

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 106994
 v. :
 :
 ESTARLING MELENDEZ, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: June 4, 2019

Cuyahoga County Court of Common Pleas
Case No. CR-03-436652-ZA
Application for Reopening
Motion No. 528072

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecutor, and
Frank Romeo Zeleznikar, Assistant Prosecuting Attorney,
for appellee.

Estarling Melendez, *pro se.*

KATHLEEN ANN KEOUGH, J.:

{¶ 1} Estarling Melendez seeks to reopen his appeal, *State v. Melendez*, 8th
Dist. Cuyahoga No. 106994, 2019-Ohio-533, claiming that appellate counsel was

ineffective for not arguing that trial counsel was ineffective during a resentencing hearing held by the trial court. We deny the application.

{¶ 2} In 2003, Melendez pled guilty to a single count of murder, for which he received a prison sentence of 15 years to life. According to the sentencing entry memorializing this sentence, the court also imposed a five-year term of postrelease control. Melendez did not file a direct appeal challenging his conviction.

{¶ 3} In 2018, the trial court held a hearing that was prompted by a motion Melendez filed seeking “to correct the facially illegal sentence.” At the hearing, where Melendez was represented by counsel, the trial court removed the improperly imposed period of postrelease control and reworded the imposition of sentence to track the language of the appropriate sentencing statute to state an indefinite sentence of 15 years to life. The court issued a new sentencing entry reflecting these changes.

{¶ 4} Melendez appealed, raising three assignments of error. He argued that (1) the court erred in not allowing him to argue an oral motion to withdraw his plea, (2) trial counsel was ineffective for not seeking a continuance to file a written motion or objecting to the trial court’s decision denying Melendez the ability to argue the oral motion, and (3) the trial court denied him his right of allocution *Melendez*, 8th Dist. Cuyahoga No. 106994, 2019-Ohio-533. This court overruled these assigned errors and affirmed his convictions. *Id.* at ¶ 23.

{¶ 5} Melendez then timely filed an application for reopening, asserting a single proposed assignment of error arguing that “trial counsel failed to render

effective assistance of counsel at appellant's resentencing in violation of his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution."

I. Ineffective Assistance of Appellate Counsel

{¶ 6} App.R. 26(B) provides a limited opportunity to reopen a direct appeal based on ineffective assistance of appellate counsel. Ineffective assistance of appellate counsel is reviewed using the same standard applicable to ineffective assistance of trial counsel set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The applicant must prove that counsel's conduct fell below an objective standard of reasonableness and that prejudice resulted. Prejudice can be established by showing there was a reasonable probability the results would have been different. *State v. Were*, 120 Ohio St.3d 85, 2008-Ohio-5277, 896 N.E.2d 699, ¶ 10-11. The applicant must show that counsel was deficient for failing to raise the proposed issues presented in the application and that there was a reasonable probability of success had he presented those claims on appeal. *Id.* at ¶ 11, citing *State v. Sheppard*, 91 Ohio St.3d 329, 330, 744 N.E.2d 770 (2001). This means the appellant bears the burden of demonstrating that there is a "genuine issue" as to whether he has a "colorable claim" of ineffective assistance of appellate counsel. *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

{¶ 7} In support of his claim of ineffective assistance of appellate counsel, Melendez claims that the question at issue is

whether trial counsel made reasonable attempts to review Melendez's 2003 plea and sentencing transcript to determine whether he was induced to enter into a plea agreement sentence that was unlawful on its face, and whether counsel had a constitutional duty to bring the void plea agreement to the attention of the trial court judge before the court resentenced Melendez to a sentence he could never have pled guilty to in the first instance.

Application to reopen, 3-4.

{¶ 8} In the appeal Melendez seeks to reopen, this court held that “[a] defendant does not have a right of counsel regarding a postsentence motion to withdraw a guilty plea.” *Melendez*, 8th Dist. Cuyahoga No. 106994, 2019-Ohio-533, at ¶ 15, citing *State v. Meadows*, 6th Dist. Lucas L-05-1321, 2006-Ohio-2622. This court went on to hold that “because Melendez did not have a constitutional right to counsel, he cannot be deprived of effective assistance of counsel.” *Id.*, citing *State v. Carter*, 93 Ohio St.3d 581, 582, 757 N.E.2d 362 (2001). This is determinative of the issue Melendez raises in his application to reopen. Appellate counsel could not have been ineffective for failing to argue that trial counsel fell short of his constitutional responsibilities to Melendez assuming trial counsel did not adequately review and research the validity of Melendez's prior guilty plea. This is because Melendez did not have a right to counsel to argue his postsentence motion to withdraw his guilty plea.¹ This is simply another way of arguing that trial counsel was ineffective for not arguing Melendez's motion to withdraw his guilty plea. While worded slightly different, this court has already overruled this assignment of error raised in the

¹ The trial court ruled that the hearing was limited to Melendez's motion to correct his sentence and indicated it would decide a written motion to withdraw guilty pleas separately.

direct appeal. Appellate counsel cannot be ineffective because counsel did, in fact, argue this issue on appeal. *See State v. Adams*, 146 Ohio St.3d 232, 2016-Ohio-3043, 54 N.E.3d 1227, ¶ 23-24.

{¶ 9} Application denied.

KATHLEEN ANN KEOUGH, JUDGE

MARY EILEEN KILBANE, A.J., and
ANITA LASTER MAYS, J., CONCUR