

[Cite as *State v. Lipscomb*, 2010-Ohio-6469.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92189

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANDRE LIPSCOMB

DEFENDANT-APPELLANT

**JUDGMENT:
APPLICATION DENIED**

Cuyahoga County Common Pleas Court
Case No. CR-476264
Application for Reopening
Motion No. 439762

RELEASE DATE: December 28, 2010

FOR APPELLANT

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By: Daniel T. Van
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MELODY J. STEWART, J.:

{¶ 1} Andre Lipscomb has filed an application for reopening pursuant to App.R. 26(B). Lipscomb is attempting to reopen the appellate judgment rendered in *State v. Lipscomb*, Cuyahoga App. No. 92189, 2010-Ohio-4104, that affirmed his sentences for rape and kidnapping, but reinstated the original sexual predator classification. We decline to reopen Lipscomb's appeal, since it is not timely filed.

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

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

{¶ 3} “We * * * reject [applicant’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 [applicant’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. [Applicant] 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. 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.

{¶ 5} Herein, Lipscomb is attempting to reopen the appellate judgment that was journalized on September 2, 2010. The application for reopening was not filed until December 2, 2010, more than 90 days after journalization of the appellate judgement in *State v. Lipscomb*, supra. Lipscomb has failed to raise or establish “good cause” for the untimely filing of his application for reopening. The failure to establish “good cause” mandates that this court deny the 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. In addition, 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.

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

MELODY J. STEWART, PRESIDING JUDGE

SEAN C. GALLAGHER, A. J., and
MARY EILEEN KILBANE, J., CONCUR