[Cite as *State v. Tell*, 2006-Ohio-3834.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 84790

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	AND
	:	OPINION
vs.	:	
	:	
WILLIAM TELL, AKA PETER WILLIAMSON	:	
Defendant-Appellant	:	
	:	
	:	
DATE OF JOURNALIZATION	:	JULY 25, 2006
CHARACTER OF PROCEEDINGS	:	Application for Reopening,
	:	Motion No.373623
	:	Lower Court No. CR-412538
	:	Common Pleas Court
JUDGMENT	:	APPLICATION DENIED.

APPEARANCES:

For plaintiff-appellee:

WILLIAM D. MASON
Cuyahoga County Prosecutor
BY: JOHN J. GALLAGHER
Assistant County Prosecutor
Justice Center - 9th Floor
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For defendant-appellant:

WILLIAM TELL, pro se
Inmate No. A464-296
Marion Correctional Institution
P.O. Box 57
Marion, Ohio 43301-0057

JUDGE PATRICIA A. BLACKMON:

{¶ 1} On July 12, 2005, Defendant William Tell 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. Tell,* Cuyahoga App. No. 84790, 2005-Ohio-1178. On August 19, 2005, the State of Ohio, through the Cuyahoga County Prosecutor's office, filed its opposition to the application to reopen appeal. For the following reasons, we decline to reopen Tell's 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, Tell possessed a prior opportunity to raise and argue the claim of ineffective assistance of appellate counsel through an appeal to the Supreme Court of Ohio. However, Tell did not file an appeal with the Supreme Court of Ohio and has further failed to provide this court with any valid reason why no appeal was taken. *State v. Hicks* (Oct. 28, 1982), Cuyahoga App. No. 44456, reopening disallowed

reopening disallowed (Apr. 19, 1994), Motion No. 50328, affirmed (Aug. 3, 1994), 70 Ohio St.3d 1408, 637 N.E.2d 6. We further find that applying the doctrine of res judicata to this matter would not be unjust.

{¶ 4} Notwithstanding the above, Tell fails to establish that his appellate counsel was ineffective. "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.

{¶ 5} Additionally, Strickland charges us to "appl[y] a heavy measure of deference to counsel's judgments," 466 U.S. at 91, 104 S.Ct. 2052, 80 L.Ed.2d 674, and to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674. Moreover, we must bear in mind that counsel need not raise every

every possible issue in order to render constitutionally effective assistance. See *Jones v. Barnes*, (1983), 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987; *State v. Sanders* (2002), 94 Ohio St.3d 150, 151-152, 761 N.E.2d 18. After reviewing Tell's proposed assignments of error, we find that he has failed to raise a "genuine issue as to whether he was deprived of the effective assistance of counsel on appeal" as required by App.R. 26(B)(5).

{¶ 6} R.C. 2945.74 provides that a defendant may be convicted of a lesser offense other than the one with which he was formally charged. See also Crim.R. 31(C). In this matter, Tell was indicted for a violation of R.C. 2925.11(C)(3)(e), possession of marijuana in an amount equal to or exceeding 5,000 grams but less than 20,000 grams; and for a violation R.C. 2925.03(C)(3)(e), preparation of drugs for sale in an amount equal to or exceeding 5,000 grams but less than 20,000 grams. However, when the evidence at trial revealed the amount of marijuana involved was 3,925.85 grams, Tell was convicted of possession of marijuana and preparation of drugs for sale in an amount more than 1,000 grams but less than 5,000 grams, in violation of R.C. 2925.11(C)(3)(d) and 2925.03(C)(3)(d), respectively. Since R.C. 2925.11(C)(3)(d) is a lesser included offense of 2925.11(C)(3)(e), and because 2925.03(C)(3)(d) is a lesser included offense of R.C. 2925.03(C)(3)(e), Tell's conviction for those offenses was proper. See *State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294, paragraph three of the syllabus.

{¶ 7} Accordingly, Tell's application to reopen is denied.

PATRICIA A. BLACKMON
PRESIDING JUDGE

JAMES J. SWEENEY, J., CONCURS

COLLEEN CONWAY COONEY, J., CONCURS