

[Cite as *State v. Deering*, 2010-Ohio-1849.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 88919 and 88920

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CARLOS DEERING

DEFENDANT-APPELLANT

**JUDGMENT:
APPLICATION DENIED**

Application for Reopening
Motion No. 431808
Cuyahoga County Common Pleas Court
Case No. CR-461914

RELEASE DATE: April 26, 2010

FOR APPELLANT

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ATTORNEYS FOR APPELLEE

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Cuyahoga County Prosecutor

By: Diane Smilanick
Assistant County Prosecutor
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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Carlos Deering has filed an application for reopening pursuant to App.R. 26(B). Deering is attempting to reopen the appellate judgment, as rendered in *State v. Deering*, Cuyahoga App. Nos. 88919 and 88920, 2007-Ohio-5321, which affirmed his pleas of guilty and sentences of incarceration to the offenses of trafficking in drugs, possession of drugs, felonious assault, failure to comply with order or signal of police officer, endangering children,

resisting arrest, and possessing criminal tools. We decline to reopen Deering's appeal.

{¶ 2} App.R. 26(B)(2)(b) requires that Deering establish "a showing of good cause for untimely filing if the application is filed more than 90 days after journalization of the appellate judgment," which is subject to reopening.

The Supreme Court of Ohio, with regard to the 90-day deadline as provided by App.R. 26(B)(2)(b), has firmly established that:

{¶ 3} "We now reject Gumm's claim that those excuses gave him good cause to miss the 90-day deadline in App.R. 26(B). The rule was amended to include the 90-day deadline more than seven months before Gumm's appeal of right was decided by the court of appeals in February 1994, so the rule was firmly established then, just as it is today. **Consistent enforcement of the rule's deadline by the appellate courts in Ohio protects on the one hand the state's legitimate interest in the finality of its judgments and ensures on the other hand that any claims of ineffective assistance of appellate counsel are promptly examined and resolved.**

{¶ 4} "Ohio and other states 'may erect reasonable procedural requirements for triggering the right to an adjudication,' *Logan v. Zimmerman Brush Co.* (1982), 455 U.S. 422, 437, 102 S.Ct 1148, 71 L.Ed 2d 265, and that is what Ohio has done by creating a 90-day deadline for the

filing of applications to reopen. Gumm could have retained new attorneys after the court of appeals issued its decision in 1994, or he could have filed the application on his own. What he could not do was ignore the rule's filing deadline. * * * **The 90-day requirement in the rule is 'applicable to all appellants,'** *State v. Winstead* (1996), 74 Ohio St.3d 277, 278, 658 N.E.2d 722, and Gumm offers no sound reason why he – unlike so many other Ohio criminal defendants – could not comply with that fundamental aspect of the rule.” (Emphasis added.) *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, at ¶7.

{¶ 5} See, also, *State v. LaMar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970; *State v. Cooley*, 73 Ohio St.3d 411, 1995-Ohio-328, 653 N.E.2d 252; *State v. Reddick*, 72 Ohio St.3d 88, 1995-Ohio-249, 647 N.E.2d 784.

{¶ 6} Herein, Deering is attempting to reopen the appellate judgment that was journalized on October 15, 2007. The application for reopening was not filed until March 8, 2010, more than 90 days after journalization of the appellate judgement in *State v. Deering*, supra. Lack of knowledge or ignorance of the time constraint, applicable to an application for reopening per App.R. 26(B), does not provide sufficient cause for untimely filing. *State v. Klein* (Mar. 28, 1991), Cuyahoga App. No. 58389, reopening disallowed (Mar. 15, 1994), Motion No. 249260, affirmed (1994), 69 Ohio St.3d 1481; *State v. Trammell* (July 13, 1995), Cuyahoga App. No. 67834, reopening disallowed (Apr. 22, 1996), Motion No.

270493; *State v. Travis* (Apr. 5, 1990), Cuyahoga App. No. 56825, reopening disallowed (Nov. 2, 1994), Motion No. 251073, affirmed (1995), 72 Ohio St.3d 317. See, also, *State v. Torres*, Cuyahoga App. No. 86530, 2007-Ohio-3696, reopening disallowed (Jan. 3, 2007), Motion No, 390254; *State v. Gaston* (Feb. 7. 2002), Cuyahoga App. No. 79626, reopening disallowed (Jan. 17, 2007), Motion No. 391555. In addition, reliance upon appellate counsel or lack of communications with appellate counsel does not establish good cause for untimely filing an application for reopening. *State v. White* (Jan. 31, 1991), Cuyahoga App. No. 57944, reopening disallowed (Oct. 19, 1994), Motion No. 249174; *State v. Allen* (Nov. 3, 1994), Cuyahoga App. No. 65806, reopening disallowed (July 8, 1996), Motion No. 267054. See, also, *State v. Moss* (May 13, 1993), Cuyahoga App. Nos. 62318 and 62322, reopening disallowed (Jan. 16, 1997), Motion No. 275838; *State v. McClain* (Aug. 3, 1995), Cuyahoga App. No. 67785, reopening disallowed (Apr. 15, 1997), Motion No. 276811; *State v. Russell* (May 9, 1996), Cuyahoga App. No. 69311, reopening disallowed (June 16, 1997), Motion No. 282351. Herein, Deering has failed to establish “a showing of good cause” for the untimely filing of his application for reopening, as premised upon a lack of knowledge or lack of communications with his appellate counsel.

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

FRANK D. CELEBREZZE, JR., JUDGE

ANN DYKE, P.J., and
JAMES J. SWEENEY, J., CONCUR