**[Cite as *State v. McGee*, 2009-Ohio-6637.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
**No. 91638**

## STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

## BELVIN MCGEE

DEFENDANT-APPELLANT

**JUDGMENT:**
**APPLICATION DENIED**

Application for Reopening
Motion No. 426710
Cuyahoga County Common Pleas Court
Case No. CR-383003

**RELEASE DATE:** December 11, 2009

**ATTORNEYS FOR APPELLEE**

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PATRICIA A. BLACKMON, J.:

**{¶ 1}** Belvin McGee has filed a timely application for reopening pursuant to App.R. 26(B). McGee is attempting to reopen the appellate judgment, as journalized on August 3, 2009, in *State v. McGee*, Cuyahoga App. No. 91638, 2009-Ohio-3374, that affirmed the trial court's refusal to vacate his plea of guilty to multiple charges of rape and gross sexual imposition. For the following reasons, we decline to reopen McGee'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, McGee must demonstrate that appellate counsel's performance was deficient and that but for the deficient performance, the result of his appeal would have been different.[1] In order for this court to grant an application for reopening, McGee 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."[2]

**{¶ 4}** It is also well settled that appellate counsel is not required to raise and argue assignments of error that are meritless.[3] Appellate counsel cannot be

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[1] *State v. Reed*, 74 Ohio St.3d 534, 1996-Ohio-21, 660 N.E.2d 456.

[2] *State v. Spivey*, 84 Ohio St.3d 24, 1998-Ohio-704, 701 N.E.2d 696, at 25.

[3] *Jones v. Barnes* (1983), 463 U.S. 745, 77 L.Ed.2d 987, 103 S.Ct. 3308.

considered ineffective for failing to raise every conceivable assignment of error on appeal.[4]

**{¶ 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 an 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."[5] 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.[6]

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[4]*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]*Id.* at 689.

[6]*Jones v. Barnes*, supra.

**{¶ 6}** In support of his claim of ineffective assistance of appellate counsel, McGee raises two proposed assignments of error, that should have been raised on direct appeal. McGee, through his initial proposed assignment of error, argues that the trial court improperly applied the doctrine of res judicata to his pre-sentence motion to withdraw his plea of guilty pursuant to Crim.R. 32.1 vis-a-vis a void judgment. The issue of the trial court's denial of McGee's motion to withdraw his guilty pleas, however, was previously addressed upon direct appeal through the assignment of error as raised by counsel and the six pro se assignments of error as independently raised and argued by McGee. This court, in the underlying appeal, addressed the issues of McGee's numerous motions to withdraw his pleas of guilty, a void judgment, and the doctrine of res judicata. We previously held that:

**{¶ 7}** "McGee's primary argument on appeal is that the court erred by failing to follow Sarkozy and permit withdrawal of the plea. The state argues that we need not apply Sarkozy because principles of res judicata barred McGee from raising the validity of his guilty plea in a successor motion to vacate the guilty plea. * * *

**{¶ 8}** "The distinction between a void sentence and an invalid guilty plea is important in this case when principles of res judicata are applied. Res judicata bars the assertion of claims from a valid, final judgment of conviction

that have been raised or could have been raised on direct appeal. *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus. As we noted in Case No. 89133, principles of res judicata do not apply to void sentences because, by definition, a void sentence means that no final judgment of conviction has been announced. The void nature of McGee's sentence meant that his original sentence was a nullity -- the net effect being that he was not sentenced. We therefore ordered, pursuant to Bezak, that McGee be re-sentenced due to the court's failure to mention postrelease control in his original sentence. See *McGee*, 2007-Ohio-6655, at ¶17-18.

**{¶ 9}** "This court though, among many others, has applied res judicata to bar the assertion of claims in a motion to withdraw a guilty plea that were, or could have been, raised at trial or on direct appeal. *State v. Robinson*, Cuyahoga App. No. 85266, 2005-Ohio-4154, at ¶11; *State v. Totten*, Franklin App. No. 05AP-278 and 05AP-508, 2005-Ohio-6210 (collecting cases). * * *

**{¶ 10}** "We affirmed McGee's conviction on direct appeal in 2001, specifically rejecting a Crim.R. 11 challenge based on the trial court's alleged failure to correctly inform him of his parole eligibility. He could have, but did not, raise an issue relating to the imposition of postrelease control in that direct appeal. During the period following our affirmation of his guilty pleas, we have steadfastly applied res judicata to reject McGee's repeated attempts to vacate his

guilty plea. Under the authority of *Special Prosecutors*, the trial court simply had no authority to vacate that which we had affirmed in *State v. McGee*, Cuyahoga App. No. 77463.

**{¶ 11}** "* * *

**{¶ 12}** "When considering McGee's motion to withdraw his guilty plea, the court did not state which standard it used when ruling on that motion. The supreme court's remand in Boswell arguably would suggest that we do the same; that is, remand this matter to the trial court to ensure consideration of the motion as a presentence motion. However, Boswell had no occasion to consider the impact of res judicata on previously resolved questions on the validity of a guilty plea. Id. at ¶11, 906 N.E.2d 422. Given our finding under *Special Prosecutors* that the trial court had no authority to vacate a guilty plea that we had previously affirmed, a Boswell issue relating to whether the trial court used the correct standard for reviewing a motion to withdraw a guilty plea is not a concern. The court had no authority to grant the motion to vacate the guilty plea in the first instance, so any discussion concerning the standard of review it may have employed is immaterial. We therefore overrule the assigned error, as well as the first, second, third, and sixth pro se assignments of error." [7]

[7] *State v. McGee*, supra, at 4.

**{¶ 13}** Errors of law that were previously raised on appeal are barred from further review by the doctrine of res judicata.[8] 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.[9] Thus, we are prevented from considering McGee's first proposed assignment of error.

**{¶ 14}** McGee, through his second proposed assignment of error, argues that his plea of guilty was defective, since the terms of the plea agreement were breached. Specifically, McGee argues that "* * * he was to serve only ten full years on the various counts and [be] eligible for parole [in] December of 2009."

**{¶ 15}** The issue of the time frame for parole eligibility and a knowing, intelligent and voluntary plea was previously raised and found to be without merit in *State v. McGee*, Cuyahoga App. No. 77463, 2001-Ohio-4238.

**{¶ 16}** "Appellant first argues that his plea was not made knowingly, intelligently, and voluntarily because he was misinformed that he would be eligible for parole in ten (10) years. The appellant discovered at sentencing he would be eligible for parole in eighteen years instead of ten. * * *

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[8]See, generally, *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph one of the syllabus.

[9]*State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204.

**{¶ 17}** "Under Crim.R. 11(C), there is no specific requirement that the court must inform the defendant about his eligibility for parole. Further, a convicted defendant does not have a conditional right to a conditional release prior to the expiration of a valid sentence. *State v. Moody* (Mar. 16, 1998), Pickaway No. 97 CA 13, unreported, citing *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex* (1979), 422 U.S. 1, 99 S.Ct. 2100.

**{¶ 18}** "In the case at bar, the record does not indicate the appellant was misinformed by the trial court. The appellant was informed he would become eligible for parole on the charge of forcible rape after ten years of incarceration, which was an accurate statement. The appellant alleges he was not informed about the consequences of his plea in regard to the imposition of consecutive eight-year sentences on the attempted rape charge. Therefore, he alleges that his plea was not made knowingly and intelligently. * * *

**{¶ 19}** "Therefore, the trial court's failure to inform the appellant of the effect that a definite term of incarceration may have on his parole eligibility when run consecutive to a life sentence cannot be seen as a violation of Crim.R. 11(C). Appellant's first assignment of error is without merit."[10]

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[10]Id. at 3.

**{¶ 20}** In addition, the identical issue of a defective plea of guilty was addressed in McGee's first App.R. 26(B) application for reopening as filed on November 9, 2004. This court held that:

**{¶ 21}** "In his first [proposed] assignment of error, McGee claims that he was denied the effective assistance of appellate counsel because his appellate counsel did not assign as error that the judgment of conviction is void due to trial counsel's purportedly entering into a plea agreement that McGee would be eligible for parole in ten years. * * * A review of the transcript does not support McGee's characterization, however. In fact, his counsel made the following statement during the plea hearing: "It's my understanding that he is eligible for parole and I emphasize the term 'eligible' after serving ten full years on these various counts." Tr. at 239. McGee has not identified anywhere in the record which reflects that the participants in the trial court proceedings attempted to determine when McGee would be released on parole.

**{¶ 22}** "Additionally, as the state observes, on direct appeal this court observed that McGee was accurately informed regarding when he would become eligible for parole. *State v. McGee*, Cuyahoga App. No. 77463, 2001-Ohio-4238, at 5. McGee has not demonstrated that his appellate counsel was deficient or that

he was prejudiced by the absence of this error on direct appeal. As a consequence, McGee's first [proposed] assignment of error is not well-taken."[11]

**{¶ 23}** Once again, the doctrine of res judicata prevents the reopening of McGee's appeal as premised upon his second proposed assignment of error. Thus, we decline to reopen McGee's appeal.

Application denied.

PATRICIA A. BLACKMON, JUDGE

CHRISTINE T. MCMONAGLE, P.J., and
LARRY A. JONES, J., CONCUR

[11]*State v. McGee*, Cuyahoga App. No. 77463, 2001-Ohio-4238, reopening disallowed, 2005-Ohio-3553, Motion No. 365720, at 2.