

[Cite as *State v. Shearer*, 2017-Ohio-7394.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92974

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LANDRA SHEARER

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-08-510282
Application for Reopening
Motion No. 509384

RELEASE DATE: August 25, 2017

FOR APPELLANT

Landra Shearer, pro se
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ATTORNEYS FOR APPELLEE

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Cuyahoga County Prosecutor
By: Katherine Mullen
 Mary McGrath
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EILEEN T. GALLAGHER, J.:

{¶1} On August 8, 2017, the applicant, Landra Shearer, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Shearer*, 8th Dist. Cuyahoga No. 92974, 2010-Ohio-1666, in which this court affirmed his convictions for attempted murder, two counts of felonious assault, and having a weapon while under disability, but remanded the case for resentencing to allow for merger of allied offenses. Shearer now argues that his appellate counsel was ineffective for not arguing alleged errors at the resentencing. For the following reasons, this court denies the application.

{¶2} Shearer shot his neighbor twice, in the arm and in the face, while they were arguing. The grand jury indicted Shearer for attempted murder with one- and three-year firearm specifications, two counts of felonious assault with one- and three-year firearm specifications, and two counts of having a weapon while under disability. The jury found him guilty of attempted murder and the two counts of felonious assault with the firearm specifications, and the court found him guilty of Count 4, having a weapon while under disability.¹ After merging the one- and three- year firearm specifications, the trial judge sentenced Shearer to three years on the firearm specification consecutive to five years on the base charge of attempted murder, three years on the firearm specifications for both felonious assault charges consecutive to two years on each of the felonious assault charges, and two years on the weapons charge. Each of the firearm

¹ A review of the journal entries shows that the court found him not guilty of Count 5, having a weapon while under disability, although other opinions concerning this case state that he was found guilty of both weapon charges.

specifications were consecutive to each other and consecutive to the base charges. The attempted murder charge and the felonious assault charges were to be served consecutively to each other, and the weapons charge was concurrent to the other charges for a total of 18 years.

{¶3} On appeal, this court affirmed the convictions but noted:

In *Williams* [124 Ohio St.3d 381, 2010-Ohio-174, 922 N.E.2d 937], the Ohio Supreme Court held that felonious assault as defined in R.C. 2903.11(A)(2) is an allied offense of attempted murder * * *.² As a result, a criminal defendant ‘may be found guilty of both offenses, [but] he may be sentenced for only one.’ * * * Shearer shot the victim twice although he was charged and convicted of three separate counts. The state retains the right to choose which of the allied offenses to pursue at sentencing.

8th Dist. Cuyahoga No. 92974, 2010-Ohio-1666, ¶ 32 and 33. This court then remanded the case for resentencing.

{¶4} On remand, the state of Ohio elected to have the court sentence on Counts 1, 2, and 4, admitting that Count 3, felonious assault, would merge with attempted murder. Apparently, the trial judge then issued a nunc pro tunc order on July 7, 2010, merging Count 3 and retaining the rest of the sentence, so that Shearer was sentenced to 13 years. Shearer maintains that this was done without notice, without his attorney, without a court reporter, without a hearing, and without him.

{¶5} Since July 2010, Shearer has been trying to obtain a review of that July 7, 2010 resentencing order. He has filed multiple motions for resentencing; motions for

² The grand jury indicted Shearer for felonious assault under R.C. 2903.11(A)(1) in Count 2 and under R.C. 2903.11(A)(2) in Count 3.

delayed appeal; an application to reopen this appeal, *State v. Shearer*, 8th Dist. Cuyahoga No. 92974, 2010-Ohio-1666, *reopening disallowed*, 2015-Ohio-5131, and appeals of the denials of motions to resentence, *e.g.*, *State v. Shearer*, 8th Dist. Cuyahoga No. 103848, 2016-Ohio-7302, in which this court ruled that Shearer's merger arguments are now barred by res judicata.

{¶6} Shearer has now filed another application to reopen pursuant to App.R. 26(B) arguing that his appellate counsel in Case No. 92974 was ineffective for not arguing the errors in the resentencing. However, this is the wrong remedy at the wrong time.

{¶7} App.R. 26(B) is to correct appellate counsel's deficient representation in pursuing the appeal. Errors, if any, that occurred after the appeal upon remand are beyond the scope of App.R. 26(B). Appellate counsel in 2009 could not have argued issues that would not arise until July 2010. *State v. Redmond*, 8th Dist. Cuyahoga No. 74738, 1999 Ohio App. LEXIS 4108 (Sept. 2, 1999), *reopening disallowed*, 2016-Ohio-5130.

{¶8} Moreover, Shearer has previously filed an application to reopen this appeal, which this court denied. Successive applications are not permitted. *State v. Slagle*, 97 Ohio St.3d 332, 2002-Ohio-6612, 779 N.E.2d 6612; *Redmond*, 2016-Ohio-5130.

{¶9} Finally, App.R. 26(B)(1) and (2)(b) require applications to reopen to be filed within 90 days from journalization of the decision unless the applicant shows good cause for filing at a later time. The August 2017 application was filed more than seven years

after this court's April 15, 2010 decision. Thus, the application is untimely on its face.

Claims of errors after the appeal do not state good cause for untimely filing.

{¶10} Accordingly, this court denies the application to reopen.

EILEEN T. GALLAGHER, JUDGE

MARY EILEEN KILBANE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR