

[Cite as *State v. Johnson*, 2018-Ohio-2836.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105560

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARVIN F. JOHNSON, SR.

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-15-594187-B
Application for Reopening
Motion No. 517426

RELEASE DATE: July 17, 2018

FOR APPELLANT

Marvin F. Johnson, Sr., pro se
Inmate No. A694191
Grafton Correctional Institution
2500 South Avon Belden Road
Grafton, Ohio 44044

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
By: Frank Romeo Zeleznikar
Assistant County Prosecutor
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

ANITA LASTER MAYS, J.:

{¶1} On May 9, 2018, Marvin F. Johnson Sr. (“Johnson”) filed an “Application for Reopening Appeal App. R. 26(B)” in *State v. Johnson*, 8th Dist. Cuyahoga No. 105560, 2018-Ohio-178. In this application and supporting affidavit, Johnson claims that his appellate counsel was ineffective for not arguing the following: (1) that Johnson’s plea of no contest was not entered knowingly, intelligently, and voluntarily, and (2) that Johnson’s sentence was based upon vindictiveness. On May 15, 2018, the state filed the “State’s Response to Appellant’s Application to Reopen Appeal.” In that response, the state contends that Johnson’s application is untimely under App.R. 26(B) and that Johnson has not shown good cause for a delay in filing. On May 21, 2018, Johnson filed a reply arguing that the original application was timely as from the date of the denial of Johnson’s motion for *en banc* reconsideration of 8th Dist. Cuyahoga No. 105560. For the following reasons, this court denies the application to reopen as untimely.

{¶2} Johnson’s application is untimely, and there is no showing of good cause for the delay. App.R. 26(B)(1) and (2)(b) require applications claiming ineffective assistance of appellate counsel to be filed within 90 days from the journalization of the decision unless the applicant shows good cause for filing at a later time. Untimeliness alone is sufficient to dismiss the application. *State v. Wynn*, 8th Dist. Cuyahoga No. 93057, 2010-Ohio-5469. This court decided Johnson’s case and journalized the decision on January 18, 2018. Thus, Johnson’s May 9, 2018 application is untimely on its face.

{¶3} Johnson does not claim that there is just cause for a delay. Johnson’s claim is simply that an intervening motion tolls the time for filing an application to reopen. But motions do not toll the time in which to file. In *State v. Allen*, 8th Dist. Cuyahoga No. 92482,

2010-Ohio-9, *reopening disallowed*, 2011-Ohio-588, Allen endeavored to toll the time for filing by submitting a “Notice of intent to file App.R. 26(B).” This court rejected Allen’s attempt because the rules do not allow such a “notice” and the Supreme Court of Ohio has insisted on strictly enforcing the 90-day deadline. Further, when this court disallowed reopening the application in *State v. Jarrett*, 8th Dist. Cuyahoga No. 98759, 2014-Ohio-488, the court again found that moving to toll the time in which to apply does not change the timeline for App.R. 26. Even appeals to higher courts do not toll the time to file under App.R. 26. *State v. Keith*, 119 Ohio St.3d 161, 2008-Ohio-3866, 892 N.E.2d 912.

{¶4} The Supreme Court of Ohio considered the legitimacy of the rule’s strict deadline 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. The Supreme Court of Ohio noted that states “may erect reasonable requirements for triggering the right to an adjudication.” Ohio did that “by creating a 90-day deadline for the filing of applications to reopen.” *LaMar* at ¶ 7, citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). Further, the *Gumm* court held that “[c]onsistent 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.” *Gumm* at ¶ 7. The rule’s deadline cannot be ignored, and Johnson “offers no sound reason why he — unlike so many other Ohio criminal defendants — could not comply with that fundamental aspect of the rule.” *LaMar* at ¶ 9.

{¶5} Accordingly, this court denies Johnson’s application to reopen.

ANITA LASTER MAYS, JUDGE

MARY EILEEN KILBANE, P.J., and
TIM McCORMACK, J., CONCUR