

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 102507
 v. :
 :
 DAVID RODRIGUES, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: October 1, 2019

Cuyahoga County Court of Common Pleas
Case No. CR-00-386140-ZA
Application for Reopening
Motion No. 531221

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Frank Romeo Zeleznikar, Assistant Prosecuting Attorney, *for appellee.*

Kimberly Kendall Corral, *for appellant.*

MICHELLE J. SHEEHAN, J.:

{¶ 1} Applicant, David Rodrigues, seeks to reopen his appeal, *State v. Rodrigues*, 8th Dist. Cuyahoga No. 102507, 2015-Ohio-2281, claiming that

appellate counsel was ineffective for failing to argue that an 11-year delay in resentencing Rodrigues should have resulted in the trial court's losing jurisdiction to impose a sentence. Because the application is untimely and without a showing of good cause, it is denied.

I. Procedural and Factual History

{¶ 2} In 2000, Rodrigues was convicted and sentenced to an aggregate prison term of life with parole eligibility after 20 years. He appealed and successfully argued that the trial court erred in not making findings pursuant to former R.C. 2929.14(B) necessary to impose more than the minimum sentence for a first-time offender or the necessary findings in order to impose consecutive sentences under former R.C. 2929.14(E)(4). *State v. Rodrigues*, 8th Dist. Cuyahoga No. 80610, 2003-Ohio-1334 ¶ 39-47. This court remanded the matter to the trial court for resentencing. *Id.* at ¶ 47.

{¶ 3} On remand, a resentencing hearing was scheduled, but the trial court granted a motion to withdraw Rodrigues's guilty pleas instead. The state appealed. In *State v. Rodrigues*, 8th Dist. Cuyahoga No. 84161, 2004-Ohio-6010, this court reversed the grant of the motion to withdraw the guilty pleas, reinstated Rodrigues's pleas, and remanded the case to the trial court. *Id.* at ¶ 14.

{¶ 4} On remand, the trial court entered an order on May 3, 2005, that reinstated Rodrigues's convictions and reimposed the same sentence that was originally imposed. Rodrigues did not appeal from this order, but filed a motion to schedule a resentencing hearing on August 28, 2014. The trial court granted the

motion and resentenced Rodrigues on December 3, 2014. He received an aggregate sentence of life imprisonment with parole eligibility after 15 years.

{¶ 5} Rodrigues again appealed his sentence. *Rodrigues*, 8th Dist. Cuyahoga No. 102507, 2015-Ohio-2281. There, he asserted a single assignment of error challenging the consecutive nature of his sentences. *Id.* at ¶ 4. This court overruled the assigned error and affirmed his convictions and sentences. *Id.* at ¶ 15-16.

{¶ 6} On August 20, 2019, Rodrigues filed the instant application for reopening. He argues that “appellate counsel was ineffective for failing to raise undue delay in sentencing upon direct appeal.” The state timely filed a brief in opposition pointing out that the application is untimely without a showing of good cause.

II. Law and Analysis

{¶ 7} App.R. 26(B)(1) provides, “A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel.” However, the rule also provides for a strict 90-day deadline: “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.” *Id.* App.R. 26(B)(2)(b) further stresses that a showing of good cause is required for any untimely application. Failure to show good cause is

sufficient grounds to deny the application. *State v. LaMar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970.

{¶ 8} Here, the appellate decision Rodrigues is attempting to reopen was issued on June 11, 2015. The application was filed 1,531 days later. Therefore, Rodrigues is required to show good cause for this lengthy delay.

{¶ 9} Rodrigues's application fails to set forth any cause for the delay, let alone good cause. The application is silent as to why it could not have been filed within 90 days of the date the appellate decision was journalized. The alleged ineffective assistance of counsel would have been apparent at the time of the appeal. The application is untimely without a showing of good cause. The proposed assignment of error raised in the application cannot be considered. *State v. Keith*, 119 Ohio St.3d 161, 2008-Ohio-3866, 892 N.E.2d 912, ¶ 8. Therefore, the application is denied.

{¶ 10} Application denied.

MICHELLE J. SHEEHAN, JUDGE

SEAN C. GALLAGHER, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR