[Cite as *State v. Fisher*, 2023-Ohio-2693.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 111953
v.	:	
BRANDON FISHER,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: August 3, 2023

Cuyahoga County Court of Common Pleas
Case No. CR-21-657553-A
Application for Reopening
Motion No. 564838

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Gregory J. Ochocki, Assistant Prosecuting Attorney, *for appellee*.

Brandon Fisher, *pro se*.

MARY EILEEN KILBANE, P.J.:

{¶ 1} Brandon Fisher has filed a timely application for reopening pursuant to App.R. 26(B). Fisher is attempting to reopen the appellate judgment rendered in *State v. Fisher*, 8th Dist. Cuyahoga No. 111953, 2023-Ohio-1372, that affirmed his

conviction and sentence for the offenses of rape (R.C. 2907.02(A)(2)); gross sexual imposition (R.C. 2907.05(A)(4)), endangering children (R.C. 2919.22(B)(1)), driving while under the influence of alcohol or drugs (R.C. 4511.19(A)(1)(a)), and physical control of vehicle while under the influence (R.C. 4511.194(B)(1)). We decline to reopen Fisher's appeal.

I. Standard of Review Applicable to App.R. 26(B) Application for Reopening

{¶ 2} An application for reopening will be granted if there exists a genuine issue as to whether an appellant was deprived of the effective assistance of appellate counsel on appeal. *See* App.R. 26(B)(5). To establish a claim of ineffective assistance of appellate counsel, Fisher is required to establish that the performance of his appellate counsel was deficient, and the deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed. 2d 768 (1990).

{¶ 3} In *Strickland*, the United States Supreme Court held that a court's scrutiny of an attorney's work must be highly deferential. The court further stated that "it is all too tempting for a defendant to second-guess" his attorney after conviction and that it would be "too easy" for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. *Id.* at 689. Thus, a court must indulge in "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.*, quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955).

{¶ 4} Even if Fisher establishes that an error by his appellate counsel was professionally unreasonable, Fisher must further establish that he was prejudiced; but for the unreasonable error there exists a reasonable probability that the results of his appeal would have been different. Reasonable probability, regarding an application for reopening, is defined as a probability sufficient to undermine confidence in the outcome of the appeal. *State v. May*, 8th Dist. Cuyahoga No. 97354, 2012-Ohio-5504.

II. Argument

{¶ 5} Fisher sole proposed assignment of error, in support of his application for reopening, is:

> Appellant suffers infirm to his Double Jeopardy Clause protection against unauthorized cumulative punishment.

{¶ 6} Fisher argues that appellate counsel's failure to argue on appeal that the offenses, to which he plead guilty, were allied offenses of similar import that required merger for purposes of sentencing. This court has held that when the transcript demonstrates the state and defense counsel specifically agreed that the offenses were not allied, the issue of allied offenses is waived. *State v. Booker*, 8th Dist. Cuyahoga No. 101886, 2015-Ohio-2515; *State v. Adams*, 8th Dist. Cuyahoga No. 100500, 2014-Ohio-3496; *State v. Yonkings*, 8th Dist. Cuyahoga No. 98632, 2013-Ohio-1890; *State v. Carman*, 8th Dist. Cuyahoga No. 99463, 2013-Ohio-4910; *State v. Ward*, 8th Dist. Cuyahoga No. 97219, 2012-Ohio-1199. Herein, the

transcript of the sentencing hearing clearly demonstrates that the state and defense counsel specifically agreed that the felony offenses, to which Fisher pleaded guilty, were not allied offenses: "As part of this plea, he would agree that there would be no contact with the victims, and that these are non-allied offenses." Tr. 5. In addition, the trial court specifically instructed Fisher, prior to the entry of the guilty pleas, that the felony offenses would not merge for sentencing. Tr. 18.

{¶ 7} Notwithstanding Fisher's waiver of the claim that the felony offenses of rape, gross sexual imposition, and endangering children were allied offenses of similar import that required merger for purposes of sentencing, we find that the offenses of rape, gross sexual imposition, and endangering children are not allied offenses of similar import that required merger for sentencing. Applying the standards found in *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, we find that the offenses of rape and gross sexual imposition are not allied offenses of similar import. Herein, the offenses of rape and gross sexual imposition involved different conduct and were committed separately at different times.

{¶ 8} The offense of endangering children is not an allied offense with regard to rape and gross sexual imposition. Child endangering, pursuant to R.C. 2919.22, involves the duty of care and protection a parent or a person acting in loco parentis has with respect to a child. Rape and gross sexual imposition on the other hand, criminalizes actual physical harm regardless of the relationship between the victim and Fisher. Thus, the offenses of child endangering, in relation to rape and gross sexual imposition, are offenses of dissimilar import and do not require merger

for sentencing. *State v. Stites*, 1st Dist. Hamilton Nos. C-190247 and C-190255, 2020-Ohio-4281.

{¶ 9} Finally, a plea of guilty waives a defendant's right to challenge his or her conviction on all potential issues except for jurisdictional issues and the claim that ineffective assistance of counsel caused the guilty plea to be less than knowing, intelligent, and voluntary. *Montpelier v. Greeno*, 25 Ohio St.3d 170, 495 N.E.2d 581 (1986); *State v. Vihtelic*, 8th Dist. Cuyahoga No. 105381, 2017-Ohio-5818; *State v. Szidik*, 8th Dist. Cuyahoga No. 95644, 2011-Ohio-4093; *State v. Salter*, 8th Dist. Cuyahoga No. 82488, 2003-Ohio-5652.

{¶ 10} By entering pleas of guilty, Fisher waived all appealable errors that might have occurred at trial unless the errors prevented Fisher from entering a knowing and voluntary plea. *State v. Kelley*, 57 Ohio St.3d 127, 566 N.E.2d 658 (1991); *State v. Barnett*, 73 Ohio App.3d 244, 596 N.E.2d 1101 (2d Dist.1991). Our review of the plea transcript clearly demonstrates that the trial court meticulously complied with the mandates of Crim.R. 11 and that Fisher entered a knowing, intelligent, and voluntary plea of guilty. Because Fisher's pleas were knowingly, intelligently, and voluntarily made, and the claimed error raised by Fisher is not based upon any jurisdictional defects, the raised proposed assignment of error is waived. We further find that no prejudice can be demonstrated by Fisher based upon appellate representation on appeal. *State v. Bates*, 8th Dist. Cuyahoga No. 100365, 2015-Ohio-297.

{¶ 11} Accordingly, this court denies the application.

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MARY EILEEN KILBANE, PRESIDING JUDGE

LISA B. FORBES, J., and
EMANUELLA D. GROVES, J., CONCUR