

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	No. 113644
	:	
v.	:	
	:	
PHILLIP C. LITTLEJOHN,	:	
	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: March 19, 2025

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-23-678475-A
Application for Reopening
Motion No. 580216

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Matthew W. Moretto, Assistant Prosecuting Attorney, *for appellee*.

Phillip C. Littlejohn, *pro se*.

MICHELLE J. SHEEHAN, J.:

{¶ 1} Phillip C. Littlejohn has filed a timely App.R. 26(B) application for reopening. Littlejohn is attempting to reopen the appellate judgment rendered in

State v. Littlejohn, 2024-Ohio-4797 (8th Dist.), which affirmed his pleas of guilty and the imposed sentences with regard to the offenses of abduction (R.C. 2905.02(A)(1)), attempted felonious assault (R.C. 2923.02/2903.11(A)(1)), violating a protection order (R.C. 2919.27(A)(1)), domestic violence (R.C. 2919.25(A)), and endangering children (R.C. 2919.22(A)).¹ We decline to grant Littlejohn’s application for reopening because he has failed to establish that he was prejudiced by the performance of his appellate counsel on appeal.

I. Standard of review applicable to App.R. 26(B) application for reopening

{¶ 2} In order to establish a claim of ineffective assistance of appellate counsel under App.R. 26(B), Littlejohn 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. 688 (1984); *State v. Bradley*, 42 Ohio St.3d 136, (1989), *cert. denied*, 497 U.S. 1011 (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. Thus, a

¹Pursuant to this court’s opinion journalized on October 3, 2024, the sentence imposed as to Count 12, domestic violence, was vacated by the trial court on December 16, 2024, through a nunc pro tunc entry: “Nunc pro tunc entry as of and for 01/18/2024. Pursuant to order of the Eighth District of the Court of Appeals, prison term imposed on Count 12 is vacated. Matter returned from court of appeals.”

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. *Strickland*.

{¶ 4} Moreover, even if Littlejohn establishes that an error by his appellate counsel was professionally unreasonable, Littlejohn 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 with regard to an application for reopening is defined as a probability sufficient to undermine confidence in the outcome of the appeal. *State v. Simmons*, 2024-Ohio-3188 (8th Dist.); *State v. Atwater*, 2020-Ohio-484 (8th Dist.); *State v. May*, 2012-Ohio-5504 (8th Dist.).

II. Effect of plea of guilty on App.R. 26(B)

{¶ 5} In *State v. Littlejohn*, Cuyahoga C.P. No. CR-23-678475, Littlejohn entered pleas of guilty to the offenses of abduction, attempted felonious assault, violating a protection order, domestic violence, and endangering children. A plea of guilty waives a defendant's right to challenge his or her conviction and sentence 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. *State v. Vihtelic*, 2017-Ohio-5818 (8th Dist.); *State v. Szidik*, 2011-Ohio-4093 (8th Dist.). By entering pleas of guilty, Littlejohn waived all appealable errors that might have occurred at trial unless the errors prevented him from entering a

knowing and voluntary plea. *State v. Kelley*, 57 Ohio St.3d 127 (1991); *State v. Barnett*, 73 Ohio App.3d 244 (2d Dist. 1991).

{¶ 6} Our review of the guilty plea transcript clearly demonstrates that the trial court meticulously complied with the mandates of Crim.R. 11 and that Littlejohn entered knowing, intelligent, and voluntary pleas of guilty to the offenses of abduction, attempted felonious assault, violating a protection order, domestic violence, and endangering children. Specifically, the trial court informed Littlejohn that he would be waiving numerous constitutional rights and further informed him of the potential sentence and fine associated with each charged offense: (1) the degree of each charged offense (tr. 70, 71, 76, 77, and 78); (2) the maximum sentence and fine associated with each charged offense (tr. 63, 64, 67, and 68); (3) waiver of the right to a jury or bench trial (tr. 65); (4) waiver of the right that the State must prove guilt beyond a reasonable doubt (tr. 67); (5) waiver of the right to confront and cross-examine each witness called by the State (tr. 66); (6) Littlejohn could not be compelled to testify against himself (tr. 66-67); and (7) mandatory and permissive imposition of postrelease control and the effects of violation of postrelease control (tr. 63, 64, 68, 70, and 116). The trial court also inquired as to whether any threats or promises had been made to encourage the entry of a guilty plea. (tr. 78-79). The trial court further determined that Littlejohn was not under the influence of drugs or alcohol and that his legal counsel answered all of his questions. (tr. 64-65).

{¶ 7} Because Littlejohn's plea was knowingly, intelligently, and voluntarily made and the claimed errors raised by Littlejohn are not based upon any jurisdictional defects, the raised proposed assignments of error are waived. We further find that no prejudice can be demonstrated by Littlejohn based upon appellate representation on appeal. *State v. Bates*, 2015-Ohio-297 (8th Dist.).

III. Proposed assignments of error

{¶ 8} Finally, following a review of Littlejohn's two proposed assignments of error, we find that he has failed to establish any prejudice that resulted from the conduct of appellate counsel on appeal. Littlejohn's first proposed assignment of error is as follows:

Applicant is denied the effective assistance of appellate counsel and is prejudiced by having more convictions than are authorized by law where multiple charges are allied offenses of similar import and should have merged for sentencing.

{¶ 9} Littlejohn, through his initial proposed assignment of error, argues that the offenses of abduction, attempted felonious assault, and violation of a protection order are allied offenses of similar import that required merger for sentencing. The Ohio Supreme Court in *State v. Ruff*, 2015-Ohio-995, with regard to allied offenses and merger, established that an allied-offenses analysis requires more than just consideration of a defendant's conduct. An allied-offenses analysis requires this court to also consider whether (1) the offenses are of dissimilar import or significance, (2) the offenses were committed separately, or (3) the offenses were committed with separate animus or motivation. In addition, two or more offenses

are of dissimilar import “when the defendant’s conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.” *Id.* at paragraph two of the syllabus.

{¶ 10} Applying the *Ruff* analysis to the convictions for abduction, attempted felonious assault, and violation of a protection order, we find that the aforesaid offenses are not allied that required merger. The offenses of abduction and attempted felonious assault involved the animus of “knowingly” while the offense of violation of a protection order involved the animus of “reckless.” We also find that the offenses of abduction and attempted felonious assault were committed as separate acts and caused different harms. The offense of abduction involved the restraining of the victim’s liberty and the inability to leave her residence while attempted felonious assault caused physical harm to the victim as the result of Littlejohn’s breaking her teeth, choking her, and beating her. Appellate counsel was not ineffective for failing to argue the issue of allied offenses and merger on appeal.

{¶ 11} Littlejohn’s second proposed assignment of error is that

[a]ppellate counsel was ineffective in their assistance when they fail to raise that attempted felonious assault is not a cognizable charge in the State of Ohio.

{¶ 12} Littlejohn, through his second proposed assignment of error, argues that he plead guilty to an offense, attempted felonious assault, that does not exist in Title 29 of the Ohio Revised Code. This court has held that a plea of guilty to a nonexistent criminal offense, as part of a negotiated plea of guilty, creates an invited error that is not addressable on appeal, if the guilty plea was knowingly, intelligently,

and voluntarily made. *See State v. Wooden*, 2022- Ohio-814 (8th Dist.); *State v. Brawley*, 2002-Ohio-3115 (8th Dist.) (defendant’s claim that it was “legally impossible” to be charged with offense to which he pled guilty did not warrant withdrawal of his negotiated guilty plea because any error was invited error); *State v. Lester*, 2018-Ohio-4893 (8th Dist.) (although attempted involuntary manslaughter is a nonexistent crime in Ohio, defendant could not seek to set aside his conviction based on a claim that counsel was ineffective by allowing him to plead guilty to the nonexistent offense where defendant negotiated his plea to it with the State).

{¶ 13} Littlejohn entered a voluntary, knowing, and intelligent plea of guilty to the offense of attempted felonious assault. The plea of guilty to the offense of attempted felonious assault was negotiated, and Littlejohn received the benefit of the nolle of the serious offenses of two counts of kidnapping, three counts of rape, one count of felonious assault, one count of tampering with evidence, and one count of domestic violence. Thus, we find that appellate counsel was not ineffective on appeal by failing to raise the issue of pleading guilty to the nonexistent offense of attempted felonious assault. *State v. Thorp*, 2023-Ohio-3629 (8th Dist.); *State v. Robinson*, 2020-Ohio-98 (8th Dist.).

{¶ 14} Application for reopening is denied.

MICHELLE J. SHEEHAN, JUDGE

EILEEN A. GALLAGHER, A.J., and
LISA B. FORBES, J., CONCUR