

[Cite as *State v. Barnes*, 2011-Ohio-63.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92512

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

TERRENCE BARNES

DEFENDANT-APPELLANT

**JUDGMENT:
APPLICATION DENIED**

Cuyahoga County Common Pleas Court
Case No. CR-440305
Application for Reopening
Motion Nos. 434985, 435128, and 435131

RELEASE DATE: January 12, 2011

FOR APPELLANT

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ATTORNEYS FOR APPELLEE

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SEAN C. GALLAGHER, P.J.:

{¶ 1} In *State v. Barnes*, Cuyahoga County Court of Common Pleas Case No. CR-440305, applicant, Terrence Barnes, initially pled guilty to one count of gross sexual imposition (amended from rape) and one count of felonious assault. The trial court sentenced Barnes to concurrent terms of 18 months and eight years, respectively. Barnes appealed and challenged the propriety of his plea because the trial court did not “inform him of the length of time that he would be subject to post-release control and the maximum penalty that could be imposed for a violation of post-release control.” *State v.*

Barnes, Cuyahoga App. Nos. 86654 and 86655, 2006-Ohio-5939, ¶4. This court vacated the plea and remanded the case for further proceedings.

{¶ 2} On remand, Barnes tried the case to a jury who found Barnes guilty of felonious assault and kidnapping. The trial court sentenced Barnes to consecutive terms of six years on the felonious assault count and eight years on the kidnapping count. This court affirmed that judgment in *State v. Barnes*, Cuyahoga App. No. 92512, 2010-Ohio-1659. 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. Barnes*, 126 Ohio St.3d 1550, 2010-Ohio-3855, 932 N.E.2d 342.

{¶ 3} Barnes has filed with the clerk of this court a timely application for reopening. He asserts that he was denied the effective assistance of appellate counsel because appellate counsel did not assign as error that: evidence was not presented at trial which would have resulted in his acquittal; the trial court judge was biased against him; and his conviction was against the manifest weight of the evidence and the court of common pleas did not have jurisdiction.

{¶ 4} Initially, we note that the application for reopening exceeds ten pages in violation of App.R. 26(B)(4). The application is, therefore, defective and we could strike the application. Cf. *State v. O'Neal*, Cuyahoga App. No. 83393, 2004-Ohio-2862, reopening disallowed, 2005-Ohio-3568.

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

{¶ 6} 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 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.

{¶ 7} In his first four proposed assignments of error, Barnes contends that: 1) the record did not include a complete transcript; 2) the preliminary hearing transcript was not included as part of the record; 3) trial counsel was

ineffective because she did not introduce various exhibits; and 4) the state withheld evidence which would have been favorable to his defense. Barnes has attached several documents to his application: four affidavits by him; a copy of a transcript of the proceedings before the Berea Municipal Court (which does not include the court reporter's executed certificate of accuracy); copies of various records from the Berea Municipal Court; copies of medical records of the victim; a police report; and the victim's statement to police.

{¶ 8} Many of these materials were not, however, part of the record before the court of appeals. “It is well-settled that ‘[m]atters outside the record do not provide a basis for reopening.’ *State v. Hicks*, Cuyahoga App. No. 83981, 2005-Ohio-1842, at ¶ 7. More properly, ‘any allegations of ineffectiveness based on facts not appearing in the [trial] record should be reviewed through the postconviction remedies.’ *State v. Coleman*, 85 Ohio St.3d 129, 1999-Ohio-258, 707 N.E.2d 476, 483.” *State v. Carmon* (Nov. 18, 1999), Cuyahoga App. No. 75377, reopening disallowed, 2005-Ohio-5463, ¶29.

To the extent that Barnes relies on materials which are outside the record, his first four proposed assignments of error do not provide a basis for reopening.

{¶ 9} In his first proposed assignment of error, Barnes complains that the record does not include the complete transcript of his guilty plea in September 2003. Yet, this court vacated his plea in Case Nos. 86654 and

86655, 2006-Ohio-5939. Appellate counsel was not deficient and Barnes was not prejudiced by the absence of the September 2003 transcripts. As a consequence, his first proposed assignment of error does not provide a basis for reopening.

{¶ 10} In his second proposed assignment of error, Barnes complains that trial and appellate counsel did not make the preliminary hearing transcript part of the record. The grand jury issued a four-count indictment.

“A finding of probable cause by the trial court conducting the preliminary hearing is not appealable. See Crim.R. 5(B)(5). In addition, a subsequent indictment of the defendant by a grand jury renders any defects in the preliminary hearing moot. *State v. Washington* (1986), 30 Ohio App.3d 98, 506 N.E.2d 1203; *State v. Henry* (1968), 13 Ohio App.2d 217, 235 N.E.2d 533. See, also, *State v. Bonarrigo* (1980), 62 Ohio St.2d 7, 402 N.E.2d 530.” *State v. Seldon*, Cuyahoga App. Nos. 80129 and 80130, 2003-Ohio-1947, ¶5. As a consequence, his second proposed assignment of error does not provide a basis for reopening.

{¶ 11} In his third proposed assignment of error, Barnes asserts that his appellate counsel should have assigned as error that his trial counsel was ineffective for failing to introduce various exhibits. Likewise, in his fourth proposed assignment of error, Barnes contends that the state withheld favorable material. As discussed above, evidence dehors the record does not

provide a basis for reopening. Because his third and fourth proposed assignments of error rely entirely on matters outside the record, neither provides a basis for reopening.

{¶ 12} In his fifth proposed assignment of error, Barnes contends that the trial court erred by imposing a harsher sentence after his trial than it had when he pled guilty. On direct appeal, appellate counsel's third assignment of error asserted that the trial court imposed a vindictive sentence. This court rejected that contention. In his sixth proposed assignment of error, Barnes argues that the trial court's remarks exhibited "judicial bias" against him. Likewise, on direct appeal, appellate counsel's second assignment of error asserted this argument and this court rejected it.

{¶ 13} "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. 52164, quoted with approval in *State v. Logan*, Cuyahoga App. No. 88472, 2008-Ohio-1934, at ¶4.

{¶ 14} This court fully reviewed Barnes’s claims of vindictive sentencing and bias by the trial court. The application of res judicata in this case is not, therefore, unjust. As a consequence, his fifth and sixth proposed assignments of error do not provide a basis for reopening.

{¶ 15} In his seventh proposed assignment of error, Barnes argues that his conviction was against the manifest weight of the evidence and that the court of common pleas did not have jurisdiction over the case. That is, Barnes contends that “[t]he illegally obtained indictment,” Application at 12, is inconsistent with domestic violence, the basis for his arrest. Yet, the record from *Middleburg Hts. v. Barnes*, Berea Mun. Court Case No. MD0301886 – which is included among the original papers in Case No. CR-440305 – reflects that complaints were filed in Case No. MD0301886 charging Barnes with felonious assault, kidnapping and rape. In Case No. CR-440305, the indictment included the following counts: rape; felonious assault; kidnapping; and domestic violence. His argument is, therefore, not supported by the record.

{¶ 16} Additionally, Barnes merely states that the judgment of conviction is against the manifest weight of the evidence. He does not provide any review of the evidence in light of the elements of the crimes to demonstrate that the greater amount of the credible evidence supports his argument. Cf. *State v. Jordan*, Cuyahoga App. No. 94168, 2010-Ohio-5131,

¶7. “Merely asserting that the judgment was against the ‘manifest weight’ of the evidence is not sufficient to establish a genuine issue as to whether [applicant] was deprived of the effective assistance of counsel on appeal. App.R. 26(B)(5).” *State v. Allen* (Nov. 30, 2000), Cuyahoga App. No. 76672, reopening disallowed 2003-Ohio-24, ¶59. Barnes has not demonstrated that the jury clearly lost its way resulting in a manifest miscarriage of justice requiring that this court reverse the conviction and order a new trial. Rather, he merely asserts manifest weight of the evidence. He has not, therefore, demonstrated either that appellate counsel was deficient or that Barnes was prejudiced by the performance of appellate counsel. As a consequence, his seventh proposed assignment of error does not provide a basis for reopening.

{¶ 17} Applicant cannot satisfy either prong of the *Strickland* test. We must, therefore, deny the application on the merits.

SEAN C. GALLAGHER, Presiding Judge

MARY J. BOYLE, J., and
JAMES J. SWEENEY, J., CONCUR