

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

PAUL LEE KERR,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 15 MA 0083

Application to Reopen

BEFORE:

Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:

Denied.

Atty. Paul J. Gains, Mahoning County Prosecutor, *Atty. Ralph M. Rivera*, Assistant Prosecutor, Mahoning County Prosecutor's Office, 21 W. Boardman Street., 6th Floor., Youngstown, Ohio 44503, For Plaintiff-Appellee and

Paul Lee Kerr, pro se., Inmate No. A671445, *Mansfield Correctional Institute*, 1150 N. Main St., Mansfield, Ohio, 44905, for Defendant-Appellant.

Dated: November 30, 2018

PER CURIAM.

{¶1} Defendant-Appellant Paul Lee Kerr has filed an untimely application to reopen the direct appeal in his criminal case. A jury found him guilty of aggravated murder with a firearm specification, and the trial court found him guilty of having a weapon under disability. On May 12, 2015, Appellant was sentenced to life without parole, plus three years on the firearm specification and a consecutive sentence of thirty-six months on the weapon under disability charge. New counsel was appointed to represent him on appeal. In his appellate brief, Appellant raised three assignments of error alleging: insufficient evidence of prior calculation and design; improper supplemental jury instructions; and ineffective assistance of trial counsel for presenting an unsupported defense theory. On December 28, 2016, this court overruled Appellant's assignments of error and affirmed his convictions.

{¶2} On October 22, 2018, Appellant filed the within application to reopen. Pursuant to App.R. 26(B)(1), a criminal defendant may apply for reopening of an appeal from the judgment of conviction and sentence based on a claim of ineffective assistance of appellate counsel. The application for reopening must contain: "One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation." App.R. 26(B)(2)(c). The applicant must provide a sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised and the manner in which the deficiency prejudicially affected the outcome of the appeal. App.R. 26(B)(2)(c). The applicant must demonstrate there is a "genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). The inquiry utilizes the standard two-part test for ineffective assistance of counsel where both prongs must be met: deficient performance and resulting prejudice. See *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987, 849 N.E.2d 1, ¶ 5.

{¶3} As for the timing of the application: “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.” App.R. 26(B)(1). The application for reopening must contain a “showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.” App.R. 26(B)(2)(b).

{¶4} Appellant sets forth two assignments of error that he believes should have been raised on appeal. Both relate only to the third-degree felony of having a weapon under disability. First, he alleges the state failed to present to the trial court sufficient evidence of his prior conviction. He takes issue with the procedure indicated by the following events occurring on May 6, 2015: the state presented an exhibit to the court relating to a prior conviction for purposes of the bench trial on the weapon under disability charge; while the jury was deliberating the aggravated murder charge, the court reviewed the exhibit and said Appellant would be found guilty of having a weapon under disability; and the state was then permitted to reopen its case (on the charge being tried to the bench) and present a new exhibit to the court by 4:30 p.m. (The jury deliberated on the aggravated murder charge all of that day and the next day.) Appellant complains the transcript does not indicate the state then submitted a new exhibit. According to a May 11, 2015 judgment entry finding Appellant guilty of having a weapon under disability, which was signed by the court on May 6, 2015, the state presented evidence on the prior conviction during jury deliberations “to supplement” its presentation during trial and the court compared this to the indictment setting forth the charge of having a weapon under disability.

{¶5} The second assignment of error, which Appellant believes his appellate attorney should have raised on appeal, complains the trial court failed to impose post-release control for having a weapon under disability as required by R.C. 2967.28; in the sentencing entry, the trial court opined it unnecessary due to the sentence of life without parole for aggravated murder. Regardless of whether there was deficiency and prejudice involved in the failure to address these issues on appeal, an application to reopen filed after the 90-day deadline will not be reviewed in the absence of a showing of good cause for the untimely filing.

{¶16} In arguing good cause for his untimely application, Appellant states his appellate attorney was ineffective for failing to provide him notice of this court’s decision so that he could file a timely appeal in the Ohio Supreme Court and a timely application for reopening in this court.¹ Appellant notes the docket shows the clerk made service of this court’s judgment on counsel pursuant to App.R. 30(A). He cites a disciplinary rule stating counsel shall not withdraw until reasonable steps are taken to avoid foreseeable prejudice to the client, including giving due notice, allowing time to employ other counsel, and delivering all papers and property to which the client is entitled.

{¶17} On this topic, the affidavit Appellant submits under App.R. 26(B)(2)(c) attests: counsel never provided him with notice of the appellate decision; as a result of counsel’s failure, Appellant was unable to file a timely appeal in the Ohio Supreme Court; and he sought leave to file a delayed appeal which the Supreme Court denied. He also claimed the prison’s legal mail log, which inmates sign and date when receiving legal mail, contains no entries from his appellate counsel; he did not support this claim with a copy of the log.

{¶18} Appellant does not explain why his missing of the 45-day deadline for appealing our decision to the Ohio Supreme Court provided him with good cause to wait and file his application to reopen 1 year and seven months late. Even where good cause is shown for a certain time period, “[g]ood cause can excuse the lack of a filing only while it exists, not for an indefinite period.” *State v. Fox*, 83 Ohio St.3d 514, 516, 1998-Ohio-517, 700 N.E.2d 1253. Our docket shows Appellant filed a motion for delayed appeal from our decision on May 26, 2017, which was denied by the Ohio Supreme Court on September 13, 2017. This alone shows Appellant had notice of our decision by May 2017 but waited until October 22, 2018 to seek reopening.

{¶19} In fact, Appellant’s filing in the Ohio Supreme Court (which was simultaneously filed in this appellate case) admitted he received our December 28, 2016 decision from his appellate attorney on January 27, 2017. Although he had more than 2 weeks remaining before his time to appeal expired, he urged (unsuccessfully)

¹ He also seems to characterize this as a reason for reopening in itself, proceeding as if it is a proposed assignment of error; however, as aforementioned, the arguments for reopening are to be based on issues that could have been but were not raised in the original appeal due to ineffective assistance of counsel. App.R. 26(B)(2)(c).

that this was not enough time to ascertain how to file a timely notice of appeal in the Supreme Court. (He waited four months to seek leave to file a delayed appeal in the Supreme Court.) Moreover, at the point of receiving our decision through the prison mail, he had two months remaining to file a timely application to reopen in this court. Being occupied with other court proceedings or ignorance of the law does not establish good cause for delaying the filing of an application for reopening. *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, ¶ 9-10.

{¶10} Finally, Appellant's motion seeking leave to file a delayed appeal in the Supreme Court also revealed the prison received the mailing from counsel on January 4, 2017. He then complained the reason the prison took so long to deliver this piece of mail to him was because counsel failed to mark the envelope as containing legal mail. This statement Appellant made to the Ohio Supreme Court destroys the effect of his current contention that the prison's legal mail log shows no letters from counsel.

{¶11} Appellant's own filings indicate his appellate counsel provided Appellant with notice of our decision in time to file a timely application to reopen, and Appellant failed to do so without good cause. Appellant's application for reopening is hereby denied as untimely.

Presiding Judge Carol Ann Robb

Judge Gene Donofrio

Judge Cheryl L. Waite

NOTICE TO COUNSEL

This document constitutes a final judgment entry.