

[Cite as *State v. Krill*, 2023-Ohio-2483.]

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA**

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	No. 111613
	:	
v.	:	
	:	
KYLE KRILL,	:	
	:	
Defendant-Appellant.	:	

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**JOURNAL ENTRY AND OPINION**

**JUDGMENT: APPLICATION DENIED**  
**RELEASED AND JOURNALIZED: July 18, 2023**

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Cuyahoga County Court of Common Pleas  
Case Nos. CR-21-665757-A and CR-21-665897-A  
Application for Reopening  
Motion No. 565022

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***Appearances:***

Kyle Krill, *pro se*

ANITA LASTER MAYS, A.J.:

{¶ 1} Applicant, Kyle Krill (“Krill”), seeks to reopen his appeal in *State v. Krill*, 8th Dist. Cuyahoga No. 111613, 2023-Ohio-1216. Krill claims that appellate counsel was ineffective for failing to argue that Krill’s waiver of jury trial for two counts of having weapons while under disability and attendant specifications was

invalid. We deny the application to reopen because appellate counsel did argue this issue on appeal.

## **I. Facts and Procedural History**

{¶ 2} Krill was indicted in two cases for crimes alleged to have occurred on November 24, 2021, and November 26, 2021, which were joined for trial. Krill elected to try two counts of having weapons while under disability to the bench, with the remaining counts tried to a jury. At the conclusion of trial, Krill was found not guilty of the charges by the jury, but the court found him guilty of two counts of having weapons while under disability with attendant firearm specifications. As a result, Krill received an aggregate 117-month prison sentence.

{¶ 3} On appeal, appellate counsel assigned four errors for review:

The trial court plainly erred in imposing prison terms on the firearms specifications, in violation of Krill's right to trial by jury, because the elements required to authorize these prison terms were not appropriately subject to judicial-fact finding;

Krill received ineffective assistance of counsel at sentencing when counsel failed to object to the imposition of prison terms on the firearms specifications;

Krill's purported waivers of right to trial by jury were invalid in total because they were not voluntary, knowing, and intelligent; and

Krill's purported waiver of right to trial by jury were invalid as to the 3-year and 54-month firearms specifications because they were not voluntary, knowing, and intelligent.

*Krill* at ¶ 8. In an opinion issued April 13, 2023, this court overruled these assigned errors and affirmed the convictions. *Id.* at ¶ 29.

{¶ 4} On June 8, 2023, Krill timely filed an application pursuant to App.R. 26(B) to reopen his appeal. In his application to reopen Krill asserted that appellate counsel was ineffective because counsel did not raise an assignment of error challenging the jury trial waiver for the two counts of having weapons while under disability. Specifically, he proposed the following assignment of error should have been asserted by counsel:

Defendant Kyle Krill was denied due process of law as Guaranteed by the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 10 and 16 of the Ohio Constitution when an invalid waiver of jury trial was accepted by the trial court.

## **II. Standard for Reopening**

{¶ 5} App.R. 26(B) provides for a two-step process where claims of ineffective assistance of appellate counsel may be raised. *State v. Leyh*, 166 Ohio St.3d 365, 2022-Ohio-292, 185 N.E.3d 1075, ¶ 19, citing *State v. Simpson*, 164 Ohio St.3d 102, 2020-Ohio-6719, 172 N.E.3d 97, ¶ 12. In the first stage, an applicant is required to make a threshold showing that there is a genuine issue that there exists a colorable claim of ineffective assistance of appellate counsel. *Id.* at ¶ 19, 21, citing *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

{¶ 6} Courts review claims of ineffective assistance of appellate counsel under the same two-pronged analysis for ineffective assistance of trial counsel enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Leyh* at ¶ 17. Under this standard, “an applicant must show that (1)

appellate counsel's performance was objectively unreasonable, and (2) there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (Internal citations omitted.) *Id.* at ¶ 18, quoting *Strickland* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, quoting *Strickland* at 694.

### **III. Invalid Waiver of Right to Trial by Jury**

{¶ 7} In the application for reopening, Krill claims that the waiver of jury trial entered in the consolidated cases was invalid. In support, Krill quotes from the very same passage of the transcript and case law that this court quoted and analyzed in our opinion in *Krill*. In the direct appeal, appellate counsel attacked the validity of the jury trial waiver in the third and fourth assignments of error. Counsel asserted that Krill did not knowingly, intelligently, and voluntarily waive his right to a jury trial for the offenses that were tried to the bench. We determined that the colloquy between the trial judge and Krill showed that Krill's waiver was knowingly, intelligently, and voluntarily made. *Krill* at ¶ 10-18.

{¶ 8} While worded differently, the proposed assignment of error raises an issue that was already addressed and decided on appeal. Krill's allegation that appellate counsel was ineffective for not challenging the validity of the jury trial waiver cannot form the basis of an ineffective assistance claim because counsel, in fact, raised and argued that issue. *See State v. Knox*, 8th Dist. Cuyahoga No. 107414, 2019-Ohio-3567, ¶ 13, citing *State v. Melendez*, 8th Dist. Cuyahoga No. 106994,

2019-Ohio-2212, ¶ 8, citing *State v. Adams*, 146 Ohio St.3d 232, 2016-Ohio-3043, 54 N.E.3d 1227, ¶ 23. Therefore, appellate counsel cannot be deemed ineffective as alleged by Krill. “Issues previously addressed on appeal are not subject to a second review in reopening.” *State v. Robinson*, 8th Dist. Cuyahoga No. 110467, 2022-Ohio-3033, ¶ 10, citing *State v. Barnes*, 8th Dist. Cuyahoga Nos. 108857, 108858, and 109321, 2020-Ohio-4988, ¶ 13, citing *State v. McGee*, 8th Dist. Cuyahoga No. 91638, 2009-Ohio-6637, ¶ 13.

**{¶ 9}** Krill’s application for reopening is denied.

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ANITA LASTER MAYS, ADMINISTRATIVE JUDGE

FRANK DANIEL CELEBREZZE, III, J., and  
MARY EILEEN KILBANE, J., CONCUR