[Cite as *State v. Barnes*, 2009-Ohio-4874.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90842

STATE OF OHIO

APPELLEE

vs.

FRANKLIN BARNES

APPELLANT

JUDGMENT:
APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 417917
CUYAHOGA COUNTY COMMON
PLEAS COURT NO. CR-498406

RELEASE DATE: September 14, 2009

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MARY EILEEN KILBANE, J.:

{¶ 1} In *State v. Barnes*, Cuyahoga County Court of Common Pleas Case No. CR-498406, applicant, Franklin Barnes, was convicted of two counts of domestic violence and one count of assault. This court affirmed that judgment in *State v. Barnes*, Cuyahoga App. No. 90842, 2008-Ohio-5997.

{¶ 2} Barnes 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 assign as error that: he was not provided discovery; his trial counsel was ineffective; he was not given the

opportunity to confront a witness; and the record did not demonstrate that his relationship with the victims met the criteria for domestic violence. We deny the application for reopening. As required by App.R. 26(B)(6), the reasons for our denial follow.

{¶ 3} Having reviewed the arguments set forth in the application for reopening in light of the record, we hold that Barnes 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*, 84 Ohio St.3d 24, 1998-Ohio-704, 701 N.E.2d 696, the Ohio 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. Applicant cannot satisfy either prong of the *Strickland* test. We must, therefore, deny the application on the merits.

{¶ 4} In his first proposed assignment of error, Barnes contends that his appellate counsel did not raise unspecified discovery issues on appeal. Barnes does not refer to any part of the record as the basis for his contention. He merely quotes Crim.R. 16(C)(1)(a) and (b) without making argument. In *State v. Price*, Cuyahoga App. No. 90308, 2008-Ohio-3454, reopening disallowed, 2009-Ohio-3503, the applicant "merely cite[d] two federal circuit court cases without additional argument or reference to the record." Id. at ¶21. We further observed that this court had previously held that the mere recitation of assignments of errors does not satisfy an applicant's burden to demonstrate that appellate counsel was deficient and that the applicant was prejudiced. In *Price*, therefore, we held that Price failed to meet his burden to maintain the proposed assignment of error. Id.

{¶ 5} Similarly, Barnes has failed to meet his burden with respect to the first proposed assignment of error. He has not cited to any portion of the record which substantiates his assertion that he was denied discovery. In fact, the record reflects that the state filed a bill of particulars. Rec. No. 15. Additionally, although he quotes a portion of Crim.R. 16, he does not make any argument. As a consequence, his first proposed assignment of error does not provide a basis for reopening.

{¶ 6} In his second proposed assignment of error, Barnes contends that his appellate counsel did not assign as error "that the trial court fail [sic] to

promulgate [sic] witness for trial, and he was not given the opportunity to face his accuser." Application, at unnumbered 4. Indeed, one of the victims of domestic violence did not testify at trial. Nevertheless, Barnes does not indicate where in the record evidence was introduced which violated his right to confront a witness against him. He also does not identify where in the record there is an objection to the introduction of that evidence. Likewise, he does not provide this court with any authority for the proposition that a victim must testify in order for the state to maintain a conviction. Rather, he merely quotes portions of Crim.R. 15 regarding witness depositions and use of depositions at trial. Again, Barnes has not met his burden under *Strickland*. See *Price*, supra. As a consequence, his second proposed assignment of error does not provide a basis for reopening.

{¶ 7} In his third proposed assignment of error, Barnes contends that his appellate counsel did not assign as error that his trial counsel was ineffective and "failed to motion [sic] the court for a competency hearing for the defendant." Application, at unnumbered 5. Although the trial court granted a continuance for "discovery of medical information as to defendant's mental health diagnosis for eligibility for mental health court docket," Rec. No. 3, Barnes does not indicate that a motion for competency hearing was filed in the trial court.

{¶ 8} In *State v. Ford*, Cuyahoga App. No. 84138, 2004-Ohio-5610, reopening disallowed, 2005-Ohio-2314, the applicant's trial counsel had told the trial court at the plea hearing and before Ford entered his plea that "there's a

question of the defendant's mental health." Id. at ¶5 quoting the *Ford* opinion on direct appeal. 2004-Ohio-5610, at ¶19. Ford's trial counsel did not file a motion or orally request a hearing on the issue of competency and, therefore, waived any objection. This court held that the absence of a request for a hearing on Ford's competency did not constitute plain error and observed that "the record contains nothing to suggest any indicia of incompetence requiring a competency hearing." 2004-Ohio-5610, at ¶24.

{¶ 9} In this case, Barnes acknowledges that trial counsel did not file a motion for a competency hearing. Yet, as was the case in *Ford*, supra, he does not identify where the record reflects "any indicia of incompetence requiring a competency hearing." Id. As a consequence, his third proposed assignment of error does not provide a basis for reopening.

{¶ 10} In his fourth, fifth, and sixth proposed assignments of error, Barnes contends that his appellate counsel did not assign as error that there is not sufficient evidence in the record to convict him of domestic violence. Barnes was convicted of two counts of domestic violence. A woman and her son, respectively, were the victims. Barnes argues that he did not have the kind of relationship with either victim that would fulfill the elements of domestic violence under R.C. 2919.25. On direct appeal, Barnes's counsel raised the same issue.

{¶ 11} "Barnes contends that the State failed to prove that [S.] cohabited with him as a 'person living as a spouse.' We disagree.

{¶ 12} "The State presented evidence that Barnes and [S.] had dated for 18 months and for four months prior to the incident, she lived with him in his house. Evidence was also presented that [S.'s] son lived in the house for three weeks prior to the incident. Barnes himself, at one point, admitted to such. Evidence was also presented that Barnes and [S.'s] relationship was sexual and there was some shared familial responsibility,[1] again, points that were established by Barnes's own testimony.

{¶ 13} "On this record, both the weight and sufficiency of the evidence support Barnes's convictions." *State v. Barnes*, Cuyahoga App. No. 90842, 2008-Ohio-5997, at ¶24-26.

{¶ 14} Clearly, on direct appeal, this court decided the issues regarding the relationship between Barnes and the victims in the two domestic violence counts. "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*

[1] "Sharing of familial responsibility and consortium are necessary to establish cohabitation." See *State v. Williams*, 79 Ohio St.3d 459, 465, 1997-Ohio-79, 683 N.E.2d 1126.

(Mar. 4, 1991), Cuyahoga App. No. 57988, reopening disallowed (Aug. 15, 1994), Motion No. 52164, quoted with approval in *State v. Logan*, Cuyahoga App. No. 88472, 2008-Ohio-1934, at ¶4. Barnes has not presented to this court any basis for concluding that the application of res judicata would be unjust. As a consequence, his fourth, fifth, and sixth proposed assignments of error do not provide a basis for reopening.

{¶ 15} App.R. 26(B) provides, in part:

{¶ 16} "(2) An application for reopening shall contain all of the following:

{¶ 17} "* * *

{¶ 18} "(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record * * *."

{¶ 19} The application includes an affidavit by Barnes and the substantive portion of the affidavit merely provides "that the statements made herein are true as he verily believes." This court has previously held that comparable affidavits are not sufficient to comply with App.R. 26(B)(2)(d). See, e.g., *State v. Day*, Cuyahoga App. No. 79368, 2002-Ohio-669, reopening disallowed, 2005-Ohio-281, at ¶7 (an affidavit merely stating "that the facts set forth in the Motion for Delayed Application for Reopening of Appeal are true and correct to the best of

my personal knowledge" did not comply with App.R. 26(B)(2)(d) and provided a sufficient basis for denying the application for reopening). See, also, cases cited in *Day*, supra, at ¶7, for similar language which did not comply with App.R. 26(B)(2)(d). We must, therefore, conclude that the affidavit accompanying the application in this case does not comply with App.R. 26(B)(2)(d). Barnes's failure to comply with App.R. 26(B)(2)(d) provides another basis for denying the application for reopening.

{¶ 20} Barnes has not met the standard for reopening. Accordingly, the application for reopening is denied.

MARY EILEEN KILBANE, PRESIDING JUDGE

CHRISTINE T. MCMONAGLE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR

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