**[Cite as *State v. Pratt*, 2010-Ohio-4998.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
**No. 93123**

## STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

## ELBERT PRATT

DEFENDANT-APPELLANT

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

Application for Reopening
Motion No. 434932
Cuyahoga County Common Pleas Court
Case No. CR-518042

**RELEASE DATE:** October 12, 2010

**FOR APPELLANT**

Elbert Pratt, pro se
Inmate No. 563-128
Marion Correctional Institution
P.O. Box 57
Marion, Ohio 43301

**ATTORNEYS FOR APPELLEE**

William D. Mason
Cuyahoga County Prosecutor

By: Daniel T. Van
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

LARRY A. JONES, J.:

**{¶ 1}** Elbert Pratt has filed a timely application for reopening pursuant to App.R. 26(B). Pratt is attempting to reopen the appellate judgment that was rendered in *State v. Pratt*, Cuyahoga App. No. 93123, 2010-Ohio-1426, which affirmed his conviction for the offense of domestic violence. For the following reasons, we decline to reopen Pratt's original appeal.

**{¶ 2}** In order to establish a claim of ineffective assistance of appellate counsel, Pratt must demonstrate that appellate counsel's performance was deficient and that, but for the deficient performance of appellant counsel, 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. Specifically, Pratt 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." *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, 103 S.Ct. 3308, 77 L.Ed.2d 987. 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 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.

**{¶ 6}** In support of his claim of ineffective assistance of appellate counsel, Pratt raises three proposed assignments of error:

**{¶ 7}** (1) "Defendant states his appeal counsel fell below objective standard[s] by failing to raise on appeal Defendant's trial counsel failed to prepare for defendant's case, which prejudiced defendant at trial.";

**{¶ 8}** (2) "Appellate counsel failed to properly notify defendant of Appellate decision which prejudiced defendant's right to file Application for Reconsideration pursuant to (26)(A) (sic)."

**{¶ 9}** (3) "Defendant suffered prejudice when his appellate counsel failed to argue on appeal his trial counsel failed to object to the maximum sentence given to defendant at his sentencing by his trial counsel being the same counsel on appeal Defendant's counsel was Ineffective (sic) for failing to raise the maximum sentence on appeal, and failing to object to the maximum sentence at trial as counsel for both trial and appeal."

**{¶ 10}** Pratt, through his first proposed assignment of error, argues that he should have been convicted of a misdemeanor instead of a third degree felony.

**{¶ 11}** The first proposed assignment of error, however, is barred from further review, since it was previously raised on appeal. The doctrine of res judicata prevents further review. 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, in an App.R. 26(B) application for reopening, by the doctrine of res judicata. *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204.

**{¶ 12}** In the case sub judice, the issue of an improper conviction as a felony was raised through Pratt's first assignment of error, as argued on appeal. This court held that:

**{¶ 13}** "In his sole assignment of error, he claims that the trial court erred in sentencing him for a third degree felony when he had only one prior domestic violence conviction. * * * Accordingly, the trial court properly classified Pratt's conviction for domestic violence as a third degree felony and sentenced him to prison within the statutory guidelines for an offense of that degree." *State v. Pratt*, supra, at ¶3.

**{¶ 14}** Thus, we are prevented from considering Pratt's first proposed assignments of error.

**{¶ 15}** Pratt, through his second proposed assignments of error, argues that appellate counsel failed to provide a timely notice of this court's appellate judgment. Specifically, Pratt argues that he was prevented from filing a timely application for reopening pursuant to App.R. 26(B). Pratt 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).

**{¶ 16}** An application for reopening is premised upon one or more assignments of error that were not previously considered on the merits in the original appeal by any appellate court or that were considered on an incomplete record as a result of appellate counsel's deficient representation. See App.R.

26(B)(2)(c). The issue of failing to provide notice of this appellate judgment, in order to timely file an application for reconsideration per App.R. 26(B), could not be raised on direct appeal and thus cannot form a basis for reopening under App.R. 26(B).

**{¶ 17}** In addition, consideration of Pratt's second proposed assignment of error would not have resulted in a reversal of the conviction for the offense of domestic violence. Thus, Pratt was not deprived of the guarantee of effective assistance of appellate counsel and has failed to establish a basis for reopening through the second proposed assignment of error.. *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.

**{¶ 18}** Pratt, through his third proposed assignment of error, argues that appellate counsel failed to argue on appeal that it was improper for the trial court to impose a maximum sentence of five years of incarceration. A trial court possesses full discretion to impose a prison sentence within the statutory range and is not required to make findings or provide reasons for imposing a maximum sentence. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Herein, the offense of domestic violence, pursuant to R.C. 2929.14(A), is a felony of the third degree that is punishable by a prison term of up to five years. The trial court's imposition of a five year term of incarceration did not exceed the maximum term of incarceration and was not contrary to law. In addition, Pratt

has failed to demonstrate that the trial court abused its discretion by imposing the maximum sentence of incarceration. Thus, Pratt has failed to demonstrate that he was prejudiced by the sentence as imposed by the trial court and has once again failed to establish a basis for reopening his original appeal. Cf. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124; *State v. Lycan*s, Cuyahoga App. No. 93480, 2010-Ohio-2780; *State v. Craig*, Cuyahoga App. No. 92932, 2010-Ohio-906. Pratt has not met the standard for reopening of his original appeal.

**{¶ 19}** Accordingly, Pratt's application for reopening is denied.

LARRY A. JONES, JUDGE

KENNETH A. ROCCO, P.J., and
CHRISTINE T. MCMONAGLE