[Cite as *State v. Burks*, 2009-Ohio-4362.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91719

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GODFREY BURKS

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 423870
CUYAHOGA COUNTY COMMON
PLEAS COURT NO. CR-502709

RELEASE DATE: August 24, 2009

ATTORNEYS FOR APPELLEE

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MARY EILEEN KILBANE, J.:

{¶ 1} Appellant Godfrey Burks filed a timely application for reopening pursuant to App.R. 26(B). He is attempting to reopen the appellate judgment that was rendered by this court in *State v. Burks*, Cuyahoga App. No. 91719, 2009-Ohio-2375. In that opinion, we affirmed Burks's convictions for aggravated burglary and for violating a protection order. On July 14, 2009, the state of Ohio filed a memorandum of law in opposition to the application for reopening. For the reasons stated below, we decline to reopen Burks's original appeal.

{¶ 2} To establish a claim of ineffective assistance of appellate counsel, the applicant must demonstrate that counsel's performance was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, cert. denied (1990), 497 U.S. 1011, 110 S.Ct. 3258.

{¶ 3} In *Strickland*, the United States Supreme Court stated that a court's scrutiny of an attorney's work must be highly deferential. The court further stated that it is too tempting for a defendant to second-guess his attorney after conviction and that it would be all too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Accordingly, "a court must indulge 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*, 104 S.Ct. at 2065.

{¶ 4} In regard to claims of ineffective assistance of appellate counsel, the United States Supreme Court has upheld the appellate attorney's discretion to decide which issues he or she believes are the most fruitful arguments. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue, if possible, or at most on a few key issues."

Jones v. Barnes (1983), 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987. Additionally, appellate counsel is not required to argue assignments of error that are meritless. Id.

{¶ 5} In his lone assignment of error, Burks asserts the trial court erred at the sentencing hearing in failing to fully inform the appellant of the effect of his guilty plea and the mandatory requirements of postrelease control. However, in his direct appeal, Burks's counsel argued the following assignment of error: "The trial court failed to comply with the mandatory requirements of R.C. 2943.032 and denied appellant due process of law by accepting appellant's guilty plea without first informing him of the terms and conditions of postrelease control."

{¶ 6} In rejecting this assignment of error, this court found that, "there is no debate that the trial court advised Burks he would be subjected to a period of postrelease control, and that the term would be for a five-year period." *Burks* at ¶11. Additionally, "there was no showing that Burks was prejudiced * * *. Also, there is no indication he would not have pled had these additional sections been read to him. There is no requirement that a court recite every possible manner in which a violation of postrelease control can, or will, occur. The constitutional safeguards are protected when it is clear from the record that the defendant was advised of, and clearly understood, the maximum penalty." *Burkes* at ¶17.

{¶ 7} Because the same issue was raised and addressed by this court on direct appeal, we find that the doctrine of res judicata prohibits this court from reopening the original appeal. Errors of law that were either raised or could have been raised through a direct appeal may be barred from further review under the doctrine of res judicata. See, generally, *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 1204. The Supreme Court of Ohio has further established that a claim for ineffective assistance of counsel may be barred by the doctrine of res judicata unless circumstances render the application of the doctrine unjust. *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204. In this matter we do not find that applying the principles of res judicata would be unjust.

{¶ 8} Accordingly, based upon these reasons, we deny the application to reopen.

MARY EILEEN KILBANE, JUDGE

COLLEEN CONWAY COONEY, A.J., and
LARRY A. JONES, J., CONCUR