

[Cite as *State v. McCrimon*, 2017-Ohio-5742.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87617

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GERALD McCRIMON

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-469565
Application for Reopening
Motion No. 506474

RELEASE DATE: July 3, 2017

FOR APPELLANT

Gerald McCrimon, pro se
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ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
By: Brett Hammond
Assistant County Prosecutor
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TIM McCORMACK, P.J.:

{¶1} Gerald McCrimon has filed an application for reopening pursuant to App.R. 26(B). McCrimon is attempting to reopen the appellate judgment rendered in *State v. McCrimon*, 8th Dist. Cuyahoga No. 87617, 2006-Ohio-5722, that affirmed his plea of no contest and finding of guilt to two counts of attempted murder, three counts of felonious assault, and one count of having weapons while under disability. We decline to reopen McCrimon’s appeal.

{¶2} App.R. 26(B)(2)(b) requires that McCrimon 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:

[w]e 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, 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, ¶ 7-8. 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, 653 N.E.2d 252 (1995); *State v. Reddick*, 72 Ohio St.3d 88, 647 N.E.2d 784 (1995).

{¶3} Herein, McCrimon is attempting to reopen the appellate judgment that was journalized on November 2, 2006. The application for reopening was not filed until April 20,

2017, more than 90 days after journalization of the appellate judgment in *McCrimon, supra*. McCrimon has failed to argue any showing of good cause for the untimely filing of his application for reopening.

{¶4} Even if McCrimon were able to establish good cause for the untimely filing of his application for reopening, we find that he has failed to demonstrate a claim of ineffective assistance of appellate counsel based upon the argument that “in light of the Supreme Court’s holding in *State v. Nolan*, 141 Ohio St.3d 454, 2014-Ohio-4800, in which the Supreme Court of Ohio recently held that attempted murder is not a cognizable crime in Ohio because it is impossible to commit.” Appellate counsel is not deficient for failing to anticipate new developments in the law or failing to argue such an issue, such as trying to declare a statute unconstitutional. *State v. Williams*, 74 Ohio App.3d 686, 600 N.E.2d 298 (8th Dist. 1991); *State v. Cody*, 8th Dist. Cuyahoga No. 100797, 2017-Ohio-1543; *State v. Lucic*, 8th Dist. Cuyahoga No. 91069, 2009-Ohio-5686.

{¶5} Finally, McCrimon has failed to comply with App.R. 26(B)(2)(d), which mandates that the applicant must attach to the application for reopening a sworn statement of the basis for the claim that appellate counsel’s representation was deficient. *State v. Doles*, 75 Ohio St.3d 604, 665 N.E.2d 197 (1996); *State v. Lechner*, 72 Ohio St.3d 374, 650 N.E.2d 449 (1995); *State v. Bates*, 8th Dist. Cuyahoga Nos. 97631, 97632, 97633, and 97634, 2015-Ohio-4176.

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

TIM McCORMACK, PRESIDING JUDGE

ANITA LASTER MAYS, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR

