

[Cite as *State v. Price*, 2016-Ohio-711.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103282

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TERRELL PRICE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-577236-A

BEFORE: Celebrezze, J., Jones, A.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: February 25, 2016

FOR APPELLANT

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Defendant-appellant Terrell Price (“Price”) brings this appeal challenging his convictions for trafficking, drug possession, and possessing criminal tools. Specifically, Price argues that he was denied effective assistance of counsel. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} The Cuyahoga County Grand Jury returned a five-count indictment charging Price with two counts of drug trafficking, R.C. 2925.03(A)(2), two counts of drug possession, R.C. 2925.11(A), and one count of possessing criminal tools, R.C. 2923.24(A). The trafficking and drug possession counts included forfeiture specifications.

{¶3} Price’s retained counsel requested to withdraw on the day that trial was scheduled to commence. The trial court granted counsel’s request, continued the trial, and appointed the public defender’s office to represent Price. On the day of trial, Price appeared with newly retained counsel. The trial court denied Price’s request for substitute counsel. Price requested to represent himself. The trial court engaged in a lengthy discussion with Price during which it discussed the issue of challenging the search warrant. Specifically, the trial court advised Price that if he wished to defend his case on the basis that he did not live at, own, or lease the apartment where officers executed the search warrant, he lacked standing to challenge the search warrant.

Following this discussion, Price chose to proceed to trial with the public defender appointed by the trial court.

{¶4} During cross-examination of the state's first witness, Price again requested to represent himself. The trial court engaged in another lengthy conversation with Price after which it granted his request. The trial court appointed the public defender as Price's standby counsel.

{¶5} At the close of the state's case, Price exercised his right not to testify. The jury found Price guilty of all charges. The trial court sentenced Price to a prison term of 11 years with a five-year term of mandatory postrelease control.

{¶6} On February 11, 2014, Price appealed his convictions, raising eight assignments of error. Specifically, Price argued: (1) the trial court denied him his Sixth Amendment right to counsel by refusing his request for substitute counsel and forcing him to proceed to trial with appointed counsel; (2) the trial court violated his rights by denying his pro se request for a psychological evaluation; (3) the trial court erred in denying his motion for acquittal, because the state failed to present sufficient evidence to support his convictions; (4) his convictions are against the manifest weight of the evidence; (5) the trial court denied him a fair trial by commenting on his failure to testify and giving the jury a specific instruction to that effect; (6) the trial court erred by ordering him to serve a consecutive sentence without making the appropriate R.C. 2929.14 findings; (7) the trial court erred by imposing court costs in its journal entry when court costs were neither ordered nor addressed in open court at the time of sentencing; and (8)

the mandatory fine imposed by the trial court at the sentencing hearing infringes upon his rights under the Eighth and Fourteenth Amendments to the United States Constitution, and R.C. 2929.18, 2929.19(B)(5), and 2947.14.

{¶7} In *State v. Price*, 8th Dist. Cuyahoga No. 100981, 2015-Ohio-411, (“*Price I*”) this court affirmed Price’s convictions and remanded the matter to the trial court for the limited purpose of allowing Price to seek the waiver of court costs. *Id.* at _ 66. Price appealed this court’s decision to the Ohio Supreme Court, and the Ohio Supreme Court declined to accept the matter for review. *State v. Price*, 143 Ohio St.3d 1465, 2015-Ohio-3733, 37 N.E.3d 1250.

{¶8} On July 21, 2014, Price filed a petition for postconviction relief with the trial court, raising an ineffective assistance of counsel claim. Price argued that his trial counsel was ineffective for failing to suppress evidence recovered from the search of an apartment in North Olmsted. The trial court denied Price’s petition, finding that Price’s claim was barred by res judicata because he did not raise the issue of ineffective assistance of counsel on direct appeal, and Price’s ineffective assistance of counsel claim had no substantive merit.

{¶9} On February 3, 2015, Price filed a timely motion to reopen his direct appeal. *See State v. Price*, 8th Dist. Cuyahoga No. 100981, 2015-Ohio-4069. This court found that Price failed to meet the standard of reopening his appeal and denied his application to reopen. *Id.* at _ 18.

{¶10} Price filed the instant appeal challenging the trial court’s denial of his petition for postconviction relief. In his sole assignment of error, Price argues that he was denied his constitutional right to the effective assistance of counsel at trial.

II. Law and Analysis

A. Price’s Petition for Postconviction Relief

{¶11} Price argued that his trial counsel was ineffective for failing to suppress evidence recovered from the search of an apartment in North Olmsted. Furthermore, Price argued that the evidence should have been suppressed because (1) he never leased the apartment and (2) he was not properly *Mirandized* prior to the search of the apartment. In support of his motion, Price attached a rental agreement indicating that another individual was the tenant of the apartment in question.

{¶12} The trial court did not hold a hearing on Price’s petition. Pursuant to R.C. 2953.21(), the trial court found that Price failed to present substantive grounds for relief.

See State v. Armstrong, 56 Ohio App.3d 105, 108, 564 N.E.2d 1070 (8th Dist.1988) (“a trial court may dismiss a petition for postconviction relief without a hearing if the petition and its supporting evidentiary documents do not contain operative facts which, if true, would establish a substantive ground for relief.”) Furthermore, in denying Price’s petition, the trial court filed findings of fact and conclusions of law pursuant to R.C. 2953.21().

{¶13} First, in denying Price’s petition, the trial court found that his claim was barred by res judicata, because he did not raise the issue of ineffective assistance of

counsel on direct appeal in *Price I*. See *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, _ 17; *State v. Quinnie*, 8th Dist. Cuyahoga No. 100317, 2014-Ohio-1435, _ 11; *State v. Littlejohn*, 8th Dist. Cuyahoga No. 98495, 2012-Ohio-5897, _ 14. Second, the trial court found that Price's ineffective assistance of counsel claim had no substantive merit. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, _ 98.

{¶14} The trial court recognized that the failure to file a motion to suppress does not constitute ineffective assistance of counsel per se. See *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858, _ 65; *State v. Webb*, 8th Dist. Cuyahoga No. 100487, 2014-Ohio-2644, _ 13. The trial court held that Price's counsel was not deficient and Price was not prejudiced, because he failed to present sufficient operable facts to establish a basis to suppress the evidence in question.

{¶15} The trial court held that Price lacked standing to challenge the search of the apartment. Price contended that he neither leased nor resided at the apartment in question. The trial court recognized that an individual who challenged the legality of a search bears the burden of proving standing. See *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387, fn. 1 (1978); *State v. Smith*, 8th Dist. Cuyahoga No. 96348, 2011-Ohio-6466, _ 16. The trial court found that Price, by claiming that he did not reside at the apartment, failed to establish that he had a privacy interest in the apartment and thus lacked standing to challenge the search. When the issue of standing came up

during pretrial proceedings, the trial court likewise determined that Price lacked standing to challenge the search of the apartment.

{¶16} In the instant matter, Price challenges the trial court's denial of his petition for postconviction relief, arguing that his trial counsel's assistance was ineffective. Specifically, Price argues that trial counsel failed to challenge the search warrant and file a motion to suppress evidence that did not belong to him.

B. Standard of Review

{¶17} Reversal of a conviction for ineffective assistance of counsel requires a defendant to show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *State v. Smith*, 89 Ohio St.3d 323, 327, 731 N.E.2d 645 (2000), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Defense counsel's performance must fall below an objective standard of reasonableness to be deficient in terms of ineffective assistance of counsel. *See State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989). Moreover, the defendant must show that there exists a reasonable probability that, were it not for counsel's errors, the results of the proceeding would have been different. *State v. White*, 82 Ohio St.3d 16, 23, 693 N.E.2d 772 (1998).

{¶18} To establish ineffective assistance of counsel, a defendant must show (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that but for

counsel's errors, the proceeding's result would have been different. *Strickland* at 687-688, 694; *Bradley* at paragraphs two and three of the syllabus.

{¶19} In evaluating a claim of ineffective assistance of counsel, a court must give great deference to counsel's performance. *Strickland* at 689. "A reviewing court will strongly presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *State v. Pawlak*, 8th Dist. Cuyahoga No. 99555, 2014-Ohio-2175, ¶ 69.

C. Res Judicata

{¶20} Price's ineffective assistance of counsel claim is barred by res judicata.

{¶21} Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial that resulted in that judgment of conviction or on an appeal from that judgment. *State v. Segines*, 8th Dist. Cuyahoga No. 99789, 2013-Ohio-5259, ¶ 8, citing *State v. Perry*, 10 Ohio St.2d 175, 180, 226 N.E.2d 104 (1967). Thus, any issue that could have been raised on direct appeal and was not is res judicata and not subject to review in subsequent proceedings. *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 16.

{¶22} In the instant matter, Price had an opportunity to raise the ineffective assistance of counsel issue in his direct appeal. Although Price did argue that the trial court denied him his Sixth Amendment right to counsel by refusing his request for

substitute counsel, he did not allege that his trial counsel's assistance was ineffective based on the failure to challenge the search warrant and suppress the evidence. *See State v. Price*, 8th Dist. Cuyahoga No. 100981, 2015-Ohio-411.

{¶23} Accordingly, our review of the issue is prohibited under the doctrine of res judicata.

D. Ineffective Assistance of Counsel

{¶24} After reviewing the record, we further find no substantive merit to Price's ineffective assistance of counsel claim.

{¶25} We initially note that to the extent that Price represented himself at trial, he cannot raise a valid ineffective assistance of counsel claim. As the United States Supreme Court noted in *Faretta v. California*, 422 U.S. 806, 834, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), "a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" *See State v. Perotti*, 8th Dist. Cuyahoga No. 73743, 2005-Ohio-2175, ¶ 2. Price repeatedly raised the issue that he did not rent or reside at the apartment where officers executed the search warrant — both before and during trial when he was represented by counsel, and at trial while acting pro se.

{¶26} Regarding the first *Strickland* prong, Price cannot demonstrate deficient performance, falling below an objective standard of reasonable representation, by trial counsel. Price's trial counsel addressed the issues regarding his proposed defense and whether he had standing to challenge the search warrant. Price's trial counsel stated

“[t]he search warrant was not challenged in this case. If I may, because one of our arguments is that [these] aren’t his premises, okay, so there is — the standing isn’t there.”

Furthermore, the trial court addressed the conflict between Price’s proposed defense and having standing to challenge the search warrant. The trial court explained to Price that he cannot raise the defense that he neither leased nor resided in the apartment where officers executed the search warrant if he wished to challenge the search warrant.

{¶27} Despite the trial court’s advisement, Price elected to proceed to trial where he asserted that he did not live in the apartment where officers executed the search warrant. By claiming that he neither leased nor resided at the apartment, Price failed to establish a privacy interest in the apartment, and thus lacked standing to challenge the constitutionality of the officers’ search.

{¶28} Regarding the second *Strickland* prong, Price cannot demonstrate prejudice, or a reasonable probability that but for trial counsel’s failure to file a motion to suppress the evidence, the proceeding’s result would have been different. Even if trial counsel had challenged the validity of the search warrant and moved to suppress the evidence, the outcome would have been the same. By asserting that he did not lease or reside at the apartment where officers executed the search warrant, Price lacked standing to challenge the search.

{¶29} Accordingly, as Price failed to show either of the *Strickland* prongs, his ineffective assistance of counsel claim fails.

{¶30} Price’s sole assignment of error is overruled.

III. Conclusion

{¶31} As Price failed to raise the issue of ineffective assistance of trial counsel on direct appeal, the doctrine of res judicata prohibits our review of the issue in the instant matter. Furthermore, we find no substantive merit to Price's ineffective assistance of counsel claim, because he failed to show that (1) trial counsel's performance was deficient and (2) a reasonable probability that, but for trial counsel's failure to challenge the search warrant and file a motion to suppress the evidence, the outcome of the proceedings would have been different.

{¶32} Accordingly, Price's assignment of error is overruled and the trial court's judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

LARRY A. JONES, SR., A.J., CONCURS;
SEAN C. GALLAGHER, J., CONCURS IN JUDGMENT ONLY