

[Cite as *State v. Robinson*, 2017-Ohio-8055.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 88473

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GREGORY ROBINSON

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-445084
Application for Reopening
Motion No. 507903

RELEASE DATE: September 29, 2017

FOR APPELLANT

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ATTORNEYS FOR APPELLEE

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MARY EILEEN KILBANE, J.:

{¶1} Almost 11 years after his untimely appeal was dismissed, applicant Gregory Robinson seeks to reopen the appeal under App.R. 26(B). Because it is untimely and fails to meet the requirements for reopening, we deny his application.

A. Facts and Procedural History

{¶2} In *State v. Robinson*, Cuyahoga C.P. No. CR-03-445084, Robinson was convicted of rape with force of a victim less than 13 years old, gross sexual imposition, and compelling prostitution. In his direct appeal, this court affirmed these convictions but reversed and remanded for the trial court to amend its journal entries to find Robinson not guilty of the sexually violent predator and sexual motivation specifications that had been attached to the offenses. *State v. Robinson*, 8th Dist. Cuyahoga No. 85207, 2005-Ohio-5132. This court further recognized, sua sponte, that Robinson should have been sentenced to a life term on the rape count and the issue of parole should have been addressed. Consequently, this court vacated Robinson's sentence and remanded the case for resentencing. *Id.* at ¶ 27.¹

{¶3} Robinson appealed to the Ohio Supreme Court, which denied the discretionary appeal. *State v. Robinson*, 108 Ohio St.3d 1488, 2006-Ohio-962, 843 N.E.2d 794.

¹Robinson sought to reopen his direct appeal of his conviction and sentence in Case No. 85207, which this court denied. *See State v. Robinson*, 8th Dist. Cuyahoga No. 85207, 2005-Ohio-5132, *reopening disallowed*, 2017-Ohio-951.

{¶4} In May 2006, the trial court resentenced Robinson and imposed a life term with eligibility for parole after 15 years on the rape count. Following the resentencing, Robinson, pro se, filed an untimely appeal, which this court dismissed in *State v. Robinson*, 8th Dist. Cuyahoga No. 88473 (Sept. 18, 2006). This court further denied Robinson’s motion for delayed appeal filed in the same case number on October 30, 2006. At the time that the motion was filed, Robinson had appellate counsel, who filed the motion on his behalf. In 2013, Robinson, pro se, again moved for a delayed appeal, which was denied in *State v. Robinson*, 8th Dist. Cuyahoga No. 99969 (July 9, 2013).

{¶5} Relying on App.R. 26(B), Robinson now seeks to reopen the untimely appeal that was dismissed in September 2006.

B. Untimely

{¶6} App.R. 26(B)(1) plainly states that: “An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.” Likewise, App.R. 26(B)(2)(b) requires that Robinson establish “a showing of good cause for untimely filing if the application is filed more than 90 days after journalization of the appellate judgment.” The Ohio Supreme Court requires intermediate appellate courts to strictly enforce App.R. 26(B)’s 90-day deadline, explaining as follows:

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, 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. Cooley*, 73 Ohio St.3d 411, 653 N.E.2d 252 (1995); and *State v. Reddick*, 72 Ohio St.3d 88, 647 N.E.2d 784 (1995).

{¶7} Robinson offers no explanation or showing of good cause for his untimely filing. Accordingly, because Robinson failed to file his application with this court within the 90-day period and fails to show “good cause” for the exceptional delay, we decline to grant his application.

C. No Meritorious Argument

{¶8} “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, ¶ 2, 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. Specifically, Robinson “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).

{¶9} Aside from being untimely, Robinson’s argument is unpersuasive. Here, the gravamen of Robinson’s application is an attack on this court’s judgment in his first direct appeal (Case No. 85207), arguing that this court ordered an “illegal remand.” Robinson relies on *State v. Saxton*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, for the proposition that this court had no authority to vacate his sentence and remand for resentencing when he did not raise any assignment of error related to his sentence in his direct appeal.

{¶10} Assuming, arguendo, that this argument constitutes a genuine assignment of error for purposes of App.R. 26(B)(2)(c), the argument fails. Robinson’s reliance on *Saxton* is misplaced. *Saxton* does not support Robinson’s claim that this court should have ignored a void sentence or that it lacks authority to vacate it and remand for resentencing. To the contrary, *Saxton* dealt with the sentencing-package doctrine and recognized that “[w]hen a defendant fails to appeal the sentence for a certain offense, he cannot take advantage of an error in the sentence for an entirely separate offense to gain a second opportunity to appeal upon resentencing.” *Id.* at ¶ 19. Thus, the court held that “[a]n appellate court may modify, remand, or vacate only a sentence for an offense that is appealed by the defendant and may not modify, remand, or vacate the entire multiple-offense sentence based upon an appealed error in the sentence for a single

offense.” *Id.* at paragraph three of the syllabus. The case stands for the proposition that “[b]ecause Ohio does not ‘bundle’ sentences, nothing is ‘unbundled’ when one of several sentences is reversed on appeal.” *Id.* at ¶ 15. *Saxton*, however, does not limit an appellate court’s authority to vacate a sentence that is contrary to law.

{¶11} Based on the foregoing, we find no prejudice in this case to support the granting of Robinson’s application to reopen. Contrary to Robinson’s assertion, any challenge to the trial court’s authority to resentence him on appeal would have been futile.

Robinson’s sole argument therefore cannot support a “colorable claim of ineffective assistance of counsel on appeal” as required under App.R. 26(B)(5). *Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

{¶12} Accordingly, Robinson’s application for reopening is denied.

MARY EILEEN KILBANE, JUDGE

EILEEN A. GALLAGHER, P.J., and
SEAN C. GALLAGHER, J., CONCUR