

[Cite as *State v. Moats*, 2009-Ohio-5350.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91646

STATE OF OHIO

APPELLEE

VS.

CHARLES E. MOATS

APPELLANT

**JUDGMENT:
APPLICATION DENIED**

APPLICATION FOR REOPENING
MOTION NO. 425890
CUYAHOGA COUNTY COMMON
PLEAS COURT NO. CR-506052

RELEASE DATE: October 7, 2009

ATTORNEYS FOR APPELLEE

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FOR APPELLANT

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JUDGE MARY J. BOYLE:

{¶ 1} Appellant, Charles E. Moats, has 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. Moats*, Cuyahoga App. No. 91646, 2009-Ohio-3063. In that opinion, we affirmed defendant's convictions for operating a motor vehicle while under the influence of alcohol. For the below stated reasons, we decline to reopen Moat's original appeal.

{¶ 2} To establish a claim of ineffective assistance of appellate counsel, the applicant must demonstrate that counsel's performance was deficient and that deficiency prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 688, 80 L.Ed.2d 674, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, cert. denied (1990), 497 U.S. 1011, 110 S.Ct. 3258.

{¶ 3} In *Strickland*, the United States Supreme Court stated that a court's scrutiny of an attorney's work must be highly deferential. The court further stated that it is too tempting for a defendant to second-guess his attorney after conviction 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." *Strickland*, 104 S.Ct. at 2065.

{¶ 4} In regard to claims of ineffective assistance of appellate counsel, 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. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue, if possible, or at most on a few key issues." *Jones v. Barnes*

(1983), 463 U.S. 745, 77 L.Ed.2d 987, 103 S.Ct. 3308. Additionally, appellate counsel is not required to argue assignments of error which are meritless. *Barnes*, supra.

{¶ 5} In his application, Moats asserts two proposed assignments of error: The trial court erred in denying his Crim.R. 15 motion for deposition of an expert and that his trial counsel was ineffective. However, in his direct appeal, Moats proposed the following assignments of error: The trial court erred in denying the appellant's Criminal Rule 15 motion for deposition of his expert for use at trial; and Appellant's convictions must be reversed as he was deprived of effective assistance of legal counsel at trial where the court excluded his doctor's testimony.

{¶ 6} Since the same issues were raised and addressed by this court on direct appeal, we find that 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. Since

Moats’s current arguments are identical to the issues raised on direct appeal, we do not find that applying the principles of res judicata would be unjust.

{¶ 7} Accordingly, based upon the above reasons, [we deny the application to reopen.](#)

MARY J. BOYLE, JUDGE

CHRISTINE T. MCMONAGLE, P.J., and
ANN DYKE, J., CONCUR