

[Cite as *State v. Lewis*, 2019-Ohio-4974.]

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 107552
 v. :
 :
 JUSTIN LEWIS, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

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

Cuyahoga County Court of Common Pleas
Case Nos. CR-17-624178-A and CR-18-626972-B
Application for Reopening
Motion No. 530946

Appearances:

Paul Mancino, Jr., *for appellant.*

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Anthony T. Miranda, Assistant Prosecuting Attorney, *for appellee.*

MICHELLE J. SHEEHAN, J.:

{¶ 1} Justin Lewis has filed a timely application for reopening pursuant to App.R. 26(B). Lewis is attempting to reopen the appellate judgment rendered in *State v. Lewis*, 8th Dist. Cuyahoga No. 107552, 2019-Ohio-1994, that affirmed his

plea of guilty and the sentence of incarceration imposed for the offenses of trafficking in cocaine, trafficking in heroin, possession of drugs, possessing criminal tools, and child endangering. We decline to reopen Lewis's original appeal because he has failed to establish that he was prejudiced by the claim of ineffective assistance of appellate counsel.

I. Standard of Review Applicable to App.R. 26(B) Application for Reopening

{¶ 2} In order to establish a claim of ineffective assistance of appellate counsel, Lewis is required to establish that the performance of his appellate counsel was deficient and the deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 767 (1990).

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

II. First Proposed Assignment of Error

{¶ 4} Lewis's first proposed assignment of error is that:

Defendant was denied due process of law when the court failed to inform defendant that he was waiving certain rights by entering a plea of guilty.

{¶ 5} Lewis, through his first proposed assignment of error, argues that appellate counsel failed to assert on appeal that he was prejudiced by the trial court's failure "to ascertain from [Lewis] whether he knew he was waiving certain rights when he entered a plea of guilty." Specifically, Lewis argues that his plea of guilty was not knowing, voluntary, and intelligent.

{¶ 6} Initially, we find that Lewis has failed to establish that the trial court did not properly advise him of the waiver of any constitutional right. Lewis simply recounts the colloquy that occurred at the guilty plea hearing. Lewis has failed to establish any prejudice that resulted from representation by appellate counsel. *State v. Jackson*, 8th Dist. Cuyahoga No. 100125, 2015-Ohio-1946; *State v. Jones*, 8th Dist. Cuyahoga No. 99703, 2014-Ohio-4467; *State v. Hawkins*, 8th Dist. Cuyahoga No. 90704, 2009-Ohio-2246.

{¶ 7} In addition, the principles of res judicata may be applied to bar the further litigation of issues that were raised previously or could have been raised previously in an appeal. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967). Claims of ineffective assistance of appellate counsel in an application for reopening may be barred from further review by the doctrine of res judicata unless circumstances render the application of the doctrine unjust. *State v. Murnahan*, 63

Ohio St.3d 60, 584 N.E.2d 1204 (1992); *State v. Logan*, 8th Dist. Cuyahoga No. 88472, 2008-Ohio-1934.

{¶ 8} The issue raised by Lewis, that he was prejudiced by the failure of the trial court to properly advise him of the waiver of his constitutional rights when entering a plea of guilty, has already been addressed upon direct appeal. This court previously held that:

Here, it is undisputed that the trial court substantially complied with its obligations under Crim.R. 11(C)(2)(a) regarding Lewis's nonconstitutional rights and it ensured that Lewis understood the effect of his plea pursuant to Crim.R. 11(C)(2)(b). Furthermore, the plea transcript reflects the trial court advised Lewis of the five constitutional rights enumerated in Crim.R. 11(C)(2)(c). * * *. The assignment of error is without merit.

Lewis, 8th Dist. Cuyahoga No. 107552, 2019-Ohio-1994, at ¶ 41.

{¶ 9} Res judicata prevents this court from once again determining whether Lewis was prejudiced through his plea of guilty. *State v. Tate*, 8th Dist. Cuyahoga No. 81682, 2004-Ohio-973. We further find that circumstances do not render the application of the doctrine of res judicata unjust. Lewis has failed to establish any prejudice through his first proposed assignment of error.

III. Second Proposed Assignment of Error

{¶ 10} Lewis's second proposed assignment of error is that:

Defendant was denied his Sixth Amendment right to effective assistance of counsel.

{¶ 11} Lewis, through his second proposed assignment of error, argues that appellate counsel failed to assert on appeal the issue that he was denied effective assistance of trial counsel. Specifically, Lewis argues that his trial counsel was

ineffective by failing to argue that “law enforcement had improperly accumulated the amount of drugs to enhance the offense from a low grade felony to higher grade felony” which resulted in the improper imposition of consecutive sentences.

{¶ 12} Once again, Lewis has failed to establish with any specificity how he was prejudiced by the conduct of trial court counsel. The mere recitation of a proposed assignment of error, without demonstration of the error and resulting prejudice, does not establish a proposed assignment of error in support of the App.R. 26(B) application for reopening.

{¶ 13} Lewis has failed to establish any prejudice through his second proposed assignment of error. *Jackson*, 8th Dist. Cuyahoga No. 100125, 2015-Ohio-1946; *Jones*, 8th Dist. Cuyahoga No. 99703, 2014-Ohio-4467; *Hawkins*, 8th Dist. Cuyahoga 90704, 2009-Ohio-2246.

{¶ 14} In addition, a guilty plea is a complete admission of the defendant=s guilt. A counseled plea of guilty, which is knowingly, voluntarily, and intelligently given, removes the issue of factual guilt from the case. *State v. Siders*, 78 Ohio App.3d 699, 605 N.E.2d 1283 (11th Dist.). When a defendant enters a plea of guilty, he waives all appealable errors that might have occurred at trial unless the errors precluded the defendant from entering a knowing, voluntary, and intelligent plea. *State v. Barnett*, 73 Ohio App.3d 244, 596 N.E.2d 1101 (2d Dist.1991), citing *State v. Kelley*, 57 Ohio St.3d 127, 566 N.E.2d 658 (1991). A plea of guilty even waives the right to claim that a defendant was prejudiced by ineffective counsel, except to any defects that caused the plea to be less than intelligent, knowing, and voluntary. *Id.*

at 249; *see also State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48. Herein, nothing in the record demonstrates that Lewis's plea of guilty was less than knowing, voluntary, and intelligent.

{¶ 15} Accordingly, the application for reopening is denied.

MICHELLE J. SHEEHAN, JUDGE

EILEEN T. GALLAGHER, P.J., and
RAYMOND C. HEADEN, J., CONCUR