

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ZION QUINCY HAYNES GILMORE,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 22 MA 0067

Application for Reopening

BEFORE:

David A. D'Apolito, Carol Ann Robb, Mark A. Hanni, Judges.

JUDGMENT:

Denied.

Atty. Gina DeGenova, Mahoning County Prosecutor and *Atty. Edward A. Czopur*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Zion Gilmore, *Pro Se*, #781462, Lake Erie Correctional Institution, 501 Thompson Road, P.O. Box 8000, Conneaut, Ohio 44030, Defendant-Appellant.

Dated: August 8, 2023

PER CURIAM.

{¶1} On July 24, 2023, Appellant, Zion Gilmore, filed a pro se App.R. 26(B) application for reopening his direct appeal in *State v. Gilmore*, 7th Dist. Mahoning No. 22 MA 0067, 2023-Ohio-1503. Appellee, the State of Ohio, filed a response four days later.

{¶2} Appellant was convicted and sentenced to a jointly recommended, total indefinite sentence of 11 years (minimum) to 15 years (maximum) for involuntary manslaughter and aggravated burglary following a guilty plea. In his direct appeal, Appellant asserted his guilty plea was not made in a knowing, intelligent, and voluntary manner because the trial court did not strictly comply with Crim.R. 11(C)(2)(c) because it failed to specifically inform him of his right to a trial by jury. *Id.* at ¶ 1. This court found no merit in Appellant's argument and affirmed the trial court's judgment on May 4, 2023. *Id.* at ¶ 18.

App.R. 26(B)(1) and (2)(b) require applications to reopen based on ineffective assistance of appellate counsel to be filed within ninety days from journalization of the 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 Nos. 06 MA 28, 07 MA 187, 2009-Ohio-6628, ¶ 5.

If an application for reopening is not filed within the ninety day time period, an appellant must make a showing of good cause justifying the delay in filing. *State v. Dew*, 7th Dist. Mahoning No. 08 MA 62, 2012-Ohio-434.

State v. Frazier, 7th Dist. Belmont No. 16 BE 0040, 2020-Ohio-993, ¶ 5-6.

{¶3} As stated, Appellant's application for reopening was filed on July 24, 2023. Therefore, his application is timely as it was filed within the 90-day timeframe of this court's May 4, 2023 decision. *Gilmore, supra*; App.R. 26(B)(1) and (2)(b). Upon review, however, Appellant fails to meet the standard for reopening this appeal. See *State v. Romeo*, 7th Dist. Mahoning No. 14 MA 0060, 2018-Ohio-2482, ¶ 6.

The test for ineffective assistance of counsel requires a defendant to prove (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). Under this test, a criminal defendant seeking to reopen an appeal must demonstrate that appellate counsel was deficient for failing to raise the issue presented in the application for reopening and that there was a reasonable probability of success had that issue been raised on appeal. [*State v.*] *Spivey*[, 84 Ohio St.3d 24,] 25 [(1998)].

* * *

Under App.R. 26(B), an applicant must set forth "(o)ne 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).

State v. Hackett, 7th Dist. Mahoning No. 17 MA 0106, 2019-Ohio-3726, ¶ 6, 9.

{¶4} Appellant raises one assignment of error in his application:

THE TRIAL COURT VIOLATED THE APPELLANT'S CONSTITUTIONAL RIGHTS AT THE PLEA HEARING BY NOT INFORMING THE APPELLANT AND DETERMINING THAT THE APPELLANT UNDERSTOOD HE WAS WAIVING THE RIGHTS TO [A] JURY TRIAL BY ENTERING THE PLEA AGREEMENT.

(7/24/2023 Appellant's Application for Reopening, p. 4).

{¶5} Appellant's application for reopening is not based on a claim of ineffective assistance of appellate counsel as required by App.R. 26(B). Rather, Appellant argues the same issue that was raised in his direct appeal, i.e., that his guilty plea was not made in a knowing, intelligent, and voluntary manner because the trial court did not strictly comply with Crim.R. 11(C)(2)(c) because it failed to specifically inform him of his right to

a trial by jury. (*Id.* at p. 4-6); *Gilmore, supra*, at ¶ 1. In his direct appeal, this court determined the following:

* * * Appellant's guilty plea was entered knowingly, intelligently, and voluntarily. The trial court strictly complied with the constitutional notice provisions under Crim.R. 11(C)(2)(c), including at issue here, Appellant's right to a trial by jury. Appellant's jointly recommended, total indefinite sentence of 11 years (minimum) to 15 years (maximum) was authorized by law. See R.C. 2953.08(D); R.C. 2929.14(A)(1)(a); R.C. 2929.144.

Gilmore, supra, at ¶ 17.

{¶6} We fail to see any ineffective assistance of appellate counsel warranting a reopening. Appellant has failed to comply with the requirements set forth in App.R. 26(B) and has failed to present issues that establish a colorable claim of ineffective assistance of appellate counsel.

{¶7} Accordingly, Appellant's pro se App.R. 26(B) application for reopening is hereby denied.

JUDGE DAVID A. D'APOLITO

JUDGE CAROL ANN ROBB

JUDGE MARK A. HANNI

NOTICE TO COUNSEL

This document constitutes a final judgment entry.