 2003-Ohio-2307, at ¶38. We agree with the state's contention that res judicata bars applicant's third and fourth assignments of error.

{¶ 20} We also note that Hughes was indeed convicted of both defrauding a livery (*State v. Hughes*, Cuyahoga County Court of Common Pleas Case No. CR-181075) and tampering with evidence (*State v. Hughes*, Cuyahoga County Court of Common Pleas Case No. CR-179468). In

light of this court's determination on direct appeal that the trial court properly exercised its discretion in permitting the cross-examination of Hughes regarding his prior convictions, we cannot conclude that his third and fourth assignments of error provide a sufficient basis for reopening this appeal. As a consequence, applicant has not met the standard for reopening.

{¶ 21} Accordingly, the application for reopening is denied.

KENNETH A. ROCCO
JUDGE

PATRICIA A. BLACKMON, P.J., CONCURS

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