[Cite as *State v. Oberacker*, 2017-Ohio-5741.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 81093

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DANIEL OBERACKER

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-96-342242-ZA
Application for Reopening
Motion No. 506100

RELEASE DATE: July 5, 2017

FOR APPELLANT

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LARRY A. JONES, SR., J.:

{¶1} In *State v. Oberacker*, C.P. No. CR-96-342242-ZA, applicant Daniel Oberacker pleaded guilty to two counts of rape, each count against a different teenaged victim. The trial court sentenced him to 8 to 25 years on each of the two counts with the sentences to run consecutive to one another; Oberacker was also classified a sexual predator. Oberacker appealed, challenging his sexual predator classification. In his direct appeal, this court reversed and remanded on the basis that the trial court failed to provide sufficient notice of the sexual predator classification hearing. *State v. Oberacker*, 8th Dist. Cuyahoga No. 77876, 2001 Ohio App. LEXIS 1300 (Mar. 22, 2001) ("*Oberacker I*"). On remand, the trial court conducted a second sexual predator classification hearing and found Oberacker to be a sexual predator. Oberacker appealed that order, again challenging the trial court's classification of him as a sexual predator. This court affirmed his classification but remanded for the trial court to enter a nunc pro tunc entry. *See State v. Oberacker*, 8th Dist. Cuyahoga No. 81093, 2003-Ohio-170 ("*Oberacker II*").

{¶2} On April 6, 2017, more than 16 years after this court decided his direct appeal, Oberacker filed an application pursuant to App.R. 26(B) to reopen the appellate judgment in *Oberacker I*.[1] The state opposes Oberacker's application on the grounds that it exceeds the ten-page limit set forth in App.R. 26(B)(4) and that it is untimely. For the reasons that follow, we deny Oberacker's untimely application to reopen his appeal.

{¶3} App.R. 26(B)(2)(b) requires that Oberacker establish "a showing of good cause for untimely filing if the application is filed more than 90 days after journalization of the appellate judgment" that is subject to reopening. The Supreme Court of Ohio, with regard to the 90-day deadline provided by App.R. 26(B)(2)(b), has established that

[1] Although Oberacker has also listed the appeal number in *Oberacker II* on his application to reopen his appeal, all his arguments relate to his appellate counsel's representation in *Oberacker I*.

> We now reject [the applicant's] claims that those excuses gave good cause to miss the 90-day deadline in App.R. 26(B). * * * 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.
>
> 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. * * * *The 90-day requirement in the rule is "applicable to all appellants,*" *State v. Winstead* (1996), 74 Ohio St.3d 277, 278, 1996 Ohio 52, 658 N.E.2d 722, 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.

(Emphasis added.) *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, ¶ 7. *See also State v. Lamar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970; *State v. Cooey*, 73 Ohio St.3d 411, 653 N.E.2d 252 (1995); *State v. Reddick*, 72 Ohio St.3d 88, 647 N.E.2d 784 (1995).

{¶4} Although Oberacker acknowledges that his application is delayed, none of the grounds asserted for his untimely filing support a finding of good cause. Oberacker first asserts that his "appellant's counsel inadequacy and failure to appeal the conviction or sentence" coupled with his own "inability to identify such errors" constitutes good cause for his untimely filing. This court, however, has consistently rejected the argument that ineffective assistance of

counsel on direct appeal is a sufficient basis for permitting the untimely filing of an application for reopening. *State v. Mosley*, 8th Dist. Cuyahoga No. 79463, 2002-Ohio-1101, *reopening disallowed*, 2005-Ohio-4137, ¶ 4, citing *State v. Gross*, 8th Dist. Cuyahoga No. 76836, 2000 Ohio App. LEXIS 3769 (Aug. 17, 2000), *reopening disallowed*, 2005-Ohio-1664, ¶ 2-3; *State v. Rios*, 75 Ohio App.3d 288, 599 N.E.2d 374 (8th Dist.1991). Likewise, Oberacker's lack of training in the law does not establish good cause. *See State v. Ramirez*, 8th Dist. Cuyahoga No. 78364, 2005-Ohio-378, ¶ 4.

{¶5} Next, Oberacker contends that during the appeal time, he "was under extreme duress and in fear of his life due to abuse from a state-paired cell mate" and, consequently, he was unable to receive court documents and "was dependent on information relayed through a family member who had no legal training, experience or understanding of the proceedings." But this argument also fails to establish good cause. Aside from the lack of authority recognizing alleged "extreme duress" as grounds for good cause, this argument does not prove good cause to support the 16-year delay. *See State v. Mitchell*, 8th Dist. Cuyahoga No. 88977, 2007-Ohio-6190, *reopening disallowed*, 2009-Ohio-1874, ¶ 5 ("even if this court would deem [applicant's] lack of communication as good cause, such good cause does not exist for an indefinite period of time"); *see also State v. Morris*, 10th Dist. Franklin No. 05AP-1032, 2010-Ohio-786, ¶ 10 (finding applicant's alleged diagnosis and classification as "seriously mentally ill" did not provide support for his claim that his mental health issues prevented him from filing a timely application). Likewise, Oberacker's reliance on individuals not trained in the law does not suffice as good cause for failure to seek timely relief under App.R. 26(B). *See State v. Alexander*, 151 Ohio App.3d 590, 2003-Ohio-760, 784 N.E.2d 1225 (8th Dist.), *reopening disallowed*, 2004-Ohio-3861, ¶ 4.

{¶6} Lastly, Oberacker argues that he only "recently" became aware that his appellate counsel never challenged the underlying conviction and sentence in his direct appeal. Oberacker's ignorance, however, does not establish good cause. This court has consistently held that the failure of appellate counsel to notify applicant of the court's decision or the applicant's ignorance of the decision does not state good cause for untimely filing. *State v. West*, 8th Dist. Cuyahoga No. 92508, 2009-Ohio-6217, *reopening disallowed*, 2010-Ohio-5576; *State v. Robert Plaza*, 8th Dist. Cuyahoga No. 83074, 2004-Ohio-3117, *reopening disallowed*, 2005-Ohio-5685.

{¶7} Here, we find no basis to excuse Oberacker's exceptional delay in filing his application for reopening. He fails to demonstrate good cause to accept his untimely filing under App.R. 26(B). As a consequence, Oberacker has not met the standard for reopening.

{¶8} Moreover, Oberacker's application exceeds the ten-page limitation set forth in App.R. 26(B)(4). This procedural defect provides another independent reason for dismissing the application. *State v. Harris*, 8th Dist. Cuyahoga No. 94388, 2011-Ohio-194, *reopening disallowed*, 2011-Ohio-4403, ¶ 2; *State v. Stadmire*, 8th Dist. Cuyahoga No. 88735, 2007-Ohio-3644, *reopening disallowed*, 2011-Ohio-921, ¶ 4.

{¶9} Accordingly, this application to reopen is denied.

LARRY A. JONES, SR., JUDGE

EILEEN T. GALLAGHER, P.J., and
MARY J. BOYLE, J., CONCUR