[Cite as *State v. Payne*, 2007-Ohio-273.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 86280

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAVAN PAYNE

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 387677
LOWER COURT NO. CR-454348
COMMON PLEAS COURT

RELEASE DATE: January 22, 2007

ATTORNEY FOR PLAINTIFF-APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Kristen L. Sobieski
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEY FOR DEFENDANT-APPELLANT

Javan Payne
Inmate No. 482-676
Belmont Correctional Inst.
P.O. Box 540
St. Clairsville, Ohio 43950-0540

JUDGE MELODY J. STEWART:

{¶1} In *State v. Payne*, Cuyahoga County Court of Common Pleas Case No. CR-454348, applicant, Javan Payne, was convicted of: drug trafficking, R.C. 2925.03; possession of drugs, R.C. 2925.11; and possessing criminal tools, R.C. 2923.24. This court affirmed that judgment in *State v. Payne*, Cuyahoga App. No. 86280, 2006-Ohio-3005.

{¶2} Payne 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 the "state failed to properly inform him of the nature of trafficking in heroin and/or trial counsel delivered ineffective assistance." Application, assignment of error, first

unnumbered page. We deny the application for reopening. As required by App.R. 26(B)(6), the reasons for our denial follow.

{¶3} 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.

> **"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."**
>
> Id. at 25.

{¶4} Payne cannot satisfy either prong of the *Strickland* test.

{¶5} Payne was convicted of selling heroin in an amount equal to or exceeding one hundred unit doses but less than five hundred unit doses which is a second degree felony. R.C. 2925.03(C)(6)(e). On direct appeal, this court summarized the salient facts which led to Payne's conviction.

> **"In the case at bar, the state presented the testimony of a detective who had called defendant on his cell phone and arranged to buy drugs from him. It also presented the testimony of the detective who saw defendant throw the bag of drugs to the ground when the detectives were chasing him in his yard. The amount of drugs, 100 dose units, was exactly the amount that the undercover detective had arranged to buy from defendant immediately prior to the time defendant was leaving his house. This evidence was credible and consistent with everything defendant testified to, for example, the sequence of events, the location of the people and autos, the rooms**

> **searched by the police, and the time and location of the incident, except defendant denied that he had ever had the drugs."**

State v. Payne, Cuyahoga App. No. 86280, 2006-Ohio-3005, at ¶48.

{¶6} In his application for reopening, Payne argues that the "State failed to particularize element of 'unit dose', and denied Applicant due process in evading burden of proving such element beyond a reasonable doubt." Application, first unnumbered page. R.C. 2925.01(E) provides:

> **""Unit dose" means an amount or unit of a compound, mixture, or preparation containing a controlled substance that is separately identifiable and in a form that indicates that it is the amount or unit by which the controlled substance is separately administered to or taken by an individual."**

{¶7} Payne argues that the state never proved the "amount or unit" which is "separately administered to or taken by an individual." Payne also contends that his trial counsel was ineffective for failing to force the state to prove the "unit dose" element of the charge.

{¶8} Yet, this court observed on direct appeal that "no guesswork is required to determine what constitutes one unit dose of heroin." *Payne*, supra, at ¶10. As quoted above, this court concluded that the record reflected that the bag of drugs thrown by Payne contained 100 dose units. Separately, this court also determined that the evidence against Payne was "overwhelming." *Payne*, supra, at ¶31.

{¶9} We cannot conclude that appellate counsel was ineffective or that Payne was prejudiced by appellate counsel's conduct. On direct appeal, this court extensively reviewed the record and determined that the judgment of conviction was

not against the manifest weight of the evidence. Payne has not demonstrated that he had a reasonable probability of being successful on direct appeal if his appellate counsel had raised the issues which Payne raises in his application for reopening. He has, therefore, 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).

{¶10} Payne'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.

{¶11} Payne 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. Applicant 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.

{¶12} As is discussed above, on direct appeal, this court concluded that the evidence against Payne was "overwhelming." *Payne*, supra, at ¶31. Under the circumstances, we must now conclude that the application of res judicata is not unjust.

{¶13} As a consequence, Payne has not met the standard for reopening. Accordingly, the application for reopening is denied.

MELODY J. STEWART, JUDGE

JAMES J. SWEENEY, P.J., and
SEAN C. GALLAGHER, J., CONCUR