[Cite as *State v. Hicks*, 2025-Ohio-2127.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, :

No. 113914

v. :

BERTRAM HICKS, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: May 30, 2025

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-23-681567-A
Application for Reopening
Motion No. 583848

Appearances:

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

Bertram Hicks, *pro se.*

ANITA LASTER MAYS, J.:

{¶ 1} Applicant Bertram Hicks seeks to reopen his appeal in *State v. Hicks*, 2025-Ohio-547 (8th Dist.), pursuant to App.R. 26(B). Hicks claims that appellate

counsel was ineffective for failing to advance proposed assignments of error in his appeal related to the trial court's denial of his motion to withdraw his guilty pleas, trial counsel's failure to "establish a [s]elf-defense [c]laim," trial counsel's failure to file "a motion for justified homicide," and the decision to have Hicks "enter into a dark plea."

{¶ 2} For the reasons that follow, we deny his application.

I. Facts and Procedural History

{¶ 3} In June 2023, Hicks was indicted on one count of aggravated murder, two counts of murder, two counts of felonious assault, and one count of having weapons while under disability in connection with the September 8, 2022 shooting death of Robert Hall, Jr. Most of the counts included one- and three-year firearm specifications.

{¶ 4} After reaching a plea agreement with the State, Hicks pled guilty to one count of involuntary manslaughter with a three-year firearm specification (amended Count 2) and one count of felonious assault with a three-year firearm specification (amended Count 4). The remaining counts were nolled. As part of the plea agreement, the parties agreed to an aggregate sentencing range from 20 to 25 and one-half years to 25 to 30 and one-half years. The trial court ultimately sentenced Hicks to an aggregate prison sentence of 22 to 27 and one-half years, i.e., three years on the firearm specification to be served prior to and consecutive to a base sentence of 11 to 16 and one-half years on the involuntary manslaughter count

and three years on the firearm specification to be served prior to and consecutive to a sentence of five years on the felonious assault count.

{¶ 5} Immediately after sentencing, Hicks made an oral motion to withdraw his guilty pleas, arguing that he had entered his guilty pleas believing that he would receive a 20-year prison sentence. The trial court denied the motion. An order denying Hicks's oral motion to withdraw guilty pleas and a separate sentencing journal entry were journalized on April 11, 2024. On April 17, 2024, the trial court entered a "nunc pro tunc entry" related to its prior sentencing journal entry, which stated, "Nunc pro tunc to correct Count 4 to state it is to be served consecutively to Count 2."

{¶ 6} On May 9, 2024, Hicks filed a notice of appeal, indicating that he was appealing from the trial court's "final judgment entry . . . entered on 4/17/2024" and attaching a copy of the trial court's April 17, 2024 nunc pro tunc entry.

{¶ 7} On appeal, Hicks raised a single assignment of error for review, i.e., that the trial court abused its discretion in denying his postsentence motion to withdraw his guilty pleas. Hicks argued that he had demonstrated the existence of a manifest injustice warranting the withdrawal of his guilty pleas based on his belief that "the trial court was going to sentence him to 20 years in prison" and the trial judge's reference to her own child during the sentencing hearing. In a decision journalized on February 20, 2025, this court overruled Hicks's assignment of error and affirmed the trial court. *Hicks*, 2025-Ohio-547, ¶ 13, 25-26 (8th Dist.).

{¶ 8} On April 21, 2025, Hicks filed, pro se, an application to reopen his appeal, pursuant to App.R. 26(B). Hicks contends that he was denied the effective assistance of appellate counsel because appellate counsel failed to raise the following two proposed assignments of error in his appeal:

> Assignment of Error No. 1
>
> Abuse of Discretion
>
> Assignment of Error No. 2
> Fourteenth Amendment Violation Equal Protection Under the Law as well as Ineffective Assistance of Trial Counsel/Appellate Counsel.

{¶ 9} In his first proposed assignment of error, Hicks argues that the trial court abused its discretion in denying Hicks's motion to withdraw his guilty pleas. In his second proposed assignment of error, Hicks argues that trial counsel was ineffective for failing to "establish a [s]elf-defense [c]laim," failing to file "a motion for justified homicide," and having Hicks "enter into a dark plea."

{¶ 10} The State filed an opposition in which it argues that Hicks's application should be denied because (1) Hicks "merely rehashes" his previously rejected arguments for withdrawing his guilty pleas, (2) his arguments relating to trial counsel's alleged ineffective assistance are unsupported by evidence, (3) trial counsel's alleged failure to file "certain trial motions" "would not have made a difference in the outcome" given Hicks's guilty pleas, and (4) Hicks's "guilty plea claim" is barred by res judicata.

II. Law and Analysis

A. Standard for Reopening Appeal Based on a Claim of Ineffective Assistance of Appellate Counsel

{¶ 11} Under App.R. 26(B), a defendant in a criminal case may apply to reopen his or her "appeal from the judgment of conviction and sentence" based on a claim of ineffective assistance of appellate counsel. The application must be filed within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time. App.R. 26(B)(1).

{¶ 12} Claims of ineffective assistance of appellate counsel are evaluated under the same standard applied to claims of ineffective assistance of trial counsel announced in *Strickland v. Washington*, 466 U.S. 668 (1984). *State v. Leyh*, 2022-Ohio-292, ¶ 17. Under this standard, "an applicant must show that (1) appellate counsel's performance was objectively unreasonable, [*Strickland*] at 687, and (2) there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,' [*Strickland*] at 694." *Leyh* at ¶ 18.

{¶ 13} App.R. 26(B) establishes a two-stage procedure for adjudicating claims of ineffective assistance of appellate counsel. *Id.* at ¶ 19. An applicant must first make a threshold showing that appellate counsel was ineffective. *Id.* at ¶ 19, 35. An application for reopening "'shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.'" *Id.* at ¶ 21, quoting App.R. 26(B)(5). "The burden is on the applicant to demonstrate

a 'genuine issue' as to whether there is a 'colorable claim' of ineffective assistance of appellate counsel." *Id.* at ¶ 21, citing *State v. Spivey*, 84 Ohio St.3d 24, 25 (1998). "[A]ppellate counsel need not raise every possible issue in order to render constitutionally effective assistance." *State v. Tenace*, 2006-Ohio-2987, ¶ 7, citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983), and *State v. Sanders*, 94 Ohio St.3d 150, 151-152 (2002).

{¶ 14} If the applicant makes the required threshold showing, demonstrating that "there is at least a genuine issue — that is, legitimate grounds — to support the claim that the applicant was deprived of the effective assistance of counsel on appeal," then the application shall be granted and the appeal reopened. *Leyh* at ¶ 25, citing App.R. 26(B)(5). The matter then "proceeds to the second stage of the procedure, which 'involves filing appellate briefs and supporting materials with the assistance of new counsel, in order to establish that prejudicial errors were made in the trial court and that ineffective assistance of appellate counsel in the prior appellate proceedings prevented these errors from being presented effectively to the court of appeals.'" *Leyh* at ¶ 22, quoting 1993 Staff Notes to App.R. 26(B).

B. Hicks's Application for Reopening

{¶ 15} In his application for reopening, Hicks seeks to reopen the appellate judgment that affirmed the denial of his postsentence motion to withdraw his guilty pleas.

{¶ 16} As an initial matter, we recognize that this court has previously stated that App.R. 26(B) does not provide a basis to reopen an appeal of the denial of a

motion to withdraw or vacate a guilty plea. *See, e.g., State v. Jones*, 2021-Ohio-2509, ¶ 8 (8th Dist.); *State v. Undiandeye*, 2021-Ohio-951, ¶ 10-11 (8th Dist.); *State v. Melendez*, 2021-Ohio-840, ¶ 7-10 (8th Dist.); *State v. Smith*, 2017-Ohio-8399, ¶ 2-4 (8th Dist.); *State v. Durden*, 2015-Ohio-3235, ¶ 3 (8th Dist.); *State v. Pointer*, 2014-Ohio-2383, ¶ 2-3 (8th Dist.); *State v. Smith*, 2005-Ohio-2711, ¶ 6 (8th Dist.). This is because, as it relates to criminal cases, App.R. 26(B) applies only to an "appeal from the judgment of conviction and sentence." App.R. 26(B)(1); *see also Melendez* at ¶ 7-8; *Smith*, 2017-Ohio-8399, at ¶ 3 ("Because App.R. 26(B) applies only to the direct appeal of a criminal conviction and sentence, it cannot now be employed to reopen the appeal that dealt with the denial of [the defendant's] motion to withdraw his plea of guilty.").

{¶ 17} In this case, however, although the only issue the court addressed on appeal was the trial court's denial of Hicks's postsentence motion to withdraw his guilty pleas — because it was the sole assignment of error raised in Hicks's appellate brief — Hicks's "appeal" was not "from" (or otherwise limited to) the order denying his postsentence motion to withdraw his guilty pleas. As indicated above, Hicks appealed from the judgment of conviction and sentence. Accordingly, the fact that the appellate judgment Hicks seeks to reopen here involved an affirmance of the trial court's denial of his postsentence motion to withdraw his guilty pleas does not preclude this court from considering Hicks's claims that appellate counsel was ineffective for failing to raise other potential issues or arguments as part of Hicks's appeal, pursuant to App.R. 26(B).

1. First Proposed Assignment of Error – The Trial Court Abused Its Discretion in Denying Hicks's Motion to Withdraw His Guilty Pleas

{¶ 18} In his first proposed assignment of error, Hicks contends that appellate counsel was ineffective for not fully and completely addressing the issue of whether the trial court abused its discretion in denying his postsentence motion to withdraw his guilty pleas. Although it is difficult to clearly discern Hicks's argument from his application, it appears he claims that the trial court was directly involved in plea negotiations and that he improperly received "a harsher sentence" (as compared with the "tentative sentence" that "ha[d] been discussed" during plea negotiations) due to "an incomplete record" and "the ineffective assistance of trial counsel." Hicks argues that this "sentencing error" — which led him to seek to withdraw his guilty pleas — "should have been evident to the court as well as Defense Counsel." Hicks further contends that where a court "has taken a part in the (Plea Bargain)" and a "harsher sentence has followed a (Breakdown) in negotiation," "the record must show that no improper weight was giving [sic] the failure to plead guilty [sic] and must affirmatively show that the courts [sic] sentenced the Defendant solely upon the facts of the case and not on his criminal history."

{¶ 19} Hicks has not shown a genuine issue of a colorable claim of ineffective assistance of appellate counsel related to the trial court's denial of his motion to withdraw his guilty pleas. Appellate counsel raised, and we fully considered, such arguments in the appeal, and we found them to be meritless.

{¶ 20} As we explained in our appellate decision, although the trial judge had reportedly told counsel in chambers that (at that point) a 20-year sentence seemed reasonable, she also made it clear that she did not know what other unknown information might come out at the sentencing hearing that could impact her decision regarding sentencing. The trial judge later indicated, when sentencing Hicks, that information received during the sentencing hearing, "tipped the scale a bit," leading her to impose a longer sentence within the parties agreed sentencing range. *Hicks*, 2025-Ohio-547, at ¶ 3-5, 16-18, 22 (8th Dist.).

{¶ 21} We also pointed out that the record clearly showed that (1) the trial court had specifically advised Hicks, prior to the entry of his guilty pleas, that it would "stay within the agreed sentencing range of 20 to 25 and 1/2 to 25 to 30 and 1/2 years" but that it made "no promises with respect to [his] exact sentence," (2) the trial court explained, in great detail, possible sentences Hicks might receive, in accordance with Reagan Tokes, (3) Hicks stated that he understood the parameters the trial court had set forth regarding sentencing, confirmed that no promises had been made to induce him to enter his guilty pleas, and indicated that he had no questions regarding his rights, the charges, the penalties, or anything placed on the record at the change-of-plea hearing, and (4) the trial court ultimately sentenced Hicks within the stated, agreed range. *Id.* at ¶ 3-5, 16-18, 21.

{¶ 22} We also considered and rejected Hicks's argument that the trial judge had improperly referenced her own child during sentencing and found that the trial court had complied with R.C. 2947.051 and had sentenced Hicks based on

information presented at the sentencing hearing. *Id.* at ¶ 20, 24. We concluded that Hicks had failed to establish the existence of manifest injustice, specifically noting that the trial court did not sentence Hicks to a maximum term or to a term that had not been explained to him, and that the trial court did not abuse its discretion in denying Hicks's motion to withdraw his guilty pleas. *Id.* at ¶ 23-24.

{¶ 23} "Issues previously addressed on appeal are not subject to a second review in reopening." *State v. Robinson*, 2022-Ohio-3033, ¶ 10 (8th Dist.). "Res judicata bars the relitigation of an issue that was previously addressed, even if cast in a slightly different form. 'Where an argument is raised by appellate counsel in a direct appeal, the same issue may not constitute grounds for reopening.'" *State v. Barnes*, 2020-Ohio-4988, ¶ 13 (8th Dist.), quoting *State v. Lindsey*, 2019-Ohio-3358, ¶ 9 (8th Dist.); *see also State v. Morris*, 2024-Ohio-6190, ¶ 20 (8th Dist.) ("To the extent [claims] were fully considered on appeal, they may not form the basis of an application for reopening.").

{¶ 24} Thus, this proposed assignment of error does not provide a basis for reopening Hicks's appeal.

2. Second Proposed Assignment of Error – Ineffectiveness of Trial Counsel

{¶ 25} In his second proposed assignment of error, Hicks contends that appellate counsel was ineffective for failing to raise as assignments of error trial counsel's failure to "establish a [s]elf-defense [c]laim," trial counsel's failure to file "a motion for justified homicide," and having Hicks "enter into a dark plea."

{¶ 26} Hicks argues that trial counsel was ineffective for "fail[ing] to establish a [s]elf-defense [c]laim" because "the record clearly demonstrates" that "Mr. Hall[,] the deceased[,] was the aggressor and that he fired the first shot." Hicks further contends that trial counsel was ineffective for "fail[ing] to file a motion for justified homicide" because "the evidence would have showed" that the victim was selling drugs the night of the shooting and "had a[n] O.V.I. blood level 3 times the legal limit" such that "it's possible that the victim could have provoked this matter forcing the defendant . . . to protect his self."

{¶ 27} However, a guilty plea is a complete admission of guilt. When a defendant enters a guilty plea, the defendant generally waives all nonjurisdictional errors, including any claims of ineffective assistance of trial counsel, except to the extent that the errors precluded the defendant from knowingly, intelligently, and voluntarily entering his or her guilty plea. *See, e.g., State v. Littlejohn*, 2025-Ohio-1444, ¶ 5 (8th Dist.); *State v. Jackson*, 2025-Ohio-369, ¶ 43 (8th Dist.); *Morris*, 2024-Ohio-6190, at ¶ 10 (8th Dist.). Hicks does not explain what he refers to as a "dark plea" or how he was allegedly led to enter such a plea here.[1] Aside from his

[1] Former Ohio Supreme Court Justice Michael Donnelly used the term "dark plea" to refer to a plea deal offered during postconviction proceedings in which a criminal defendant must decide whether (1) to accept a plea deal that guarantees release from prison but will not exonerate the defendant or (2) to continue to attempt to prove his or her innocence through the court system: "Prisoners are presented with the choice of going forward with the hearing (and risk losing) or the opportunity to walk out of prison with either the original conviction or some form of conviction remaining firmly intact. This, in essence, is the Dark Plea, the ultimate coercive tactic." *See* Donnelly, *The Dark Plea: One of the Most Coercive Abuses of Power Permitted in the Criminal Justice System*, 72 Clev.St.L.Rev. Et Cetera, 125, 128-131 (2024), available at https://engagedscholarship.csuohio.edu/etcetera/vol72/iss1/6. That is not the situation here.

claim that he believed that the trial court was going to sentence him to 20 years when he entered his guilty pleas — which was fully argued, considered, and rejected in his appeal — Hicks does not claim that any such "errors" precluded him from entering his guilty pleas knowingly, intelligently, and voluntarily.

{¶ 28} Further, there is nothing in the record to support Hicks's claim that he, in fact, acted in self-defense or that he was otherwise "justified" in killing Hall. The fact that Hall was "delivering drugs" that evening, that Hicks was allegedly "along for . . . the ride," and/or that a toxicology screen of the victim's femoral blood tested positive methamphetamines — the only facts or evidence to which Hicks points in support of such claims — would not tend to show that Hicks acted in self-defense or was otherwise "justified" in killing Hall.

{¶ 29} Hicks has not established a genuine issue of a colorable claim of ineffective assistance of appellate counsel relating to his second proposed assignment of error. Accordingly, this proposed assignment of error does not provide a basis for reopening his appeal.

{¶ 30} For all these reasons, Hicks's application for reopening is denied.

ANITA LASTER MAYS, JUDGE

EILEEN T. GALLAGHER, P.J., and
WILLIAM A. KLATT, J.,* CONCUR

(*Sitting by assignment: William A. Klatt, J., retired of the Tenth District Court of Appeals.)