[Cite as *State v. Lenard*, 2010-Ohio-2220.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93373

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RICHARD LENARD

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Application for Reopening
Motion No. 432221
Cuyahoga County Common Pleas Court
Case Nos. CR-463837 and CR-468589

RELEASE DATE: May 14, 2010

FOR APPELLANT

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ATTORNEYS FOR APPELLEE

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KENNETH A. ROCCO, P. J.:

{¶ 1} Richard Lenard has filed a timely application for reopening pursuant to App.R. 26(B). Lenard is attempting to reopen the appellate judgment that was rendered in *State v. Lenard*, Cuyahoga App. No. 93373, 2010-Ohio-81, which affirmed the trial court's judgment finding that he violated his community control sanction and further ordered him to serve the remainder of a four-year prison term. For the following reasons, we decline to reopen Lenard's appeal.

{¶ 2} In Cuyahoga County Court of Common Pleas Case No. CR-463837, Lenard pled guilty to receiving stolen property, tampering with records, telecommunications fraud, forgery, theft, and grand theft of a motor vehicle. Lenard was sentenced to an aggregate term of four years in prison, to be served consecutively to the sentence imposed in Cuyahoga County Court of Common Pleas Case No. CR-468589.

{¶ 3} In Case No. CR-468589, Lenard pled guilty to attempted theft and tampering with records. Lenard was sentenced to 11 months of incarceration on each count, to be served concurrently with each other, but consecutive to the four-year prison term imposed in CR-463837.

{¶ 4} On February 9, 2007, Lenard filed a motion for judicial release. Following a hearing, Lenard was granted judicial release and was placed under a community control sanction, under community control conditions, and under the supervision of the department of probation. In January 2009, Lenard was arrested and indicted in Cuyahoga County Court of Common Pleas Case No. CR-520755. In May 2009, the trial court conducted a hearing and found that Lenard was in violation of his community control conditions. Lenard's community control sanction was terminated and he was sentenced to serve the time remaining on his four-year prison term for which he had been granted judicial release.

{¶ 5} Lenard filed a timely appeal and raised three assignments of error for review: (1) denial of due process when the trial court terminated the community control sanction without being notified in writing of the alleged violations; (2) failure of the state to prove by a preponderance of the evidence that he violated the conditions of his community control sanction; and (3) trial court abused its discretion and violated his due process rights when it revoked his community control sanction. On January 25, 2010, this court found that Lenard's three assignments of error lacked merit and affirmed the trial court's judgment, which terminated Lenard's community control sanction and returned him to prison in order to serve the balance of his sentence of incarceration. On March 22, 2010, Lenard filed his App.R. 26(B) application for reopening.

{¶ 6} In order to establish a claim of ineffective assistance of appellate counsel, Lenard must demonstrate that appellate counsel's performance was deficient and that, but for his deficient performance, the result of his appeal would have been different. *State v. Reed*, 74 Ohio St.3d 534, 1996-Ohio-21, 660 N.E.2d 456. In order for this court to grant an application for reopening, Lenard must establish that "there is a genuine issue as to whether he was deprived of the assistance of counsel on appeal." App.R. 26(B)(5).

{¶ 7} "In *State v. Reed* [supra, at 458] [the Supreme Court of Ohio] held that the two-prong analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, is the appropriate standard to assess a defense request for reopening under App.R. 26(B)(5). [Applicant] must prove that his counsel was deficient for failing to raise the issue he now presents, as well as showing that had he presented those claims on appeal, there was a 'reasonable probability' that he would have been successful. Thus, [applicant] bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Spivey*, 84 Ohio St.3d 24, 1998-Ohio-704, 701 N.E.2d 696, at 25.

{¶ 8} It is also well settled that appellate counsel is not required to raise and argue assignments of error that are meritless. *Jones v. Barnes* (1983), 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987. Appellate counsel cannot be considered ineffective for failing to raise every conceivable assignment of error on appeal. *Jones v. Barnes*, supra; *State v. Grimm*, 73 Ohio St.3d 413, 1995-Ohio-24, 653 N.E.2d 253; *State v. Campbell*, 69 Ohio St.3d 38, 1994-Ohio-492, 630 N.E.2d 339.

{¶ 9} In *Strickland v. Washington*, supra, the United States Supreme Court also stated that a court's scrutiny of an attorney's work must be

deferential. The court further stated that it is too tempting for a defendant/appellant to second-guess his attorney after conviction and appeal 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." Id. at 689. Finally, 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 and the importance of winnowing out weaker arguments on appeal and focusing on one central issue or at most a few key issues. *Jones v. Barnes*, supra.

{¶ 10} In support of his claim of ineffective assistance of appellate counsel, Lenard raises three proposed assignments of error:

{¶ 11} 1) "THE APPELLANT HAD INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE WAS DENIED THE OPPORTUNITY TO INSPECT THE SEARCH WARRANT AFFIDAVIT FOR SUFFICIENCY TO DETERMINE WHETHER IT WAS SUFFICIENT TO CONDUCT A LEGAL SEARCH AND SEIZURE. APPELLANT WAS DENIED DUE PROCESS OF

LAW AND EQUAL PROTECTION OF LAW WHEN COUNSEL FAILED TO RAISE IRREVERSIBLE ERROR.";

{¶ 12} 2) "THERE ARE ELEMENTS TO THE AFFIDAVIT MISSING TO MAKE THE SEARCH OF APPELLANT'S RESIDENCE A LEGAL SEARCH AND SEIZURE. THE APPELLANT HAS A RIGHT TO CHALLENGE THE SUFFICIENCY OF THE SEARCH WARRANT."; AND

{¶ 13} 3) "THE APPELLANT HAS COMPLETED FOURTEEN MONTHS OF A SENTENCE THAT IS FACIALLY VOID IN CASE CR-05-463837. IN CASE CR-08-508101, THE APPELLANT WAS SENTENCED TO SIX MONTH CONSECUTIVE TO CR-05-463837. THE APPELLANT'S INCARCERATION TIME HE SERVED SHOULD BE CREDITED TOWARDS THE SIX MONTH SENTENCE."

{¶ 14} Lenard, through his first and second proposed assignments of error, essentially argues that the validity of a search warrant and the search of his home should have been challenged on appeal. Any challenge to the search warrant or the search of Lenard's home, however, could not be addressed through the appeal that was prosecuted in *State v. Lenard*, Cuyahoga App. No. 93373, 2010-Ohio-81. The trial court judgment, which formed the basis of the appeal in *State v. Lenard*, supra, involved the termination of Lenard's community control sanction and the resulting

sentence of incarceration. Lenard is attempting to raise proposed assignments of error that are directly related to his plea of guilty of December 7, 2005, and the resulting sentences of March 16, 2006. No timely appeal was filed by Lenard, from his plea of guilty and sentences, and he cannot now "bootstrap" arguments to seek review of errors from which a timely appeal has not been taken. See App.R. 3(D), 4(A), 5, and 16(A)(3); *State v. Gray* (May 24, 2001), Cuyahoga App. No. 78467; *State v. Terrell* (Jan. 13, 2000), Cuyahoga App. No. 76637; *State v. Church* (Nov. 2, 1995), Cuyahoga App. No. 68590.

{¶ 15} It must also be noted that Lenard's plea of guilty waived all challenges to his conviction, except that his plea was entered involuntary. In other words, a defendant who enters a voluntary plea of guilty waives all non-jurisdictional defects in prior stages of proceedings. *State v. Kelley* (1991), 57 Ohio St.3d 127, 566 N.E.2d 658; *Ross v. Common Pleas Court of Auglaize Cty.* (1972), 30 Ohio St.2d 323, 285 N.E.25. Thus, assuming that Lenard filed a timely appeal from his original conviction, any errors associated with a search warrant or the search of his home, were not reviewable by this court and could not be raised on appeal. This court is prevented from considering Lender's first and second proposed assignments of error.

{¶ 16} Lenard, through his third proposed assignment of error, argues that he has not been properly credited with"incarceration time" vis-a-vis the six months of incarceration as ordered in Cuyahoga County Court of Common Pleas Case No. CR-508101. Any jail-time credit error, as associated with Case No. 508101, cannot be addressed through the present application for reopening. Lenard's application for reopening is solely concerned with the judgments of the trial court as rendered in Case Nos. CR-463837 and CR-468589. Any jail-time credit associated with Case No. CR-508101 must be raised through a separate timely appeal. See App.R. 26(B)(1); App.R. 4. Cf. *State v. Skaggs* (May 12, 1999), Cuyahoga App. No. 76301, reopening disallowed (Sept. 21, 1999), Motion No. 307505. See, also, *State v. Loomer*, 76 Ohio St.3d 398, 1996-Ohio-59, 667 N.E.2d 1209; *State v. Halliwell* (Jan 29, 1999), Cuyahoga App. No. 70369, reopening disallowed (Jan 29, 1999), Motion No. 300187; *State v. Fields* (Feb. 29, 1996), Cuyahoga App. No. 68906, reopening disallowed (Sep. 5, 1997), Motion No. 284867; *State v. Williams* (Oct. 31, 1996), Cuyahoga App. No. 69936, reopening disallowed (Apr. 24, 1997), Motion No. 280441.

{¶ 17} Accordingly, Lenard's application for reopening is denied.

KENNETH A. ROCCO, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
CHRISTINE T. MCMONAGLE, J., CONCUR