

[Cite as *State v. Gilbert*, 2010-Ohio-4103.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90856

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHN GILBERT

DEFENDANT-APPELLANT

**JUDGMENT:
APPLICATION DENIED**

Application for Reopening
Motion Nos. 432607 and 432606
Cuyahoga County Common Pleas Court
Case No. CR-484177

RELEASE DATE: August 27, 2010

FOR APPELLANT

John Gilbert, pro se
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ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: T. Allan Regas
Assistant County Prosecutor
8th Floor Justice Center
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SEAN C. GALLAGHER, J.:

{¶ 1} On April 1, 2010, the applicant, John Gilbert, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. John Gilbert*, Cuyahoga App. No. 90856, 2009-Ohio-607, in which this court affirmed Gilbert's convictions for murder and two counts of aggravated robbery, all with firearm specifications.

In this filing, Gilbert submits that an illness provides good cause for an untimely application. On April 29, 2010, the State of Ohio filed its brief in opposition. On May 18, 2010, Gilbert filed his brief in which he argues that his appellate counsel was ineffective because he did not properly argue the issue of transactional immunity.¹ On May 20, 2010, the State of Ohio filed its brief in opposition. For the following reasons, this court denies the application.

{¶ 2} App.R. 26(B)(1) and (2)(b) require applications claiming ineffective assistance of appellate counsel to be filed within ninety days from journalization of the decision unless the applicant shows good cause for filing at a later time. This court journalized its decision on February 23, 2009. Thus, Gilbert's April 1, 2010 filing is untimely on its face. In an effort to show good cause, Gilbert submitted his own affidavit in which he swears that he became ill in April 2009, and was hospitalized until December 2009; during this time he claims he suffered seizures resulting from a serious brain injury. He further stated in his affidavit that he was not recovered enough until March 2010, to return to the general prison population

¹ In *State v. John Gilbert*, Cuyahoga County Common Pleas Court Case No. 484177, between the time of Gilbert's conviction and his sentencing, Gilbert offered to testify against his co-defendant. Gilbert, the prosecution and the trial court then worked out an agreement in which Gilbert would testify, this testimony could not be used in subsequent proceedings against Gilbert, e.g., a new trial upon reversal by this court, and the trial court would consider his co-operation upon sentencing. However, on the day of sentencing Gilbert and his lawyer argued that his convictions should be dismissed because his testimony qualified for transactional immunity under R.C. 2945.44. On appeal Gilbert's counsel argued only this issue.

and resume working on his application. Gilbert submitted no other supporting records.

{¶ 3} This court holds that a self-serving affidavit pleading medical incapacity does not show good cause for untimely filing. It would be all too easy for a petitioner to claim a medical excuse to show good cause for an untimely applications. Thus, a claim of medical incapacity without some supporting records to substantiate the medical condition, e.g., prison medical records, is not sufficient to show good cause. Accordingly, this court denies Gilbert's application as untimely.

{¶ 4} The court further notes that Gilbert's April 1, 2010 filing did not include one or more assignments of error or arguments in support of assignments of error that were previously not considered or additional arguments for assignments of error that the applicant claims were improperly presented by his former appellate counsel. App.R. 26(B)(2)(d). Thus, Gilbert's April 1, 2010 filing was not an authentic application to reopen. Indeed, Gilbert captioned this filing as "Request for leave to file a delayed re-opening of appeal application pursuant to App.R. 26(B)." However, App.R. 26(B) does not permit such a motion.

{¶ 5} Moreover, the court has reviewed his May 18, 2010 brief and finds it meritless. The sole argument in this brief is that appellate counsel improperly argued the issue of transactional immunity under R.C. 2945.44. In its opinion this court fully examined this issue and concluded that the statutory immunity did not

apply, because Gilbert did not fulfill the statute's conditions. Gilbert's supplemental arguments and authorities do not change this resolution. Therefore, Gilbert has not shown that his appellate counsel was ineffective.

{¶ 6} Accordingly, this court denies the application.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

PATRICIA A. BLACKMON, J., and
LARRY A. JONES, J., CONCUR