[Cite as *State v. Kronenberg*, 2015-Ohio-3224.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101403

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHELLE L. KRONENBERG

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-13-579027-A
Application for Reopening
Motion No. 485224

RELEASE DATE: August 7, 2015

FOR APPELLANT

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MARY J. BOYLE, J.:

{¶1} Michelle Kronenberg has filed a timely application for reopening pursuant to App.R. 26(B) relating to *State v. Kronenberg*, 8th Dist. Cuyahoga No. 101403, 2015-Ohio-1020, which affirmed her convictions for violating a protection order and telecommunications harassment. For the following reasons, we deny the application for reopening.

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

{¶3} In *State v. Smith*, 95 Ohio St.3d 127, 2002-Ohio-1753, 766 N.E.2d 588, the Supreme Court of Ohio held that:

> Moreover, to justify reopening his appeal, [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 at 25, 1998-Ohio-704, 701 N.E.2d 696.

Smith, supra, at 7.

{¶4} In addition, the Supreme Court of Ohio, in *State v. Spivey*, 84 Ohio St.3d 24, 1998-Ohio-704, 701 N.E.2d 696, held that:

> In *State v. Reed* (1996), 74 Ohio St.3d 534, 535, 1996-Ohio-21, 660 N.E.2d 456, 458, we held that the two prong analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 674, is the

> appropriate standard to assess a defense request for reopening under App.R. 26(B)(5). [Applicant] must prove that his counsel were deficient for failing to raise the issues 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.

Id.

{¶5} It is also well settled that appellate counsel is not required to raise and argue assignments of error that are meritless. *Jones v. Barnes*, 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*, *supra*, at 752; *State v. Gumm*, 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.

{¶6} In *Strickland*, 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 firmly established that appellate counsel possesses the sound discretion to decide which issues

are the most fruitful arguments on appeal. Appellate counsel possesses the sound discretion to winnow out weaker arguments on appeal and to focus on one central issue or at most a few key issues. *Jones*, *supra*, at 752.

{¶7} Kronenberg's application sets forth a single proposed error, which alleges that "Ohio telecommunications harassment statute R.C. 2917.21(B) is unconstitutionally vague and unconstitutionally overbroad on its face and as applied to this defendant-appellant." Kronenberg asserts that appellate counsel was ineffective for not referencing Kronenberg's pro se motion to dismiss in the appellate brief. Kronenberg acknowledges that appellate counsel did, however, present this error for our review which was decided in the direct appeal. *Kronenberg*, 2015-Ohio-1020, ¶ 30-36. Kronenberg has not presented us with any different or additional legal authority but instead reiterates points that we have already considered, such as the lack of statutory definitions for "harass" under Ohio law, *id.* at ¶ 34, the purpose element of the statute, *id*. at ¶ 35, 38, and whether lawful conduct can be punished by the statute, *id*. at ¶ 38. Contrary to Kronenberg's assertions, this court has already decided the issues she now presents.

{¶8} Appellate counsel challenged the constitutionality of the statute for vagueness and overbreadth. Res judicata bars her from maintaining an assignment of error that was raised on direct appeal. *State v. Dial*, 8th Dist. Cuyahoga No. 83847, 2007-Ohio-2781, ¶ 11, citing *State v. Ballinger*, 8th Dist. Cuyahoga No. 79974, 2002-Ohio-2146, *reopening disallowed*, 2003-Ohio-145,

¶ 29.

{¶9} Kronenberg has not met the standard for reopening pursuant to App.R. 26(B).

{¶10} Accordingly, her application for reopening is denied.

MARY J. BOYLE, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
EILEEN A. GALLAGHER, J., CONCUR