

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JOHN ANTHONY THOMAS, SR.,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 BE 0028

Appellant's Application to Reopen Direct Appeal

BEFORE:

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

JUDGMENT:

Denied.

John Anthony Thomas, Sr., Pro se, #A735-658, Noble Correctional Institution, 15708 McConnellsville Road, Caldwell, Ohio 43724-8902.

Dated: January 29, 2021

PER CURIAM.

{¶1} Appellant John Anthony Thomas, Sr. has filed a *pro se* application to reopen his direct appeal based on ineffective assistance of appellate counsel. Appellant claims his counsel failed to raise three issues on direct appeal: defective jury pool, sufficiency of the evidence and manifest weight of the evidence. For the following reasons, Appellant's application for reopening is denied.

Factual and Procedural History

{¶2} Appellant's wife of 28 years, Jaqueline "Jackie" Thomas ("Mrs. Thomas"), testified that between five and six o'clock on the morning of July 13, 2016, she was awakened by Appellant, profanely demanding she get out of bed. (Tr., pp. 384-385.) Appellant grasped her arm and the hair of her head, causing her to stand and forcibly follow him to the bathroom so that their sleeping grandchild, who remained in the bed, would not be awakened. (Tr., pp. 385-386.)

{¶3} Upset that she wanted a divorce, Appellant grabbed Mrs. Thomas by the throat once they got to the bathroom. She told him that he was hurting her. (Tr., p. 386.) Appellant used his non-dominant hand to punch her across the face, causing her nose to bleed and her teeth to hit the inside of her mouth, before holding her by her hair and slapping her across the face multiple times. (Tr., pp. 386-387.) She told Appellant to stop and again told him he was hurting her, but this caused Appellant to switch to using his non-dominant hand to hold her by her hair and his dominant hand to choke her, while

saying, “[y]ou want a divorce. You're going to leave me. I'll kill you. You won't leave me. No one else will have you. You'll suffer.” (Tr., p. 387.) Appellant then pushed her towards the already filled bathtub, knocking her knee into it, while continuing to hold her by the hair and choke her. (Tr., pp. 387-388.) Mrs. Thomas testified that Appellant put her head in “scalding” hot water. (Tr., p. 388.) She was able to unpin her arm from the side of the tub, push up and cry for help. However, Appellant slammed her head into the side of the tub, leaned on her until she slid into the tub, and proceeded to choke her from the back of her neck while holding her under water by her hair. (Tr., pp. 388-389.) Mrs. Thomas testified that while Appellant choked her she attempted to pull the drain to the tub, believing she was going to die. Eventually, she blacked out. (Tr., p. 389.)

{¶4} Appellant was indicted on July 13, 2016 by a Belmont County Grand Jury on five charges: two alternative charges of kidnapping in violation of R.C. 2905.01(A)(3) and R.C. 2905.01(B)(2) respectively, both first degree felonies; two alternative charges of felonious assault in violation of R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2) respectively, both second degree felonies; and attempted murder in violation of R.C. 2903.02(A), a first degree felony.

{¶5} A jury trial was held on May 4, 2017. Appellant was found guilty on both counts of kidnapping in violation of R.C. 2905.01(A)(3) and R.C. 2905.01(B)(2), and a single count of felonious assault in violation of R.C. 2903.11(A)(2). Appellant was found not guilty of the alternate felonious assault charge and the attempted murder charge. A sentencing hearing was held on May 31, 2017. Appellant’s two kidnapping convictions were merged for sentencing purposes and he was sentenced to eleven years in prison on those convictions. In addition, Appellant was sentenced to eight years for felonious

assault. The sentences were ordered to run consecutively, for a total stated prison term of nineteen years.

{¶6} Appellant filed a timely appeal. We affirmed Appellant's conviction in *State v. Thomas*, 7th Dist. Belmont No. 17 BE 0028, 2018-Ohio-3768. Appellant filed this application to reopen his direct appeal on November 12, 2020. The state did not file a response brief.

Reopening

{¶7} App.R. 26(B)(1) and (2)(b) require that an application for reopening based on a claim of ineffective assistance of appellate counsel be filed within ninety days from journalization of the appellate decision. App.R. 26(B)(1), (2)(b); *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861. The ninety-day requirement applies to all appellants. *State v. Buggs*, 7th Dist. Mahoning No. 06 MA 28, 07 MA 187, 2009-Ohio-6628, ¶ 5. An appellant's failure to offer good reason for failure to comply with the deadline is sufficient basis for overruling an application for reopening. *State v. Hoffner*, 112 Ohio St.3d 467, 2007-Ohio-376, 860 N.E.2d 1021, ¶ 7.

{¶8} Pursuant to App.R. 26(B)(2):

An application for reopening shall contain all of the following:

- (a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;
- (b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

(c) 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;

(d) 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 pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

{¶19} This Court's decision affirming Appellant's conviction was journalized on September 17, 2018. His application was filed on November 12, 2020, clearly past the ninety-day time limit. Appellant justifies his late application by asserting that he contacted Disciplinary Counsel in November of 2018 regarding appellate counsel's performance, instead of filing an application for reopening. Appellant argues that his attempt to seek some sort of remedy qualifies as good cause for this untimely application. Appellant included a letter dated February 12, 2020, from an assistant Disciplinary Counsel concluding that his appellate counsel did not violate any rules of the Ohio Rules of Professional Conduct and dismissing Appellant's grievance. As noted above, App.R. 26(B) provides the specific requirements for filing an application for reopening. The rules

allow for no alternative method and recognize no alternative forum in which to reopen an appeal. Appellant’s decision to pursue a grievance through disciplinary counsel instead of filing an application for reopening was misplaced. Disciplinary counsel is charged with investigating whether an Ohio attorney has violated the Rules of Professional Conduct, which is not synonymous with a claim for ineffective assistance of counsel under App.R. 26. Appellant additionally urges his application was delayed for two years because of the pandemic and because he was attempting “to enlighten himself with the procedural mechanism to bring himself properly before the court.” (11/12/20 Application to Reopen Direct Appeal, p. 1.) It is well-established that a lack of legal training, skill or understanding does not qualify as “good cause” under App.R. 26(B). *State v. Dew*, 7th Dist. Mahoning No. 08 MA 62, 2012-Ohio-434, ¶ 7. “[A] lack of legal knowledge is not a sufficient ground to demonstrate good cause excusing failure to timely file.” *State v. Frazier*, 7th Dist. Belmont No. 16 BE 0040, 2020-Ohio-993, ¶ 8.

{¶10} Even assuming Appellant’s application was timely filed, it falls short of compliance with App.R. 26(B)(2)(d) which mandates:

(d) 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 pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

{¶11} Moreover, App.R. 26(B)(2)(e) requires Appellant to cite to portions of the record in support of his application. *State v. Wade*, 7th Dist. Jefferson No. 14 JE 0036, 2017-Ohio-4135, ¶ 6. Appellant does not.

{¶12} Appellant states in his affidavit:

1. As demonstrated by the disciplinary counsel's report, appellate counsel never warned about the hazards of back to back representation, nor did he secure a waiver of any conflict. Instead, [appellate counsel] ensured me that he was the best option due to his intimate knowledge of my case.
2. [Appellate counsel] did not raise the complex issues he discussed with me, but chose "run-of-the-mill", novel errors over a partial jury and the State failing to prove case beyond a reasonable doubt.
3. Had [Appellate counsel] not proceeded on an actual conflict and his deficiencies at trial were put to adversarial testing, I stood a solid possibility of success on appeal.

{¶13} Appellant does not cite to any legal authority or to the record. Instead, he relies on baseless assertions regarding the outcome of his appeal. When an appellant's affidavit fails to comply with the App.R. 26(B) requirements it is properly dismissed. *Frazier*, ¶ 11, citing *State v. McNeill*, 83 Ohio St.3d 457, 459, 700 N.E.2d 613 (1998).

{¶14} As Appellant has failed to establish good cause for the untimely delay in his filing, his application fails to comply with the requirements set forth in App.R. 26(B)(2)(d) and App.R. 26(B)(2)(e). The application for reopening his direct appeal is hereby denied.

JUDGE CHERYL L. WAITE

JUDGE GENE DONOFRIO

JUDGE CAROL ANN ROBB