

**IN THE COURT OF APPEALS OF OHIO**

SEVENTH APPELLATE DISTRICT  
NOBLE COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ANTHONY D. DUNCAN,

Defendant-Appellant.

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**OPINION AND JUDGMENT ENTRY**  
**Case No. 16 NO 0440**

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Motion to Reopen Direct Appeal Pursuant to App.R. 26(B)

**BEFORE:**

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

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**JUDGMENT:**

Overruled.

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*Atty. Kelly A. Riddle*, Noble County Prosecutor  
150 Courthouse, Caldwell, Ohio 43724, for Plaintiff-Appellee

*Anthony D. Duncan, Pro se*, #707-066  
Noble Correctional Institution, 15708 McConnellsville Road, Caldwell, Ohio 43724.

Dated: June 25, 2018

**PER CURIAM.**

{¶1} Appellant Anthony D. Duncan has filed an Application for Reopening his appeal pursuant to App.R. 26(B). He was convicted of one count of complicity to commit illegal conveyance of prohibited items onto the grounds of a detention facility, in violation of R.C. 2923.03(A)(1), a felony of the third degree.

{¶2} Appellant's conviction was based on a conspiracy entered into with his former housemate, Crystal Anderson aka Seresun ("Crystal"), to smuggle Suboxone strips into the Noble County Correctional Institution *via* the U.S. Mail secreted under postage stamps. The lion's share of the evidence offered at trial consisted of transcripts of a series of audio recordings of telephone calls. In these, Appellant, an inmate at NCCI, instructs Chrystal to mail Suboxone strips to another inmate, Chod Clark, by way of "pen pal" letters from a friend of Chrystal's. On direct appeal, Appellant challenged: (1) the trial court's denial of his motion to wear street clothes during the jury trial, (2) the reading into evidence of the transcripts of telephone conversations between Appellant and Crystal, based on Crystal's failure to appear at trial, and (3) the sufficiency and weight of the evidence. Appellant's conviction was affirmed on appeal.

{¶3} 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. App.R. 26(B)(1). The application for reopening cannot merely allege that appellate counsel rendered ineffective assistance for failing to brief certain issues. Rather, the application must demonstrate that 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).

{¶4} The test for ineffective assistance of appellate counsel has two parts: establishing that the counsel's performance was deficient, and that this resulted in prejudice. *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987, 849 N.E.2d 1, ¶ 5, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); App.R. 26(B)(9). Appellant must show that counsel's performance was so deficient that it fell below an objective standard of reasonableness and, but for this substandard representation, the outcome of the case would have been different. *Strickland* at 687. Establishing ineffective assistance of appellate counsel means that the applicant must prove that 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. Were*, 120 Ohio St.3d 85, 2008-Ohio-5277, 896 N.E.2d 699, ¶ 10-11.

{¶5} However, appellate counsel need not raise every possible issue in order to render constitutionally effective assistance. *Tenace* at ¶ 7, citing *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Counsel is expected to focus on the stronger arguments and omit the weaker ones, as this strategy is generally accepted as the most effective means of presenting a case on appeal. *State v. Adams*, 7th Dist. No. 08 MA 246, 2012-Ohio-2719, ¶ 8-12.

{¶6} Appellant's application suffers from several procedural and substantive defects. Pursuant to App.R. 26(B)(1), Appellant was required to file his application for reopening within 90 days of the journalization of our judgment entry. "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.” *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, ¶ 7.

{¶7} Appellant’s application was filed 94 days after the journalization of our entry. If an application for reopening is not filed within the 90-day period set forth in App.R. 26(B)(1), an appellant must make a showing of good cause for the untimely filing. App.R. 26(B)(2)(b). Appellant offers no explanation for the untimeliness of his application.

{¶8} Next, the application does not comply with the briefing requirements of App.R. 26(B)(2)(c). Rather than stating a specific assignment of error, Appellant provides general argument. Likewise, Appellant did not fulfill the requirements of App.R. 26(B)(2)(d), insofar as he failed to submit a sworn statement of the basis for his claim that appellate counsel’s representation was deficient with respect to the assignment of error or argument raised pursuant to division (B)(2)(c), and the manner in which the deficiency prejudicially affected the outcome of the appeal.

{¶9} Even assuming that Appellant had complied with the requirements of App.R. 26(B)(1) and (2), he fails to meet the standard for reopening this appeal. Appellant contends that the state failed to identify Crystal as the declarant on the recordings. He further contends that “it is only speculation that it is [Appellant] in the recordings as false evidence was presented in an attempt to place him in the conversation.” (3/26/18 Application, p. 4.) He offers no supplemental affidavits in support of his application.

{¶10} This record, however, is replete with evidence identifying Crystal and Appellant as the participants in the recorded telephone conversations. Crystal's fingerprints were found on the correspondence addressed to Chod Clark that had Suboxone secreted under the stamps. She was a registered visitor for Appellant at NCCI. An electronic mail from Appellant's prison e-mail address to Crystal read, in pertinent part, "[h]is name is Chod Clark, 715-178, have your friend write to him he's a cool guy." *State v. Duncan*, 7th Dist. No. 16 NO 0440, 2017-Ohio-9378, ¶ 2. The investigator assigned to the case, after engaging in a brief conversation with Appellant, identified Appellant's voice as the voice on the recorded telephone conversations. The telephone calls were made from NCCI by Appellant to the telephone number Crystal supplied when she registered as a visitor and, according to protocol, Appellant identified himself at the beginning of each telephone conversation. Each of the twenty telephone calls between the two co-conspirators involved the same topic: the caller asking the recipient about purchasing stamps and writing a letter.

{¶11} Accordingly, we find that the application was not timely filed. In the alternative, we also find that Appellant has failed to establish a genuine issue of material fact regarding ineffective assistance of appellate counsel. Therefore, Appellant's App.R. 26(B) application is overruled.

**JUDGE CHERYL L. WAITE**

**JUDGE GENE DONOFRIO**

**JUDGE CAROL ANN ROBB**

**NOTICE TO COUNSEL**

**This document constitutes a final judgment entry.**