

[Cite as *State v. Harrison*, 2016-Ohio-5398.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93132

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LORENZO HARRISON

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-513945
Application for Reopening
Motion No. 497565

RELEASE DATE: August 17, 2016

FOR APPELLANT

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ATTORNEYS FOR APPELLEE

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MARY EILEEN KILBANE, J.:

{¶1} On June 22, 2016, the applicant, Lorenzo Harrison, pursuant to App.R. 26(B) and *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992), applied to reopen this court's judgment in *State v. Harrison*, 8th Dist. Cuyahoga No. 93132, 2010-Ohio-2778, *reopening disallowed*, 2011-Ohio-699, in which this court reversed in part and remanded the case to the trial court for the limited purpose of inquiring into Harrison's request for new counsel. Harrison now complains that his appellate counsel should have argued the following: (1) prosecutorial misconduct for using perjured evidence, withholding exculpatory evidence, and vouching for the complaining witness; (2) ineffective assistance of trial counsel; (3) sufficiency of the evidence; (4) erroneous jury instructions by changing the date of the occurrences without properly amending the indictments; (5) erroneous jury instruction based on the current law rather than the law at the times of the alleged incidents; and (6) speedy trial violations. For the following reasons, this court denies the application.

{¶2} A jury found Harrison guilty of three counts of rape and three counts of kidnapping of a girl under ten years old along with notice of prior convictions, repeat violent offender specifications, and sexual motivation specifications for the kidnapping counts. The girl was the daughter of Harrison's girlfriend.

{¶3} Harrison's appellate counsel argued (1) that the trial court erred in failing to remove biased jurors from the case; (2) that trial counsel was ineffective for not letting Harrison testify; (3) that the verdict was against the manifest weight of the evidence; (4) that Harrison's waiver of this right to testify was not knowingly, intelligently, and voluntarily made; and (5) that the trial court erred by denying Harrison's request to dismiss counsel without an investigation. This court overruled the first four assignments of error, but reversed on the issue of Harrison's request to dismiss counsel and remanded with instructions to hold a hearing on the issue. If the trial court found the allegations were unfounded, the convictions were to be affirmed and the sentence of life imprisonment was to be executed.

{¶4} On remand, the trial court conducted a hearing on Harrison's request to dismiss trial counsel and denied the request. This court affirmed that decision. *State v. Harrison*, 8th Dist. Cuyahoga No. 95666, 2011-Ohio-3258, *reopening disallowed*, 2011-Ohio-5823.

{¶5} Harrison also filed an earlier App.R. 26(B) application to reopen, *State v. Harrison*, 8th Dist. Cuyahoga No. 93132, 2010-Ohio-2778, *reopening disallowed*, 2011-Ohio-699, in which Harrison argued that his sentence of life without parole was not authorized at the time of the incidents, that his right to a speedy trial was violated, and that he should have been charged with sexual battery.

{¶6} This court denies Harrison's current application because it is untimely and because successive applications are not allowed. App.R. 26(B)(1) and (2)(b) require

applications claiming ineffective assistance of appellate counsel to be filed within 90 days from journalization of the decision unless the applicant shows good cause for filing at a later time. The June 2016 application was filed approximately six years after this court's decision. Thus, it is untimely on its face. In an effort to establish good cause, Harrison pleads that he has just recently received the record in his case and that the prosecutor suppressed and withheld various records, including state of Michigan social worker reports.¹ These excuses do not state good cause for untimely filing. This court has repeatedly ruled that lack of a transcript or other records does not state good cause for an untimely filing. *State v. Lawson*, 8th Dist. Cuyahoga No. 84402, 2005-Ohio-880, *reopening disallowed*, 2006-Ohio-3839; *State v. Blackmon*, 8th Dist. Cuyahoga No. 48787, 1985 Ohio App.LEXIS 6810 (July 18, 1985), *reopening disallowed*, 2000 Ohio App. LEXIS 6080; *State v. Houston*, 8th Dist. Cuyahoga No. 64574, 1994 Ohio App. LEXIS 52 (Jan. 13, 1994), *reopening disallowed*, (Feb. 15, 1995), Motion No. 259344, *affirmed*, 73 Ohio St.3d 346, 652 N.E.2d 1018 (1995). Moreover, to the extent that records were not available and, thus, not part of the appellate record, they could not form the basis for an appellate argument. Appellate review is strictly limited to the record. *The Warder, Bushnell & Glessner Co. v. Jacobs*, 58 Ohio St. 77, 50 N.E. 97 (1898). Thus, "a reviewing court cannot add matter to the record that was not part of the trial court's proceedings and then decide the appeal on the basis of the new matter. *State v.*

¹The girl initially told her mother of the rapes while they were in Ohio, but the mother did not go to the authorities. The girl and her mother then moved to Michigan. When the girl told her cousin in Michigan, the Michigan authorities began the investigation.

Ishmail, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978). “Nor can the effectiveness of appellate counsel be judged by adding new matter to the record and then arguing that counsel should have raised these new issues revealed by the newly added material.” *State v. Moore*, 93 Ohio St.3d 649, 650, 2001-Ohio-1892, 758 N.E.2d 1130. “Clearly, declining to raise claims without record support cannot constitute ineffective assistance of appellate counsel.” *State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, 776 N.E.2d 79, ¶10. Therefore, the absence of records cannot establish good cause for an untimely filing of an application to reopen. Harrison has not established good cause.

{¶7} Additionally, Harrison’s second application is not well taken because there is no right to file successive applications for reopening pursuant to App.R. 26(B). *State v. Williams*, 99 Ohio St.3d 179, 2003-Ohio-3079, 790 N.E.2d 219; *State v. Richardson*, 74 Ohio St.3d 235, 1996-Ohio-258, 658 N.E.2d 273; *State v. Cheren*, 73 Ohio St.3d 137, 1995-Ohio-28, 652 N.E.2d 707; and *State v. Peeples*, 73 Ohio St.3d 149, 1995-Ohio-36, 652 N.E.2d 717. Thus, res judicata bars consideration of Harrison’s second application for reopening because his new claims of ineffective assistance of appellate counsel were or could have been raised through his initial application of reopening. In *State v. Reddick*, 72 Ohio St.3d 88, 90-91, 1995-Ohio-249, 647 N.E.2d 784, the Supreme Court of Ohio stated: “Neither *Murnahan* nor App.R. 26(B) was intended as an open invitation for persons sentenced to long periods of incarceration to concoct new theories of ineffective assistance of appellate counsel in order to have a new round of appeals.”

{¶8} Accordingly, this court denies Harrison's application to reopen.

MARY EILEEN KILBANE, JUDGE _____

LARRY A. JONES, SR., A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR