[Cite as *State v. Fryerson*, 2010-Ohio-1852.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91960

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

LAFETTE FRYERSON

DEFENDANT-APPELLEE

JUDGMENT:
APPLICATION DENIED

Application for Reopening
Motion No.428670
Cuyahoga County Common Pleas Court
Case No. CR-510174

RELEASE DATE: April 26, 2010

FOR APPELLANT

Lafette Fryerson, pro se
Inmate No. 551-916
Marion Correctional Institution
P.O. Box 57
Marion, Ohio 43301

ATTORNEYS FOR APPELLEES

William D. Mason
Cuyahoga County Prosecutor
By: Diane Smilanick
Assistant County Prosecutor
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} In *State v. Fryerson*, Cuyahoga County Court of Common Pleas Case No. CR-501174, applicant was found guilty by a jury of two counts of aggravated robbery and one count of felonious assault as well as one- and three-year firearm specifications on each count. This court affirmed that judgment in *State v. Fryerson*, Cuyahoga App. No. 91960, 2009-Ohio-4227. The Supreme Court of Ohio declined jurisdiction to hear Fryerson's appeal. *State v. Fryerson*, 124 Ohio St.3d 1417, 2009-Ohio-6816, 919 N.E.2d 216.

{¶ 2} Applicant has filed with the clerk of this court an application for reopening. Applicant asserts that he was denied the effective assistance of

appellate counsel because his jail-time credit was not accurately calculated under R.C. 2967.191 and 2945.71(D), and neither his trial nor appellate counsel challenged the credibility of witnesses. We deny the application for reopening. As required by App.R. 26(B)(6), the reasons for our denial follow.

{¶ 3} Having reviewed the arguments set forth in the application for reopening in light of the record, we hold that applicant has failed to meet his burden to demonstrate that "there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). In *State v. Spivey*, 84 Ohio St.3d 24, 1998-Ohio-704, 701 N.E.2d 696, the Ohio Supreme Court specified the proof required of an applicant. "In *State v. Reed* (1996), 74 Ohio St.3d 534, 535, 660 N.E.2d 456, 458, we held that the two prong analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, is the appropriate standard to assess a defense request for reopening under App.R. 26(B)(5). [Applicant] must prove that his counsel were deficient for failing to raise the issues he now presents, as well as showing that had he presented those claims on appeal, there was a 'reasonable probability' that he would have been successful. Thus [applicant] bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective

assistance of counsel on appeal." Id. at 25. Applicant cannot satisfy either prong of the *Strickland* test.

{¶ 4} App.R. 26(B)(2)(d) requires "a sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised * * * and the manner in which the deficiency prejudicially affected the outcome of the appeal * * *."

{¶ 5} Fryerson did not support his application for reopening with a sworn statement. The failure to support an application for reopening with a sworn statement as required by App.R. 26(B)(2)(d) provides a sufficient basis for denying the application. See, e.g., *State v. Perry*, Cuyahoga App. No. 90497, 2008-Ohio-5588, reopening disallowed, 2009-Ohio-2245.

{¶ 6} App.R. 26(B)(2)(c) requires that an application for reopening include "[o]ne or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation[.]"

{¶ 7} Fryerson inserts in his application statements indicating that some witnesses committed perjury and complains that his trial and appellate counsel did not raise the issue of the truthfulness of their testimony. He does not identify where in the record this purported perjury occurred. He

also has not set forth a proposed assignment of error related to his assertions.

{¶ 8} This court has previously held that the failure to clearly state proposed assignments of error is "fatally defective." See, e.g., *State v. Lewis*, Cuyahoga App. Nos. 88627, 88628 and 88629, 2007-Ohio-3640, reopening disallowed, 2008-Ohio-679, at ¶17; *State v. Jackson*, Cuyahoga App. No. 88345, 2007-Ohio-2925, reopening disallowed, 2007-Ohio-5431, at ¶3. We must, therefore, deny Fryerson's application for reopening with respect to his contentions regarding the testimony of some witnesses.

{¶ 9} In his attempt to state a proposed assignment of error, Fryerson contends that the amount of jail-time credit that he should receive under R.C. 2967.191 should benefit from the triple-count provision in R.C. 2945.71(E). His argument is contrary to law.

{¶ 10} "R.C. 2945.71(E) requires that each day an accused is held in jail in lieu of bail pending trial be counted as three days for purposes of computing the time in which the accused must be brought to trial under other provisions of that section. It does not require that each day of jail time be credited as three for purposes of reducing sentence. R.C. 2967.191 requires the Adult Parole Authority to reduce the minimum and maximum sentences of a prisoner by the total number of days that the prisoner was confined

before trial, but that statute has no relation to the three-for-one provision of R.C. 2945.71(E)." *State ex rel. Freshour v. State* (1988), 39 Ohio St.3d 41, at 41-42, 528 N.E.2d 1259, cited in *State ex rel. Wooten v. Mason*, Cuyahoga App. No. 94375, 2010-Ohio-684.

{¶ 11} In light of *Freshour*, there is no legal basis for Fryerson's argument for receiving three days jail-time credit for every day he was in custody. Clearly, appellate counsel was not deficient, and Fryerson was not prejudiced by the absence of this assignment of error. His proposed assignment of error is not well-taken.

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

FRANK D. CELEBREZZE, JR., JUDGE

MARY EILEEN KILBANE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR