

[Cite as *State v. Lennon*, 2017-Ohio-9013.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104344

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DOMINIQUE LENNON

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-15-600096-A
Application for Reopening
Motion No. 509517

RELEASE DATE: December 8, 2017

FOR APPELLANT

Dominique Lennon, pro se
Inmate No. 682031
Lebanon Correctional Institution
3791 State Route 63
Lebanon, Ohio 45036

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
By: Mary M. Dyczek
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

MARY J. BOYLE, P.J.:

{¶1} On August 14, 2017, applicant Dominique Lennon filed an untimely application to reopen under App.R. 26(B). He seeks to reopen this court's judgment in *State v. Lennon*, 8th Dist. Cuyahoga No. 104344, 2017-Ohio-2753, in which this court affirmed his convictions and sentences for attempted murder, felonious assault, discharging a firearm on or near a prohibited premises, carrying a concealed weapon, improperly handling a firearm in a vehicle, and vandalism. Lennon contends that his appellate counsel was ineffective for not raising an ineffective assistance of trial counsel assignment of error. The state opposes the application on the grounds that it is untimely and has no merit. For the following reasons, this court denies the application to reopen.

{¶2} 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. Lennon is attempting to reopen the appellate judgment that was journalized on May 11, 2017. His application, however, was filed on August 14, 2017 — beyond the 90-day deadline. Thus, it is untimely on its face. Further, Lennon does not argue or identify any basis for good cause that would allow this court to consider his untimely application for reopening.

See State v. Fulton, 8th Dist. Cuyahoga No. 96156, 2011-Ohio-4259, *reopening disallowed*, 2013-Ohio-2087. Indeed, the Supreme Court of Ohio in *State v. LaMar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970, and *State v. Gumm*, 103 Ohio St.3d

162, 2004-Ohio-4755, 814 N.E.2d 861, held that the 90-day deadline for filing must be strictly enforced.

{¶3} Even if we were able to reach the merits of Lennon’s application, he still fails to satisfy the standard for reopening.

{¶4} “To succeed on an App.R. 26(B) application, a petitioner must establish that counsel’s performance fell below an objective standard of reasonable representation and that he was prejudiced by the deficient performance.” *State v. Adams*, 146 Ohio St.3d 232, 2016-Ohio-3043, N.E.3d 1227, ¶ 52, 54, citing *State v. Dillon*, 74 Ohio St.3d 166, 171, 657 N.E.2d 273 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768 (1990). Specifically, Lennon “bears the burden of establishing that there was a ‘genuine issue’ as to whether he has a ‘colorable claim’ of ineffective assistance of counsel on appeal.” *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

{¶5} In his proposed three assignments of error, Lennon argues that his trial counsel was ineffective in failing to properly investigate, interview, and call alibi witnesses, despite having filed a notice of alibi. According to Lennon, these witnesses would have established that Lennon was not at the scene of the crime, and therefore he could not have committed the offenses. He further maintains that his trial counsel did not properly investigate and failed to obtain “video footage” that would have been exculpatory. These arguments, however, are based purely on speculation.

{¶6} There is no evidence in the trial record as to what the testimony of these witnesses would have been; nor is there any support in the trial court record as to the existence of any exculpatory video surveillance. “Speculation is insufficient for making an appellate argument and does not establish prejudice.” *State v. Logan*, 8th Dist. Cuyahoga No. 97022, 2012-Ohio-1944, *reopening disallowed*, 2012-Ohio-5713, ¶ 10, citing *State v. Addison*, 8th Dist. Cuyahoga No. 90642, 2009-Ohio-221, *reopening disallowed*, 2009-Ohio 2704; and *State v. Abdul*, 8th Dist. Cuyahoga No. 90789, 2009-Ohio-225, *reopening disallowed*, 2009-Ohio-6300; *see also State v. Bays*, 87 Ohio St.3d 15, 28, 716 N.E.2d 1126 (1999) (prejudice from counsel’s failure to employ investigative services is speculative where the record does not disclose what investigations trial counsel had performed or what information an investigator might have “turned up or that defense counsel in fact failed to obtain”).

{¶7} Despite Lennon’s complaint of his “inability to provide any supporting testimony for his strongest defense”— his alibi — we note that the record reflects that the trial court expressly explained to Lennon his right to testify at trial. Lennon, however, declined. He expressly stated on the record that he “would not like to testify.” Further, as for Lennon’s accusation that his trial counsel failed to investigate the leads that Lennon provided regarding his alibi, we find no evidence in the record corroborating this.

{¶8} To the extent that Lennon relies on the affidavit that he has attached to his application in support of these arguments, this affidavit was not part of the trial court record. Thus, appellate counsel could not have relied on this evidence to raise these

arguments in the direct appeal because they would require speculation or consideration of evidence that is outside of the record. *State v. Campbell*, 8th Dist. Cuyahoga No. 102788, 2016-Ohio-389, *reopening disallowed*, 2016-Ohio-5510, ¶ 5 (matters outside the record do not provide a basis for reopening under App.R. 26(B)).

{¶9} Accordingly, this court denies the application to reopen.

MARY J. BOYLE, PRESIDING JUDGE _____

ANITA LASTER MAYS, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR