

[Cite as *State v. Dzelajlija*, 2018-Ohio-3953.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89912

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES DZELAJLIJA

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-06-475938-B
Application for Reopening
Motion No. 519970

RELEASE DATE: September 26, 2018

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SEAN C. GALLAGHER, J.:

{¶1} James Dzelajlija, pursuant to App.R. 26(B), seeks to reopen his appeal in *State v. Dzelajlija*, 8th Dist. Cuyahoga No. 89912, 2008-Ohio-2039, arguing that appellate counsel was ineffective for failing to raise two arguments. Because it is untimely without good cause, the application is denied.

{¶2} Dzelajlija was convicted of charges related to the robbery of a movie rental business in 2005. In his direct appeal, Dzelajlija claimed that his convictions were unsupported by sufficient evidence, were against the manifest weight of the evidence, that he was convicted of allied offenses that should have merged prior to sentencing and that the court erred in deciding an evidentiary issue. We previously found that certain offenses were allied and remanded for resentencing on that basis. *Id.* at _ 39. We overruled the remaining assignments of error. *Id.* at _ 49.

{¶3} On August 6, 2018, Dzelajlija filed an untimely application for reopening claiming that appellate counsel was ineffective for failing to argue that the aggravated robbery conviction should have been reversed because the state failed to adduce sufficient evidence that the firearm purportedly used in the robbery was a deadly weapon. He further argues that there is insufficient evidence to sustain a repeat violent offender specification that enhanced his sentence.

As a result, he claims his convictions for aggravated robbery and the repeat violent offender specification cannot stand. The state did not respond to the application.

A. Good Cause for Untimeliness

{¶4} App.R. 26(B) allows a criminal defendant a limited opportunity to assert a claim that appellate counsel was ineffective and for the appellate court to reexamine deficient performance prejudicial to the applicant. The rule requires that the application for reopening be filed within 90 days of the journalization of the appellate decision. App.R. 26(B)(1). App.R. 26(B)(1) and (B)(2)(b) impose this 90-day deadline for the filing, which the Supreme Court of Ohio has interpreted as a strict deadline. *State v. LaMar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970; *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861. However, an application filed after that period has elapsed may be considered where good cause for the untimely filing is established.

{¶5} The original appellate decision was issued on May 1, 2008. Therefore, under the period of time set forth in the rule, Dzelajlija was required to file his application within 90 days of that date. Instead, he filed his application over ten years later. In an effort to establish good cause under App.R. 26(B)(2)(b), Dzelajlija argues that he filed a motion for judicial release with the trial court. The trial court assigned counsel to represent him during these proceedings. According to Dzelajlija's application, but without any evidentiary support, the trial court was

inclined to grant the request for judicial release if Dzelajlija was eligible. After researching the matter, Dzelajlija's counsel determined that he was not eligible due to the aggravated robbery conviction. Dzelajlija claims that he has demonstrated good cause based on the prejudice he has incurred as a result of counsel's ineffectiveness because he is not presently eligible for judicial release.

{¶6} This argument does not establish good cause for the untimely filing of the application for reopening. Dzelajlija does not advance any reason why these arguments could not be discovered within the time period set forth in App.R. 26(B), except to say that counsel was only recently assigned. An unsupported allegation of prejudice suffered as a result of appellate counsel's alleged failings does not establish good cause. Every applicant must allege that a prejudicial error occurred as a result of their attorney's ineffectiveness. *See State v. Clark*, 7th Dist. Mahoning No. 08 MA 15, 2015-Ohio-2584, _ 35. It is a required element of an ineffective assistance counsel claim. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If this court were to allow the establishment of prejudice alone to justify untimely filing, the good cause determination required by App.R. 26(B)(1) would be subsumed by the prejudice prong of the ineffective assistance of counsel analysis.

{¶7} Dzelajlija's arguments going to good cause amount to claims that he could not have found the issues earlier because he was ignorant of the law and did not have counsel who discovered the purported errors. However, this court has previously found that such arguments do not constitute good cause. *State v. Orr*, 8th Dist. Cuyahoga No. 96377, 2014-Ohio-2384, _ 5 (ignorance of the law does not constitute good cause); *State v. Russell*, 8th Dist. Cuyahoga No. 69311, 1997 Ohio App. LEXIS 2663, *3 (Jan. 1, 1997), quoting *State v. Miller* 8th Dist. Cuyahoga No. 59987, 1992 Ohio App. LEXIS 1083 (Mar. 23, 1992), *reopening disallowed*,

Motion No. 79261, at 2 (Mar. 18, 1997) (“neither lack of counsel nor ignorance of the law have been accepted as constituting good cause for delayed filings.”). Therefore, Dzelajlija’s application is untimely without a showing of good cause.

{¶8} The Supreme Court of Ohio has upheld judgments denying applications for reopening solely on the basis that the application was untimely filed, and the applicant failed to show good cause. *Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, ¶ 7; *Lamar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970. As such, Dzelajlija’s application is denied.

{¶9} Application denied.

SEAN C. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, A.J., and
MARY EILEEN KILBANE, J., CONCUR