

[Cite as *State v. Van Tran*, 2015-Ohio-4672.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100057

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

MY VAN TRAN

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-12-566276-A
Application for Reopening
Motion No. 487955

RELEASE DATE: November 6, 2015

FOR APPELLANT

My Van Tran
Inmate No. 644-775
Marion Correctional Institution
P.O. Box 1812
Marion, Ohio 43301

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
By: Gregory J. Ochocki
Assistant County Prosecutor
9th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

EILEEN A. GALLAGHER, P.J.:

{¶1} In August 2015, My Van Tran filed an application for reopening pursuant to App.R. 26(B). Therein, applicant does not provide any basis in the record for reopening the appeal in *State v. Van Tran*, 8th Dist. Cuyahoga No. 100057, 2014-Ohio-1829. Van Tran claims he was prejudiced by the use of a translator that allegedly did not present his position properly. He states that he is unable to support his argument without having copies of his transcript. Van Tran states he “would like a copy of his trial record (transcripts) forthwith.” The state opposed the application to reopen as failing to establish good cause for considering the untimely application. The state alternatively argues that the application fails to establish a claim for ineffective assistance of appellate counsel. The application to reopen is denied for the reasons that follow.

{¶2} Van Tran’s application is untimely. App.R. 26(B)(2)(b) requires that Van Tran establish a showing of good cause for untimely filing if the application is filed more than 90 days after journalization of the appellate judgment, which is subject to reopening. The Supreme Court of Ohio, with regard to the 90-day deadline as provided by App.R. 26(B)(2)(b), has established that:

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.

Ohio and other states “may erect reasonable procedural requirements for triggering the right to an adjudication,” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) and that is what Ohio has done by creating a 90-day deadline for the filing of applications to reopen.

* * * The 90-day requirement in the rule is “applicable to all appellants,” *State v. Winstead*, 74 Ohio St.3d 277, 278, 1996 Ohio 52, 658 N.E.2d 722 (1996), and

[the applicant] offers no sound reason why he —unlike so many other Ohio criminal defendants — could not comply with that fundamental aspect of the rule.

State v. Gumm, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, ¶ 7-8, 10. See also *State v. LaMar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970; *State v. Cooey*, 73 Ohio St.3d 411, 653 N.E.2d 252 (1995); *State v. Reddick*, 72 Ohio St.3d 88, 647 N.E.2d 784 (1995).

{¶3} In *Gumm* and *LaMar*, the Ohio Supreme Court upheld judgments denying applications for reopening solely on the basis that the application was not timely filed and the applicant had failed to show “good cause for filing at a later time.” Likewise, this court has found that we need not reach the merits of an App.R. 26(B) application if the applicant fails to demonstrate good cause for the delayed filing. *State v. McNeal*, 8th Dist. Cuyahoga No. 91507, 2009-Ohio-6453, ¶ 4. The 90-day deadline for filing must be strictly enforced. *State v. Davis*, 8th Dist. Cuyahoga Nos. 97689, 97691 and 97692, 2013-Ohio-5015, ¶ 4, citing *Gumm*.

{¶4} The appellate judgment that Van Tran seeks to reopen was journalized on May 1, 2014. The application for reopening was not filed until August 2015, well beyond the 90-day deadline for reopening.

{¶5} Van Tran argues that he cannot support an application for reopening without a copy of the transcript. Inability to access the record and lack of transcripts do not provide good cause for an untimely application of reopening. E.g., *State v. Alt*, 8th Dist. Cuyahoga No. 96289, 2012-Ohio-2054. Further, we have denied several motions for copies of the transcript. Van Tran’s reliance on *Gunner v. Welch*, 749 F.3d 511 (6th Cir.2014), is misplaced. *Gunner* examined an ineffective assistance of appellate counsel claim premised upon appellate counsel’s failure to advise the defendant of the deadline for filing a postconviction relief petition. There was no allegation or discussion regarding the defendant’s right to a second copy of the transcript

at the state's expense. The Ohio Supreme Court has held that an indigent appellant is not entitled to receive an additional copy of the transcript at the state's expense where the transcript has already been prepared and filed with the appellate court for the direct appeal. *State ex rel. Greene v. Enright*, 63 Ohio St.3d 729, 730, 590 N.E.2d 1257 (1992). The court in *Enright* held that the clerk fulfilled his duty "by transmitting the record within the prescribed time and was under no duty to provide an additional copy of a trial transcript to Greene, in addition to the copy filed with the court of appeals." *Id.* at 732.

{¶6} Van Tran has failed to establish good cause for his untimely application and has failed to establish any basis for reopening the appeal. The application is denied.

EILEEN A. GALLAGHER, PRESIDING JUDGE

TIM McCORMACK, J., and
EILEEN T. GALLAGHER, J., CONCUR