[Cite as *State v. Baumgartner*, 2009-Ohio-4358.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 89190, 91207, and 91208

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ELSEBETH BAUMGARTNER

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 422749
LOWER COURT NOS. CR-470184 and 478555
COMMON PLEAS COURT

RELEASE DATE: August 24, 2009

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KENNETH A. ROCCO, P.J. :

{¶ 1} Elsebeth Baumgartner has filed a timely application for reopening pursuant to App.R. 26(B). Baumgartner is attempting to reopen the appellate judgement that was rendered in *State v. Baumgartner*, Cuyahoga App. Nos. 89190, 91207, and 91208, 2009-Ohio-624, which affirmed her pleas of no contest to ten counts of intimidation, four counts of retaliation, and the resulting aggregate sentence of eight years of imprisonment. For the following reasons, we decline to reopen Baumgartner's appeal.

{¶ 2} This court, through App.R. 26(B), may reopen an appeal based upon a claim of ineffective assistance of appellate counsel. In order to establish a claim of ineffective assistance of appellate counsel, Baumgartner must demonstrate that appellate counsel's performance was deficient and that but for the deficient performance, the result of her 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, Baumgartner must establish that "there is a genuine issue as to whether she 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." *State v. Spivey*, 84 Ohio St.3d 24, 1998-Ohio-704, 701 N.E.2d 696, at 25.

{¶ 4} 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.

{¶ 5} 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 too 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 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.

{¶ 6} In the case sub judice, Baumgartner has raised eight proposed assignments of error, which allegedly should have been raised on appeal and would have resulted in a reversal of her conviction and sentence of incarceration. This court, however, will not address Baumgartner's sixth and seventh proposed assignments of error, which are not contained within the ten page limitation as established by App.R. 26(B)(4). *State v. Graham*, 71 Ohio St.3d 331, 1994-Ohio-60, 643 N.E.2d 1097. See, also, *State v. Stovall* (Jan. 22, 1998), Cuyahoga App. No. 72149, reopening disallowed (Feb. 10, 1999), Motion No. 98564; *State v. Scott* (Apr. 17, 1995), Cuyahoga App. No. 66846, reopening disallowed (Mar. 5, 1998), Motion No. 80072; *State v. Rogers* (Apr. 2, 1992), Cuyahoga App. No. 60254, reopening disallowed (Sept. 29, 1998), Motion No. 93571. Accordingly, we strike the portion of Baumgartner's brief, which exceeds the

ten page limitation and contains her sixth and seventh proposed assignments of error.

{¶ 7} Baumgartner's initial proposed assignment of error is that:

> "Appellant's sentences in 470-184 and 478-555 are contrary to law and constitute cruel and unusual punishment under the Eighth Amendment to the United States Constitution and violate double jeopardy under the Fifth Amendment to the United States Constitution because the eight year sentence is comprised of multiple punishment for a single act and is in retaliation for exercising her First Amendment rights to comment on government and matters of public concern and petition for redress of grievances and or [sic] based on her race, gender, ethnicity, and religious beliefs in violation of Appellant's rights under the First Amendment and equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution."

{¶ 8} Baumgartner, through her first proposed assignment of error, argues that the sentence imposed by the trial court constituted cruel and unusual punishment, a violation of the Eighth Amendment to the United States Constitution. Baumgartner also argues that all offenses should have merged together for the purpose of sentencing. Contrary to Baumgartner's argument, we find that the imposition of a sentence of eight years, with regards to ten counts of intimidation and four counts of retaliation, is not grossly disproportionate to the aggregate nature of her crimes and is not shocking to a reasonable person and to the community's

sense of justice. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124; *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073; *State v. Walker*, Cuyahoga App. No. 89892, 2008-Ohio-4231.

In addition, the ten counts of intimidation and the four counts of retaliation were separate and distinct acts, which are not subject to merger for sentencing under R.C. 2941.25. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625; *State v. Blanchard*, Cuyahoga App. No. 90935, 2009-Ohio-1357. Thus, Baumgartner's initial proposed assignment of error does not demonstrate prejudicial error.

{¶ 9} Baumgartner's second proposed assignment of error is that:

> "Appellant's No Contest Pleas to all counts in 470-184 and 478-555 wer [sic] not knowingly voluntarily and intelligently made in violation of her rights under the due process clause of the Fourteenth Amendment to the United States Constitution and Art I. Section 16 of the Ohio Constitution because the Court breached the terms of the plea by adding non negotiated conditions to the Appeal bond and Appellant believed the right to challenge the sufficiency of the proffers was a term of her plea agreement."

{¶ 10} Baumgartner, through her second proposed assignment of error, argues that she did not enter knowing, voluntary and intelligent pleas of no contest to ten counts of intimidation and four counts of retaliation. Baumgartner's second proposed assignment of error was previously raised

and addressed through the third assignment of error as raised on appeal. Thus, consideration of Baumgartner's second proposed assignment of error is barred by the doctrine of res judicata. *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204; *State v. Perry* (1967), 10 Ohio St.3d 175, 226 N.E.2d 104.

{¶ 11} Baumgartner's third proposed assignment of error is that:

> "Appellant was denied effective representation of counsel and her right to a fair trial in violation of the Sixth Amendment of the United States Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment by the seizure and destruction of her legal computer which contained attorney client and work product protected material by the state and the destruction of her website as part of a plea agreement with her co-defendant with the approval of the trial court judge and her rights under the Fourth Amendment to the United States Constitution and under Article 4 Article I of the Ohio Constitution to be free from unreasonable searches and seizures were violated by the February 1, 2006 search of her residence and the trial court erred in denying her motion to suppress the evidence seized."

{¶ 12} Baumgartner, through her third proposed assignment of error, argues that the trial court erred by denying her motion to suppress evidence. Baumgartner, however, does not offer any analysis as to why the trial court erred by denying her motion to suppress and makes no reference to the record of the hearing as conducted with regard to her motion to suppress. Thus, Baumgartner does not demonstrate how her

appellate counsel was deficient or how she was prejudiced by the trial court's denial of her motion to suppress. *State v. Lawson*, Cuyahoga App. No. 90589, 2008-Ohio-5590, reopening disallowed (Jan. 16, 2009), Motion No. 415561; *State v. Braun*, Cuyahoga App. No. 88336, 2008-Ohio-5980, reopening disallowed (Nov. 19, 2008), Motion Nos. 403934 and 413177; *State v. Hooks*, Cuyahoga App. No. 88713, 2008-Ohio-33346, reopening disallowed (July 1, 2008), Motion No. 404987.

{¶ 13} Having a common basis in law and fact, we shall simultaneously consider Baumgartner's fourth and fifth proposed assignments of error.

{¶ 14} Baumgartner's fourth proposed assignment of error is that:

> "RC 2921.03, 2921.04 and 2921.05 are content based, overbroad and vague in violation of the First Amendment to the United States Constitution and Article I Section 11 and 16 of the Ohio Constitution facially and as applied because they unlawfully target a particular viewpoint and reach a substantial amount of constitutionally protected conduct in the areas of speech, press, association, conscience and the right to petition for redress of grievances."

{¶ 15} Baumgartner's fifth proposed assignment of error is that:

> "R.C 2921.03, R.C. 2921.04 (B) and R.C. 2921.05 are void for vagueness under the due process clause."

{¶ 16} Baumgartner, through her fourth and fifth proposed assignments of error, argues that the offenses of intimidation, intimidation

of an attorney, victim or witness in a criminal case, and retaliation are overbroad and vague and violate her rights under the United States Constitution. This argument was previously raised on appeal through Baumgartner's fifth, sixth, seventh and eighth assignments of error. We previously found that the charged offenses of intimidation and retaliation were not overbroad, not vague and did not violate the United States Constitution. Further review is barred by the doctrine of res judicata. *State v. Murnahan*, supra; *State v. Braun*, supra.

{¶ 17} Baumgartner's eighth proposed assignment of error is that:

> "The Trial Court's findings of guilt upon entry of a No Contest plea was an abuse of discretion because the Indictments contained no facts and elements were specifically negated by the explanation proffered in violation of the due process and equal protection clauses to in the Fourteenth Amendment to the US Constitution and Ohio's differing standards of appellate review for misdemeanor and felony no contest pleas and Federal Crim R. 11. Violate the due process/equal protection clauses of the 14th Amendment."

{¶ 18} Baumgartner, through her eighth proposed assignment of error, argues that her pleas of no contest and resulting findings of guilt were void based upon insufficient proffers as made by the State and improper venue. Once again, we are prohibited from addressing Baumgartner's eighth proposed assignment of error vis-a-vis the doctrine of res judicata. The

issues of insufficient proffer by the State and improper venue were previously raised on appeal through her first and second assignments of error. Having previously found no error associated with the issue of insufficient proffers and venue, we are once again prohibited from reviewing the identical issues upon application of the doctrine of res judicata.

{¶ 19} Herein, Baumgartner has failed to present any proposed assignments of error that demonstrate ineffective assistance of appellate counsel. Baumgartner 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. Accordingly, we decline to reopen Baumgartner's original appeal.

{¶ 20} Application for reopening is denied.

KENNETH A. ROCCO, PRESIDING JUDGE

CHRISTINE T. MCMONAGLE, J., and
MARY J. BOYLE, J., CONCUR