[Cite as *State v. Smith*, 2010-Ohio-897.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91346

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GREGORY SMITH

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Application for Reopening
Motion No. 421288
Cuyahoga County Common Pleas Court
Case No. CR-362460

RELEASE DATE: March 8, 2010

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} In *State v. Smith*, Cuyahoga County Court of Common Pleas Case No. CR-362460, applicant, Gregory Smith (who has filed his application for reopening under the name of "Gregory DeDonno"), pled guilty to rape and kidnaping. He has appealed to this court several times since the court of common pleas initially imposed sentence. Most recently, he appealed the trial court's April 1, 2008 orders resentencing him and denying his motion to withdraw guilty plea. This court affirmed those rulings in *State v. Smith*,

Cuyahoga App. No. 91346, 2009-Ohio-1610 ("*Smith* 2009 direct appeal").[1] The Supreme Court of Ohio denied applicant's motion for leave to appeal and dismissed the appeal as not involving any substantial constitutional question. *State v. Smith*, 122 Ohio St.3d 1506, 2009-Ohio-4233, 912 N.E.2d 109.

{¶ 2} Smith 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 appellate counsel failed to assign as error that: the trial court erred by imposing a mandatory prison term because, when Smith entered his guilty plea, the trial court told Smith that he could receive up to 5 years community control instead of prison; the trial court did not give Smith a de novo sentencing hearing; and trial counsel did not object to multiple mandatory sentences although the trial court did not inform Smith at his plea hearing that a prison sentence and postrelease control were mandatory.

{¶ 3} We deny the application for reopening. As required by App.R. 26(B)(6), the reasons for our denial follow.

{¶ 4} Having reviewed the arguments set forth in the application for reopening in light of the record, we hold that applicant has failed to meet his

[1] For a more-detailed description of the appellate history of the underlying case, see 2009-Ohio-1610, at ¶2, et seq. In light of the considerable appellate history arising from the underlying case, we will continue to refer to applicant as "Smith."

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 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.

{¶ 5} Smith's second proposed assignment of error states: "The trial court failed to afford Gregory DeDonno a de novo sentencing hearing when it prejudicially concluded that his mitigating factors were post sentence factors better suited on a motion for judicial release in direct violation of R.C.

2929.19(A)(B)(1), and *State v. Cook*, 2008 WL 3870614 (Ohio app. 8 Dist.), 2008-Ohio-4246."

{¶ 6} In *Cook*, the appellant argued "that because the trial court stated that it was reluctant to change the original sentence because the prior judge knew more about the case, Cook did not get a de novo sentencing hearing." Id. at ¶7. This court observed "the trial court merely deferred to the original judge's decision, and erred by not giving Cook a de novo review." Id. at ¶10.

{¶ 7} Unlike *Cook*, however, the trial court in this case did not "merely defer" to the original judge's decision. Rather, the trial court undertook an extensive analysis of the facts and circumstances which gave rise to Smith's guilty plea and imposed sentence. See Tr. 46, et seq. *Cook* is not, therefore, controlling in this appeal. Smith has not demonstrated either that appellate counsel was deficient or that Smith was prejudiced by the absence of his second proposed assignment of error.

{¶ 8} In support of his first and third proposed assignments of error, Smith asserts that – at the time of his original plea hearing – he was not informed that prison and postrelease control were mandatory.[2] Yet, in his

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[2] Smith's first and third proposed assignments of error are:

I. "The trial court committed reversible error on April 1, 2008, when it imposed a 10-year mandatory sentence on the rape count as authorized by R.C. 2929.13(F), when at the time of Mr. DeDonno's plea, the trial court unlawfully informed him that he could receive up to 5-years

original direct appeal, this court determined that "defendant's plea was voluntarily, intelligently and knowingly made * * * ." *State v. Smith* (Mar. 9, 2000), Cuyahoga App. No. 75512, at 4, discretionary appeal not allowed 89 Ohio St.3d 1457, 731 N.E.2d 1142.

{¶ 9} In reaching that conclusion, this court examined the record regarding Smith's plea hearing. "Defendant stated that he understood the consequences of entering a plea of guilty to the amended indictment, and that as part of the agreement, the sexual motivation and sexually violent predator specifications would be deleted. The trial court then proceeded to explain the amended terms of the indictment and the possible sentences for each count. When asked if he understood that the amended count three, kidnapping, was a felony of the first degree carrying a possible prison term of between three and ten years, defendant responded 'Yes.' The court then set forth defendant's constitutional rights and obtained responses from defendant which demonstrated that he understood and that he waived his rights pursuant to Crim.R. 11. Also, when asked by the court, defendant confirmed that his

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community control in lieu of prison. In contravention to Crim.R. 11(C)(2)(a), 32.1 and *State v. Rand* 2004 WL 2474426, 2004-Ohio-5838.

III. "Trial counsel provided ineffective assistance [of] counsel, in violation of Section 10, Article I of the Ohio Constitution, and the Sixth Amendment to the United States Constitution, for failing to object to the multiple mandatory sentences imposed, when Gregory DeDonno was never informed of any possible mandatory sanctions at the time of

plea was made voluntarily. (Tr. at 14). The trial court then correctly accepted defendant's plea as voluntary, knowing and intelligent." Id. at 3.

{¶ 10} In Smith's appeal from his April 1, 2008 sentencing, this court determined that he could not challenge the propriety of his plea. "Because this court has already affirmed Smith's convictions based on his guilty pleas to the amended indictment, he is precluded from attempting to now overturn his pleas to the amended indictment in the instant appeal filed after his resentencing in 2008. He is limited to challenging his resentencing on April 1, 2008." *Smith* 2009 direct appeal, at ¶15.

{¶ 11} Clearly, this court previously considered and determined the propriety of Smith's pleas. "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* (Mar. 4, 1991), Cuyahoga App. No. 57988, reopening disallowed (Aug. 15, 1994), Motion No.

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his plea."

52164, quoted with approval in *State v. Logan*, Cuyahoga App. No. 88472, 2008-Ohio-1934, at ¶4. In light of this court's prior, extensive review of Smith's plea, the application of res judicata in this case is not unjust.

{¶ 12} In his first and third proposed assignments of error, Smith asserts that his claim of ineffective assistance of appellate counsel derives from a purported defect in his entering his plea. That is, Smith's argument requires the conclusion that his original plea was defective and that his trial and appellate counsel were ineffective for failing to assert that defect before the trial court and in the direct appeal of his April 1, 2008 sentencing, respectively.

{¶ 13} This court, however, has already upheld the propriety of Smith's plea. Because Smith has based his first and third proposed assignments of error on a meritless argument (i.e., that his plea was contrary to law), he cannot demonstrate either that appellate counsel was deficient or that he was prejudiced by the absence of his first and third proposed assignments of error.

{¶ 14} Smith also acknowledges that the same counsel represented him at the April 1, 2008 resentencing hearing and in the *Smith* 2009 direct appeal. "It is well-established that appellate counsel is not expected to assign as error his or her own purported ineffectiveness as trial counsel." (Citations deleted.) *State v. Fannin*, Cuyahoga App. No. 80014,

2008-Ohio-136, at ¶6. Smith's appellate counsel could not, therefore, have been expected to assert Smith's third proposed assignment of error.

{¶ 15} Accordingly, the application for reopening is denied.

FRANK D. CELEBREZZE, JR., J., JUDGE

LARRY A. JONES, J., CONCURS
CHRISTINE T. MCMONAGLE, P.J., DISSENTS