

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ZARYL G. BUSH,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 MA 0105

Application to Reopen

BEFORE:

David A. D'Apolito, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:

Denied.

Atty. Paul J. Gains, Mahoning County Prosecutor, and *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellant and

Atty. G. Michael Goins, 13609 Shaker Boulevard, Suite 3-A, Cleveland, Ohio 44120, for Defendant-Appellee.

Dated: March 9, 2020

PER CURIAM.

{¶1} Appellant Zaryl G. Bush filed an application to reopen his appeal in *State v. Bush*, 7th Dist. Mahoning No. 18 MA 0105, 2019-Ohio-4082, pursuant to App.R. 26(B) on December 26, 2019. On September 26, 2019, we issued our opinion and judgment entry affirming the dismissal of Appellant’s second successive postconviction petition by the trial court for lack of jurisdiction. We predicated our decision on Appellant’s failure to demonstrate that he was unavoidably prevented from discovering the facts upon which his claim for relief is based. We further found that the second successive petition was barred by *res judicata*, because Appellant could have raised his claims in his original petition.

{¶2} In his application to reopen, Appellant raises two assignments of error: First, he alleges that appellate counsel failed to raise evidence of police corruption and the ineffective assistance of counsel provided by Appellant’s previous counsel in his original petition for postconviction relief. Second, he alleges that appellate counsel failed to file an application for reconsideration when we relied on incorrect information regarding the date of issuance of an order of protection in our opinion. Appellee filed its response brief on January 10, 2020.

{¶3} Pursuant to App.R. 26(B)(1), a criminal defendant “may apply for reopening of the *appeal from the judgment of conviction and sentence*, based on a claim of ineffective assistance of appellate counsel.” (Emphasis added.) As a consequence, “App.R. 26(B) does not apply to post-judgment motions such as postconviction relief petitions and motions to vacate guilty pleas”. *State v. Gilbert*, 8th Dist. Cuyahoga No. 106358, 2019-Ohio-1117, ¶ 2, appeal not allowed, 156 Ohio St.3d 1447, 2019-Ohio-2498, 125 N.E.3d 917, ¶ 2 (2019), citing *State v. Loomer*, 76 Ohio St.3d 398, 1996-Ohio-59, 667 N.E.2d 1209 (App.R. 26(B) application based on appeal of motion to dismiss indictment is inappropriate.) Accordingly, Appellant’s App.R. 26(B) application is denied.

{¶4} To the extent that Appellant’s second assignment of error constitutes an application for reconsideration, rather than an application to reopen, it is untimely filed. Application for reconsideration of any cause submitted on appeal shall be made in writing

no later than ten days after the clerk has both mailed to the parties the judgment or order in question and made a note on the docket of the mailing as required by App. R. 30(A). Although App.R. 26(A) does not set forth the test to be used in determining whether to reconsider a decision, the test generally applied by this court and other courts is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered or not fully considered in the appeal. *Deutsche Bank Natl. Trust Co. v. Knox*, 7th Dist. Belmont No. 09-BE-4, 2011-Ohio-421, 2011 WL 334508, ¶ 2, citing *Matthews v. Matthews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278 (10th Dist.1981).

{15} Even assuming that the application was timely filed, Appellant's argument has no merit. Appellant contends that we predicated our conclusion that he was not unavoidably prevented from discovering the relevant facts on incorrect information, because we observed that "the order of protection [prohibiting Appellant from contacting his son, N.B.] was issued on March 16, 2015." Appellant writes, "Attached as Exhibit - K to Bush's petition for post-conviction relief was a copy of the actual Order of Protection placed against Bush preventing contact from [N.B.] (eyewitness) as of February 27, 2013."

{16} The attachment to the petition labeled "Exhibit K" was not the original order of protection. Instead, Appellant attached as "Exhibit K" a modified domestic violence civil protection order filed on November 14, 2017. The modified order removes N.B. "as a protected person under the existing civil protection order," and purports to modify "the prior Domestic Violence Civil Protection Order issued on 3/16/15." (11/14/2017 Order, p. 2.) Because our review is limited to the record on appeal, we relied on the only evidence in the record to determine the date of the existing civil protection order. We further opined that the order of protection prohibited contact between N.B. and Appellant, not his trial counsel.

{17} For the foregoing reasons, the App.R. 26 application is denied.

JUDGE DAVID A. D'APOLITO

JUDGE GENE DONOFRIO

JUDGE CHERYL L. WAITE

NOTICE TO COUNSEL

This document constitutes a final judgment entry.