[Cite as *State v. Sims*, 2018-Ohio-5388.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

KEITH SIMS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 16 MA 0084

Motion to Reopen

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

JUDGMENT:
Denied

Atty. Ralph Rivera, Mahoning County Prosecutor's Office, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee, and

Atty. Edward Czopur, DeGenova & Yarwood, Ltd., 42 North Phelps Street, Youngstown, Ohio 44503, for Defendant-Appellant.

Dated:
December 21, 2018

PER CURIAM.

{¶1} Defendant-appellant, Keith Sims, has filed an application to reopen his direct appeal in which we upheld his conviction for murder with a firearm specification. *State v. Sims*, 7th Dist. No. 16 MA 0084, 2018-Ohio-2916. For the following reasons, the application is denied.

{¶2} An application to reopen an appeal must be filed "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). Our judgment in this case was filed on July 16, 2018. Appellant filed this application on October 29, 2018. Thus, it is untimely.

{¶3} If the application is filed more than ninety days after journalization of the appellate judgment, then it must contain "[a] showing of good cause for untimely filing in the application." App.R. 26(B)(2)(b). Appellant argues that he did not receive a copy of the appellate judgment from his appellate counsel until July 27, 2018. Even if true and appellant's ninety day clock began to run on July 27, 2018, his application is still untimely by four days. Moreover, "[s]imple attorney neglect is not a reason for excusing a litigant's failure to comply with time requirements." *State v. Stockwell*, 8th Dist. No. 78501, 2002 WL 377134 (Feb. 26, 2002), citing *State ex rel. Lindenschmidt v. Board of Commissioners of Butler County*, 72 Ohio St.3d 464, 466, 650 N.E.2d 1343 (1995). Thus, appellant has not established good cause for the untimeliness of his application. On this basis alone, we can deny appellant's application.

{¶4} Even if we were to consider the merits of appellant's application, it would still be denied.

{¶5} When considering an application for reopening pursuant to App.R. 26(B), we must first determine, based upon appellant's application, affidavits, and portions of the record before us, whether appellant has set forth a colorable claim of ineffective assistance of appellate counsel. See e.g. *State v. Milburn*, 10th Dist. No. 89AP-655, 1993 WL 339900 (Aug. 24, 1993); *State v. Burge*, 88 Ohio App.3d 91, 623 N.E.2d 146 (10th Dist.1993). In order to show ineffective assistance of appellate counsel, appellant must prove that his counsel was deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims

on appeal. *State v. Goff*, 98 Ohio St.3d 327, 2003-Ohio-1017, 784 N.E.2d 700, ¶ 5, (explaining that the *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), test is used to determine if appellate counsel was ineffective).

{¶6} Appellant asserts ten separate arguments as the basis for his application.

{¶7} First, appellant claims his appellate counsel was ineffective because counsel made no attempt to meet with him and discuss potential issues.

{¶8} Appellant relies on the U.S. Supreme Court's decision in *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000), for the prospect that appointed appellate counsel has a constitutional obligation to consult with his client. However, *Roe* is distinguishable because it concerned the failure of trial counsel to consult with his or her client regarding the filing of an appeal. *Id.* at 473-474. In this case, appellant's trial counsel filed the appeal, appellant was appointed appellate counsel, and appellate counsel filed a merit brief asserting two assignments of error.

{¶9} Counsel is presumed competent. *State v. Mitchell*, 7th Dist. No. 05 CO 63, 2008-Ohio-1525 ¶ 37 citing *State v. Thompson*, 33 Ohio St.3d 1, 514 N.E.2d 407 (1987). In this case, appellant's appointed appellate counsel had access to the entire record and filed a well-written merit brief asserting two assignments of error. Therefore, appellate counsel was not deficient by allegedly failing to meet with appellant.

{¶10} Next, appellant claims his counsel failed to properly argue his speedy trial assignment of error. But we thoroughly reviewed the record concerning appellant's motions to dismiss on speedy trial grounds. We found that only 14 days had run on appellant's speedy trial clock. *Sims*, 2018-Ohio-2916, at ¶ 31-34. Appellant argues now that he was in jail beginning on October 27, 2014 and not November 6, 2014. Even if true, this would only bring the time that ran on appellant's speedy trial clock to 24 days which is insufficient to dismiss charges based on speedy trial violations.

{¶11} Appellant next asserts his appellate counsel was ineffective for failing to raise seven assignments of error alleging ineffective assistance of trial counsel. Specifically, appellant claims his appellate counsel should have raised assignments of error asserting trial counsel was ineffective for failing to: (1) meet with him regularly; (2) investigate thoroughly; (3) subpoena eyewitnesses; (4) raise a claim of selective

prosecution; (5) seek exculpatory evidence; (6) argue for a lesser-included offense; and (7) file a motion to dismiss for cumulative error.

{¶12} But each of these proposed assignments of error either deals with issues outside of the record, which we cannot consider, or are matters of trial strategy, which we cannot second-guess. See *State v. Wood*, 7th Dist. No. 11 CO 9, 2011-Ohio-6405; *State v. Carter*, 7th Dist. Nos. 07-JE-32, 07-JE-33, 2008-Ohio-6594. Thus, appellate counsel was not ineffective for failing to raise them.

{¶13} Finally, appellant asserts that his appellate counsel should have argued that his conviction was insufficient as a matter of law and against the manifest weight of the evidence. In his direct appeal, appellant's counsel did argue that his conviction was against the manifest weight of the evidence. We thoroughly examined the record and concluded that appellant's conviction was not against the manifest weight of the evidence. *Sims*, 2018-Ohio-2916 at ¶ 37-57.

{¶14} Regarding the sufficiency of the evidence, appellant was charged with murder, felonious assault, and a firearm specification. The victim died from a gunshot wound. Two of the eyewitnesses saw appellant in possession of a gun. All of the eyewitnesses heard at least one gunshot. One of the eyewitnesses testified that the only people outside during the gunshots were the victim, her friends, and appellant. Moreover, one of the eyewitnesses saw appellant shoot the victim. Based on these facts, counsel was not deficient for failing to raise a sufficiency of the evidence assignment of error.

{¶15} Accordingly, appellant's application to reopen his appeal is hereby denied.

JUDGE GENE DONOFRIO, concurs.

JUDGE CHERYL L. WAITE, concurs.

JUDGE CAROL ANN ROBB, concurs.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.