

[Cite as *State v. Wynn*, 2017-Ohio-9151.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103824

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTOINETTE WYNN

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-15-595910-A
Application for Reopening
Motion No. 510057

RELEASE DATE: December 15, 2017

FOR APPELLANT

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EILEEN A. GALLAGHER, P.J.:

{¶1} Antoine Wynn has filed an application for reopening pursuant to App.R. 26(B). Wynn is attempting to reopen the appellate judgment rendered in *State v. Wynn*, 8th Dist. Cuyahoga No. 103824, 2017-Ohio-4062, which affirmed his conviction for felonious assault.¹ For the following reasons, we deny the application for reopening.

A. Untimely

{¶2} App.R. 26(B)(1) plainly states that: “An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.” Likewise, App.R. 26(B)(2)(b) requires that Wynn establish “a showing of good cause for untimely filing if the application is filed more than 90 days after journalization of the appellate judgment.” The Ohio Supreme Court requires intermediate appellate courts to strictly enforce App.R. 26(B)’s 90-day deadline, explaining as follows:

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.

¹On May 10, 2015, Wynn attacked the victim by striking her several times in the face and head with his fist, resulting in the victim receiving seven stitches to her forehead. At the time of trial, the victim bore a scar to her forehead. The trial court sentenced Wynn to a prison term of six years.

Ohio and other states “may erect reasonable procedural requirements for triggering the right to an adjudication,” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), and that is what Ohio has done by creating a 90-day deadline for the filing of applications to reopen. * * * The 90-day requirement in the rule is “applicable to all appellants,” *State v. Winstead*, 74 Ohio St.3d 277, 278, 658 N.E.2d 722 (1996), and [the applicant] offers no sound reason why he — unlike so many other Ohio criminal defendants — could not comply with that fundamental aspect of the rule.

State v. Gumm, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, ¶ 7 - 8,

¶ 10. *See also State v. LaMar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970; *State v. Cooney*, 73 Ohio St.3d 411, 653 N.E.2d 252 (1995); and *State v. Reddick*, 72 Ohio St.3d 88, 647 N.E.2d 784 (1995).

{¶3} On September 5, 2017, Wynn filed two separate documents: (1) an application to reopen that failed to contain a sworn affidavit required under App.R. 26(B)(2)(d), and (2) motion for showing good cause for untimely filing of affidavit of sworn statement. Wynn is attempting to reopen the appellate judgment that was journalized on June 1, 2017. His application — filed six days beyond the 90-day deadline — is untimely on its face.

{¶4} In an effort to establish good cause, Wynn argues “significant hardships,” such as being held in protective control and “extreme poverty,” which have effectively deprived him of ready access to a law library or other legal materials and services. The courts, however, have repeatedly rejected the claim that limited access to legal materials states good cause for untimely filing. Prison riots, lockdowns and other library limitations have been rejected as constituting good cause. *State v. Young*, 8th Dist.

Cuyahoga No. 99752, 2014-Ohio-1055, *reopening disallowed*, 2016-Ohio-3165, citing *State v. Tucker*, 73 Ohio St.3d 152, 652 N.E.2d 720 (1995); *State v. Crain*, 8th Dist. Cuyahoga Nos. 95012, 95013, 95014 and 95015, 2011-Ohio-1924, *reopening disallowed*, 2012-Ohio-1340. Untimeliness alone is sufficient to dismiss the application. *Young* at ¶ 2.

{¶5} Wynn has failed to demonstrate good cause for his untimely application and, therefore, we are constrained to deny it.

B. Res Judicata

{¶6} Aside from being untimely, Wynn’s request for reopening is also barred by res judicata. “Res judicata may be applied to bar further litigation of issues that were raised previously or could have been raised previously in an appeal.” *State v. Houston*, 73 Ohio St.3d 346, 347, 652 N.E.2d 1018 (1995). The Supreme Court of Ohio has further established that a claim for ineffective assistance of counsel may be barred by the doctrine of res judicata unless circumstances render the application of the doctrine unjust. *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992).

{¶7} The record on appeal reveals that Wynn was afforded the opportunity to file a pro se supplemental brief. Under such circumstances and when it is not unjust to do so, this court has previously held that res judicata bars an App.R. 26(B) application for reopening. *See e.g., State v. Fanning*, 8th Dist. Cuyahoga No. 71189, 1997 Ohio App. LEXIS 4707 (Oct. 23, 1997), *reopening disallowed*, 2002-Ohio-4888; *State v. Stedman*, 8th Dist. Cuyahoga No. 77334, 2001 Ohio App. LEXIS 4912 (Nov. 1, 2001), *reopening*

disallowed, 2002-Ohio-4276; *State v. Patrick*, 8th Dist. Cuyahoga No. 78605, 2001 Ohio App. LEXIS 4079 (Sept 13., 2001), *reopening disallowed*, Motion No. 35687 (Mar. 21, 2002).

{¶8} We find that the application of res judicata is not unjust in this case. Wynn was already afforded the opportunity to raise the arguments that he now asserts in his application. Further, his arguments challenging defects in the indictment as well as the trial court's failure to grant his motion to dismiss were already raised and expressly rejected by this court. The application of res judicata is warranted in this case.

{¶9} The application for reopening is denied.

EILEEN A. GALLAGHER, PRESIDING JUDGE

MELODY J. STEWART, J., and
PATRICIA ANN BLACKMON, J., CONCUR