

[Cite as *State v. Smith*, 2004-Ohio-7367.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 75512

STATE OF OHIO :
 :
 Plaintiff-Appellee : JOURNAL ENTRY
 : AND
 vs. : OPINION
 :
 :
 GREGORY T. SMITH :
 :
 Defendant-Appellant :
 :
 :
 DATE OF JOURNALIZATION : AUGUST 10, 2004
 :
 CHARACTER OF PROCEEDINGS : Application for Reopening,
 : Motion No. 355688
 : Lower Court No. CR-362460
 : Common Pleas Court
 :
 JUDGMENT : APPLICATION DENIED.

APPEARANCES:

For plaintiff-appellee: WILLIAM D. MASON, ESQ.
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BY: AMY VENESILE
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ANTHONY O. CALABRESE, JR., J:

{¶ 1} In *State v. Smith*, Cuyahoga County Court of Common Pleas Case No. CR-362460, applicant, Gregory T. Smith, was convicted of rape and kidnapping. The court of common pleas sentenced Smith to consecutive ten-year and nine-year terms, respectively. This court affirmed that judgment in *State v. Smith* (Mar. 9, 2000), Cuyahoga App. No. 75512. The Supreme Court of Ohio dismissed applicant's appeal to that court for the reason that no substantial constitutional question existed and overruled applicant's motion for leave to appeal. *State v. Smith* (2000), 89 Ohio St.3d 1457, 731 N.E.2d 1142.

{¶ 2} Smith filed an application for reopening on October 19, 2001. This court denied the application in *State v. Smith* (Mar. 9, 2000), Cuyahoga App. No. 75512, reopening disallowed (Feb. 5, 2002), Motion No. 15465. On November 3, 2003, Smith filed a motion for reduction of sentence which this court denied on November 5, 2003 (Motion No. 353978).

{¶ 3} On December 26, 2003, Smith filed with the clerk of this court a "Motion for Delayed Reconsideration" and states that delivery of this court's November 5, 2003 ruling was delayed "due to apparantly [sic], post office irregularities." Smith requests that this court order that the consecutive sentences should be concurrent.

{¶ 4} The state has opposed Smith's motion and argues that relief is inappropriate. We agree with the state that, if the motion for delayed reconsideration is treated as a motion for reconsideration

under App.R. 26(A), we must deny the motion. Smith has not demonstrated that this court's November 5, 2003 denying his motion for reduction of sentence is in error.

{¶ 5} The state has also correctly argued that, if the motion for delayed reconsideration is treated as an application for reopening under App.R. 26(B), reopening is not appropriate. As noted above, Smith previously filed an application for reopening which this court denied on February 5, 2002. "[T]here is no right to file successive applications for reopening." *State v. Huber*, Cuyahoga App. No. 80616, 2002-Ohio-5839, reopening disallowed (June 28, 2004), Motion No. 356284, at ¶2 (citations deleted).

{¶ 6} Additionally, App.R. 26(B)(2)(d) requires a "sworn statement of the basis for the claim that appellate counsel's representation was deficient *** and the manner in which the deficiency prejudicially affected the outcome of the appeal ***."

Smith has not supported the application with an affidavit averring grounds for reopening. "The failure of [applicant] to provide this court with a sworn affidavit also requires denial of his application for reopening." *State v. Tierney*, Cuyahoga App. No. 78847, 2002-Ohio-2607, reopening disallowed (Dec. 4, 2002), Motion No. 395606, at ¶8.

{¶ 7} Furthermore, App.R. 26(B)(1) provides, in part: "An application for reopening shall be filed *** within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time." App.R. 26(B)(2)(b) requires

that an application for reopening include "a showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment." Smith's second application for reopening, which was filed more than three years after this court entered judgment in Smith's direct appeal, was clearly filed outside of the ninety-day limit. Yet, Smith has not supported his motion for delayed reconsideration with any demonstration of good cause.

{¶ 8} We also note that Smith's new counsel recently filed a notice of new authority citing *Blakely v. Washington* (2004), ___ U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d 403, in which the Supreme Court of the United States held that the sentence imposed under the law of the state of Washington violated the Sixth Amendment. "Appellate counsel is not deficient for failing to anticipate developments in the law or failing to argue such an issue." *State v. Mack* (Dec. 2, 1993), Cuyahoga App. No. 62366, reopening disallowed, 2003-Ohio-2605, Motion No. 328956, at ¶17 (citations deleted), affirmed, 101 Ohio St.3d 397, 2004-Ohio-1526, 805 N.E.2d 1108. Likewise, we cannot require appellate counsel to have predicted a decision which occurred more than four years after this court decided Smith's direct appeal.

{¶ 9} As a consequence, Smith has not met the standard for reopening. Accordingly, the application for reopening is denied.

ANNE L. KILBANE, P.J., CONCURS

FRANK D. CELEBREZZE, JR., J., CONCURS