[Cite as *State v. Barb*, 2009-Ohio-2576.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90768

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DANNY BARB

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 418872
LOWER COURT NO. CR-500671
COMMON PLEAS COURT

RELEASE DATE: June 2, 2009

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CHRISTINE T. MCMONAGLE, J.:

{¶ 1} Danny Barb has filed a timely application for reopening pursuant to App.R. 26(B). Barb is attempting to reopen the appellate judgment that was rendered in *State v. Barb*, Cuyahoga App. No. 90768, 2008-Ohio-5877, which affirmed his conviction for the offense of felonious assault. For the following reasons, we decline to reopen Barb's original appeal.

{¶ 2} In order to establish a claim of ineffective assistance of appellate counsel, Barb must demonstrate that appellate counsel's performance was deficient and that but for his deficient performance 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. In

order for this court to grant an application for reopening, Barb must establish that "there is a genuine issue as to whether he was deprived of the assistance of counsel on appeal." App.R. 26(B)(5).

{¶ 3} "In *State v. Reed* [supra, at 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 was 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 he has a 'colorable claim' of ineffective assistance of counsel on appeal."

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

{¶ 5} It is also 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, 77 L.Ed.2d 987, 103 S.Ct. 3308. Appellate counsel cannot be considered ineffective for failing to raise every conceivable assignment of error on appeal. *Jones v. Barnes*, supra; *State v. Grimm*, 73 Ohio St.3d 413, 1995-Ohio-24, 653 N.E.2d 253; *State v. Campbell*, 69 Ohio St.3d 38, 1994-Ohio-492, 630 N.E.2d 339.

{¶ 6} In *Strickland v. Washington,* supra, the United States Supreme Court also stated that a court's scrutiny of an attorney's work must be deferential. The court further stated that it is too tempting for a defendant/appellant to second-guess his attorney after conviction and appeal and that it would be all to easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Accordingly, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689. Finally, the United States Supreme Court has upheld the appellate attorney's discretion to decide which issues he or she believes are the most fruitful arguments and the importance of winnowing out weaker arguments on appeal and focusing on one central issue or at most a few key issues. *Jones v. Barnes*, supra.

{¶ 7} In support of his claim of ineffective assistance of appellate counsel, Barb raises six proposed assignments of error:

{¶ 8} 1) "Appellate Counsel was ineffective not raising that the Due Process Clause embodied in the Sixth and Fourteenth Amendments prohibits a trial court to use a motion from disqualified counsel to toll the speedy trial statutory right and constitutional right to speedy trial.";

{¶ 9} 2) "Appellate counsel was ineffective not raising that the trial court acted without color of authority in continuance of pretrial dates sua sponte beyond the constitutional and statutory right of speedy trial protected in the Sixth Amendment.";

{¶ 10} 3) "Appellate counsel was ineffective not raising that disqualified motion for discovery does not toll the speedy trial right secured through statutory law and the Sixth Amendment in the United States Constitution.";

{¶ 11} 4) "Appellate counsel was ineffective not raising that prosecution made no competent showing to rebut the presumption of innocence secured in law and the Fourteenth Amendment.";

{¶ 12} 5) "Appellate counsel was ineffective not raising that prosecution omitted to prove the mens rea of felonious assault to secure a conviction under the Thirteenth and Fourteenth Amendment of the United States constitution.";

{¶ 13} 6) "Appellate counsel was ineffective not raising that appellant never received the right of effective assistance of trial counsel guaranteed in the Sixth Amendment." and

{¶ 14} 7) "Appellate counsel acted against required duty under the Ohio Rules of Professional Conduct."

{¶ 15} Barb's first three proposed assignments of error deal with the issue of speedy trial and are barred from further review, since errors of law that were previously raised on appeal are barred from further review by the doctrine of res judicata. See, generally, *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104,

paragraph one of the syllabus. 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. *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204.

{¶ 16} In the case sub judice, the issue of speedy trial was raised through Barb's first assignment of error, as argued on appeal. This court held that:

{¶ 17} "Pursuant to R.C. 2945.72(E), the speedy trial time is extended for any period of delay necessitated by a motion filed by the defendant. Requests of discovery are tolling events under this provision. * * *However, we find that a thirty-day response period was reasonable, thus tolling the speedy trial clock until October 20, 2007. Even without attributing any other delays to appellant for purposes of calculating his speedy trial time, the commencement of trial on November 27, 2007 was well within the ninety-day period allowed by R.C. 2945.71(C)(2) and (E). Therefore, we overrule the first assignment of error."

{¶ 18} *State v. Barb*, supra, at ¶9.

{¶ 19} Thus, we are prevented from considering Barb's first, second, and third proposed assignments of error.

{¶ 20} Barb's fourth and fifth proposed assignments of error deal with the issues of manifest weight of the evidence and sufficiency of the evidence vis-a-vis his conviction for the offense of felonious assault. The issues of manifest weight and sufficiency of the evidence were previously raised and addressed upon direct appeal

through Barb's second assignment of error. This court found that the evidence was sufficient to prove felonious assault beyond a reasonable doubt and that the jury did not loose its way in finding Barb guilty of the offense of felonious assault. See *State v. Barb*, supra, at ¶10. Once again, the doctrine of res judicata prevents this court from considering Barb's fourth and fifth proposed assignments of error.

{¶ 21} Barb, through his sixth and seventh proposed assignments of error, has failed to raise a genuine issue as to whether he was deprived of the effective assistance of appellate counsel, as required by App.R. 26(B)(5). As stated previously, Barb's appellate counsel possessed the necessary discretion to decide which issues were most fruitful and should be raised on appeal. *Jones v. Barnes*, supra. In addition, consideration of Barb's sixth and seventh proposed assignments of error would not have resulted in a reversal of Barb's conviction for the offense of felonious assault. Thus, Barb was not deprived of the guarantee of effective assistance of appellate counsel. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164.

{¶ 22} Accordingly, Barb's application for reopening is denied.

CHRISTINE T. MCMONAGLE, JUDGE

SEAN C. GALLAGHER, P.J., and
MELODY J. STEWART, J., CONCUR