

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 109262
 v. :
 :
 ANTHONY BALDUCCI, :
 :
 Defendant-Appellant. :
 :

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: June 30, 2021

Cuyahoga County Court of Common Pleas
Case No. CR-19-636936-A
Application for Reopening
Motion No. 544302

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecutor, and
Tasha L. Forchione, Assistant Prosecuting Attorney, *for*
appellee.

Henderson, Mokhtari, & Weatherly, and Justin M.
Weatherly, *for appellant.*

MARY EILEEN KILBANE, J.:

{¶ 1} Anthony Balducci has filed a timely App.R. 26(B) application for reopening. Balducci is attempting to reopen the appellate judgment, rendered in

State v. Balducci, 8th Dist. Cuyahoga No. 109262, 2020-Ohio-5334, that affirmed the denial of his motion to withdraw guilty plea. We decline to reopen Balducci's appeal for the following reasons.

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, Balducci 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*.

{¶ 4} Moreover, even if Balducci establishes that an error by his appellate counsel was professionally unreasonable, Balducci must further establish that he

was prejudiced; but for the unreasonable error there exists a reasonable probability that the results of his appeal would have been different. Reasonable probability, with regard to an application for reopening, is defined as a probability sufficient to undermine confidence in the outcome of the appeal. *State v. May*, 8th Dist. Cuyahoga No. 97354, 2012-Ohio-5504.

II. Argument in Support of Reopening

{¶ 5} Balducci raises a single proposed assignment of error in support of his application for reopening. Balducci claims that appellate counsel was ineffective for failing to argue on appeal that trial counsel was ineffective. Specifically, Balducci argues that appellate counsel was ineffective for failing to argue that (1) trial counsel failed to hire an investigator to investigate the “Facebook confession” made by another individual; (2) trial counsel failed to engage in any substantive motion practice prior to Balducci’s plea of guilty; (3) trial counsel improperly counseled Balducci and convinced him that a plea of guilty was his only recourse; and (4) trial counsel failed to meet and advise Balducci prior to entering a plea of guilty.

{¶ 6} The doctrine of res judicata prevents further review of the issue of hiring an investigator, motion practice, improper counseling, and failure to consult and meet prior to entering a plea of guilty because the issues have already been addressed by this court on direct appeal and found to be without merit. *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; *State v. Tate*, 8th Dist. Cuyahoga No. 81682, 2004-Ohio-973.

{¶ 7} This court, in the appellate opinion journalized November 19, 2020, held that (1) trial counsel was not ineffective for failing to hire an independent investigator to evaluate a “Facebook confession” from another individual – *Balducci* at ¶ 37-38; (2) trial counsel was not ineffective based upon motion practice conducted in the trial court – *Balducci* at ¶ 39; (3) trial counsel did not coerce Balducci to enter a plea of guilty – *Balducci* at ¶ 59; and (4) trial counsel was not ineffective based upon the amount of time spent in conferring and advising Balducci – *Balducci* at ¶ 36;

{¶ 8} We further find that circumstances do not render the application of the doctrine of res judicata unjust. Balducci has failed to establish any prejudice through his first proposed assignment of error.

III. Effect of Plea of Guilty on App.R. 26(B)

{¶ 9} In *State v. Balducci*, Cuyahoga C.P. No. CR-19-636936-A, Balducci entered a plea of guilty to the offenses of murder (R.C. 2903.02) with a one-year and a three-year firearm specification (R.C. 2941.141 and 2941.145) and having weapons while under disability (R.C. 2923.13). A plea of guilty waives a defendant’s right to challenge his or her conviction on all potential issues except for jurisdictional issues and the claim that ineffective assistance of counsel caused the guilty plea to be less than knowing, intelligent, and voluntary. *Montpelier v. Greeno*, 25 Ohio St.3d 170,

495 N.E.2d 581 (1986); *State v. Vihtelic*, 8th Dist. Cuyahoga No. 105381, 2017-Ohio-5818; *State v. Szidik*, 8th Dist. Cuyahoga No. 95644, 2011-Ohio-4093; *State v. Salter*, 8th Dist. Cuyahoga No. 82488, 2003-Ohio-5652; and *State v. May*, 8th Dist. Cuyahoga No. 97354, 2012-Ohio-2766, *reopening disallowed*, 2012-Ohio-5504.

{¶ 10} By entering a plea of guilty, Balducci waived all appealable errors that might have occurred at trial unless the errors prevented Balducci from entering a knowing and voluntary plea. *State v. Kelley*, 57 Ohio St.3d 127, 566 N.E.2d 658 (1991); *State v. Barnett*, 73 Ohio App.3d 244, 596 N.E.2d 1101 (2d Dist. 1991).

{¶ 11} Once again, our review of the plea transcript clearly demonstrates that the trial court meticulously complied with the mandates of Crim.R. 11 and that Balducci entered a knowing, intelligent, and voluntary plea of guilty to the offenses of murder and having weapons while under disability. Specifically, the trial court informed Balducci that he would be waiving numerous constitutional rights and further informed him of the potential sentence and fine associated with each charged offense: 1) the degree of each charged felony offense (Tr. 24-25); 2) the maximum sentence and fine associated with each charged criminal offense (Tr. 28); 3) waiver of the right to a jury trial (Tr. 18); 4) waiver of the right that the state must prove guilt beyond a reasonable doubt (Tr. 19); 5) waiver of the right to confront and cross-examine each witness called by the state (Tr. 18); 6) Balducci could not be compelled to testify against himself (Tr. 19); and 7) the effects of violation of postrelease control (Tr. 29). The trial court further determined that Balducci was

not under the influence of drugs, alcohol, or medications and that he was satisfied with the representation of his legal counsel. (Tr. 17-18).

{¶ 12} Because Balducci's plea was knowingly, intelligently, and voluntarily made, and the claimed error raised by Balducci is not based upon any jurisdictional defect, the raised proposed assignment of error is waived. We further find that no prejudice can be demonstrated by Balducci based upon appellate representation on appeal. *State v. Bates*, 8th Dist. Cuyahoga No. 100365, 2015-Ohio-297.

{¶ 13} The application for reopening is denied.

MARY EILEEN KILBANE, JUDGE

EMANUELLA D. GROVES, P.J., and
LARRY A. JONES, SR., J., CONCUR