

[Cite as *State v. Cline*, 2009-Ohio-7041.]

IN THE COURT OF APPEALS OF CHAMPAIGN COUNTY, OHIO

STATE OF OHIO :
 Plaintiff-Appellee : C.A. CASE NO. 08CA21
 vs. : T.C. CASE NO. 00CR163
 JAMES M. CLINE : (Criminal Appeal from
 Defendant-Appellant : Common Pleas Court)

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O P I N I O N

Rendered on the 30th day of December, 2009.

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Defendant-Appellant, Pro Se

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GRADY, J.:

{¶ 1} Defendant, James Cline, appeals from a judgment of the common pleas court that granted the State’s motion for summary judgment on Cline’s petition for post-conviction relief.

{¶ 2} In January 2002, Defendant was convicted following a

jury trial of four counts of unauthorized use of a computer, two counts of menacing by stalking, two counts of conspiracy to commit aggravated arson, one count of criminal mischief, one count of intimidation of a crime witness/victim, and sixty-six counts of telecommunications harassment. The trial court sentenced Defendant to prison terms totaling sixty-seven and one-half years.

{¶3} We reversed Defendant's convictions on direct appeal and remanded the case for a new trial on a finding that Defendant had not executed a written waiver of his right to counsel in accordance with Crim.R. 44(C), prior to representing himself at trial. *State v. Cline*, Champaign App. No. 2002-CA-05, 2003-Ohio-4712. We also reversed one of Defendant's convictions for menacing by stalking on a finding that it was not supported by legally sufficient evidence.

{¶4} The Ohio Supreme Court reversed our decision, holding that substantial, and not literal, compliance with Crim.R. 44(C) is sufficient. *State v. Cline*, 103 Ohio St.3d 471, 2004-Ohio-5701.

On remand from the Supreme Court, we concluded that the trial court did not substantially comply with Crim.R. 44(C)'s requirements for waiver of the right to counsel, and we remanded this matter for a new trial. *State v. Cline*, 164 Ohio App.3d 228, 2005-Ohio-5779.

{¶5} In August 2006, prior to the commencement of Defendant's

new trial, the State indicted Defendant on an additional two hundred and fifty-five counts of telecommunications harassment. Defendant was found guilty following a second jury trial in November of 2006 of four counts of unauthorized use of a computer, two counts of conspiracy to commit aggravated arson, one count of menacing by stalking, one count of criminal mischief, one count of intimidation of a crime witness/victim, and one hundred seventy-six counts of telecommunications harassment. The trial court sentenced Defendant to prison terms totaling fifty-eight and one-half years.

{¶ 6} Defendant timely appealed to this court following his second trial, and on April 18, 2008, we affirmed his convictions and sentences on all counts, except one count of conspiracy to commit arson, which we reversed and vacated. *State v. Cline*, Champaign App. No. 07CA02, 2008-Ohio-1866.

{¶ 7} On February 26, 2008, while Defendant's appeal to this court was pending, Defendant filed a petition for post-conviction relief pursuant to R.C. 2953.21. (Dkt. 387). As grounds for relief, Defendant alleged: (1) ineffective assistance of trial counsel for counsel's failure to raise certain issues and call certain witnesses; (2) vindictive prosecution for the prosecutor's decision to pursue additional charges following Defendant's successful first appeal; and, (3) abuse of discretion on the part

of the trial court in imposing a disproportionate, excessive sentence.

{¶ 8} The State moved for summary judgment on Defendant's claims for relief. The trial court granted the State's motion for summary judgment on July 28, 2008, concluding that all of Defendant's claims for relief either were raised or could have been raised on direct appeal, and are therefore barred by res judicata. Defendant timely appealed to this court from the summary judgment.

FIRST ASSIGNMENT OF ERROR

{¶ 9} "ATTORNEY MOONEY PROVIDED 'INEFFECTIVE ASSISTANCE [OF] COUNSEL,' VIOLATING THE CODE OF ETHICS, AS WELL AS CONSTITUTIONAL LAW."

{¶ 10} Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, the defendant was prejudiced as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To prove prejudice the defendant must demonstrate that were it not for counsel's errors, the result of the trial would have been different. *Id.*; *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶ 11} Defendant contended that his trial counsel performed

in a constitutionally deficient manner by failing to obtain the services of expert witnesses, including a computer expert, a handwriting expert and a voice identification expert, and by failing to raise certain issues at trial such as venue, severance of the charges, speedy trial and the execution of the search warrant.

{¶ 12} The trial court found that Defendant's claim of ineffective assistance is barred by res judicata. That doctrine holds that a valid, final judgment rendered on the merits bars all subsequent actions based on any claim arising out of the transaction or occurrence that was the subject of the previous action. *Grava v. Parkman* (1995), 75 Ohio St.3d 379.

{¶ 13} Res judicata prohibits a convicted defendant who was represented by counsel from raising and litigating in an R.C. 2953.21 post-conviction proceeding any defense or claimed lack of due process that was raised or could have been raised at trial or in a prior direct appeal. *State v. Perry* (1967), 10 Ohio St.2d 175; *State Szeftcyk*, 77 Ohio St.3d 93, 1996-Ohio-337. An exception to the res judicata bar applies where no direct appeal was taken or, if an appeal was taken, the claim of incompetent counsel was not raised and adjudicated on direct appeal. Under those circumstances, res judicata will not bar the adjudication of an incompetent counsel claim in post-conviction proceedings. *State*

v. Cooperrider (1983), 4 Ohio St.3d 226.

{¶ 14} Defendant argues that his trial counsel was ineffective for failing to raise issues concerning venue and jurisdiction as it relates to the unauthorized use of computer charges. Defendant raised this venue issue in his direct appeal following his second trial, and we found that Champaign County was a proper venue. *State v. Cline*, Champaign App. No. 07CA02, 2008-Ohio-1866, at ¶38-50. Accordingly, because the underlying venue issue was raised and adjudicated in a prior appeal, it is barred as grounds for arguing that counsel was ineffective for failing to raise the issue in the subsequent trial. Further, for the same reason, Defendant cannot demonstrate that he suffered any prejudice as a result of trial counsel's failure.

{¶ 15} Defendant also argues that his trial counsel was ineffective for failing to argue that Defendant's speedy trial rights were violated. Defendant raised his speedy trial issue in a prior appeal, following his first trial, and we found that Defendant's speedy trial rights were not violated. *State v. Cline*, Champaign App. No. 2002-CA-05, 2003-Ohio-4712, at ¶25-32. The speedy trial provisions of R.C. 2945.71 do not apply to retrials following an appeal. *State v. Fanning* (1982), 1 Ohio St.3d 19. Therefore, on this record, failure to argue a speedy trial violation cannot be the basis of an ineffective assistance of

counsel claim.

{¶ 16} Finally, Defendant complains that his trial counsel was ineffective for (1) failing to challenge how the search warrant was executed, because an officer other than the one to whom the warrant was issued removed his computer, (2) failing to secure the assistance of voice, handwriting and computer experts to contest the State's evidence, and (3) failing to raise an issue concerning severance of the charges. These underlying issues were not raised and adjudicated in Defendant's prior appeals, and neither was his related claim of ineffective assistance of trial counsel. The trial court nevertheless concluded that Defendant's incompetent counsel claim in his petition as it relates to these underlying issues is barred by res judicata. That violates the rule of *Cooperrider*, and the trial court erred in so holding. The trial court's judgment dismissing Defendant's post-conviction

{¶ 17} claim of ineffective assistance of trial counsel as it relates to counsel's failure to raise an issue concerning execution of the search warrant, expert witnesses and severance of the charges will be reversed, and the case will be remanded for a determination of the ineffective assistance of counsel claim in those respects.

{¶ 18} Defendant's first assignment of error is overruled in part and sustained in part.

SECOND ASSIGNMENT OF ERROR

{¶ 19} "VINDICTIVE PROSECUTION WAS COMMITTED BY PROSECUTOR SELVAGGIO."

{¶ 20} Defendant claims that he is a victim of prosecutorial vindictiveness because, following a successful appeal of his convictions after his first trial, the prosecutor brought an additional two hundred and fifty-five charges of telecommunications harassment against Defendant. Defendant raised this issue on the direct appeal following his second trial, and we found the claim lacked merit. *State v. Cline*, Champaign App. No. 07CA02, 2008-Ohio-1866, at ¶11-22. Because this claim was raised on direct appeal, it is now barred by res judicata. Furthermore, our decision on this issue remains the law of the case on the questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. *Nolan v. Nolan* (1984), 11 Ohio St.3d 1; *State ex rel. Cordray v. Marshall*, 123 Ohio St.3d 229, 2009-Ohio-4986.

{¶ 21} Defendant's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 22} "JUDGE WILSON SHOWED FAVORITISM TOWARD PROSECUTOR, BUT WAS BIASED TOWARD MR. CLINE, AND AS SUCH SENTENCED MR. CLINE TO DISPROPORTIONATE SENTENCE OF 58 ½ YEARS."

{¶ 23} Defendant argues that the trial court abused its discretion in imposing a disproportionate, excessive sentence that

constitutes cruel and unusual punishment. On direct appeal following his second trial, Defendant raised this same issue. We found the claim lacked merit. *State v. Cline*, Champaign App. No. 07CA02, 2008-Ohio-1866, at ¶99-114. Having raised this claim on direct appeal, it is barred by res judicata. Furthermore, our decision on this issue remains the law of the case on that issue for all subsequent proceedings. *Nolan v. Nolan*, supra; *State ex rel. Cordray v. Marshall*, supra.

{¶ 24} Defendant's third assignment of error is overruled.

{¶ 25} Having sustained Defendant's first assignment of error, in part, the trial court's summary judgment regarding Defendant's post-conviction claim of ineffective assistance of his trial counsel as it relates to counsel's failure to raise an issue concerning execution of the search warrant, expert witnesses, and severance of the charges, will be reversed and remanded for a determination of his ineffective assistance claim. Otherwise, the judgment of the trial court will be affirmed.

DONOVAN, P.J. And FAIN, J., concur.

Copies mailed to:

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Hon. Roger B. Wilson