

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 102954
 v. :
 :
 BRENDAN M. WEEMS, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: August 7, 2019

Cuyahoga County Court of Common Pleas
Case No. CR-14-586089-A
Application for Reopening
Motion No. 528611

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Anthony Thomas Miranda, Assistant Prosecuting Attorney, *for appellee*.

Brendan M. Weems, *pro se*.

RAYMOND C. HEADEN, J.:

{¶ 1} Applicant, Brendan M. Weems, seeks to reopen his direct appeal, *State v. Weems*, 8th Dist. Cuyahoga No. 102954, 2016-Ohio-701. He claims that appellate counsel was ineffective because he was also trial counsel and failed to raise

his own ineffectiveness, and counsel failed to sufficiently object to a ruling of the trial court. The application is denied because it is untimely without a showing of good cause.

Procedural and Substantive History

{¶ 2} Weems was tried and convicted of rape and kidnapping, for which he was sentenced to serve a prison term 15 years to life. He appealed, arguing there was insufficient evidence to support his conviction for kidnapping and his convictions were against the manifest weight of the evidence. This court overruled these assigned errors and affirmed his convictions. More than three years later, Weems filed an application for reopening. There, he claims appellate counsel was ineffective because appellate counsel also acted as trial counsel and failed to raise an assignment of error about his own ineffectiveness, and trial counsel failed to offer additional objection to an evidentiary ruling made by the trial court.

Law and Analysis

{¶ 3} App.R. 26(B) provides a limited means of asserting a claim that appellate counsel was ineffective under the same standard for ineffective assistance of trial counsel set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Where an applicant is able to demonstrate a colorable claim of ineffective assistance of appellate counsel, this court shall reopen the appeal. App.R. 26(B)(5). However, the rule provides for a strict deadline of 90 days. App.R. 26(B)(1); *State v. LaMar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970. Applications filed outside of that time must demonstrate good cause for the

untimely submission. App.R. 26(B)(1) and 26(B)(2)(b). Failure to demonstrate good cause is fatal to an untimely application. *See LaMar*.

{¶ 4} The appellate decision in this case was issued on February 25, 2016. The application was filed on May 21, 2019. The more than three-year span between these two dates means that the application is untimely. Therefore, Weems must establish good cause for the untimely filing. App.R. 26(B)(1) and (B)(2)(b).

{¶ 5} In an effort to show good cause, Weems argues that extensive public records requests and information he obtained therefrom prompted the application for reopening. However, arguments in an application to reopen are limited to the record on appeal. *See* App.R. 9 and 12(A)(1)(b). As this court has previously held, an applicant may not attempt to add items to the record and then rely on those items in the application.

It is well settled that “appellate review is strictly limited to the record.” *State v. Ellis*, 8th Dist. Cuyahoga No. 90844, 2009-Ohio-4359, ¶ 6, citing *The Warder, Bushnell & Glessner Co. v. Jacobs*, 58 Ohio St. 77, 50 N.E. 97 (1898) (other citations omitted); *State v. Corbin*, 8th Dist. Cuyahoga No. 82266, 2005-Ohio-4119, ¶ 7. A reviewing court cannot add material to the appellate record and then decide the appeal on the basis of the new material. *Id.*, citing *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500; *State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585, 805 N.E.2d 1042, ¶ 62; *State v. Thomas*, 97 Ohio St.3d 309, 2002-Ohio-6624, 779 N.E.2d 1017, ¶ 50. “Nor can the effectiveness of appellate counsel be judged by adding new matter to the record and then arguing that counsel should have raised these new issues revealed by the newly added material.” *State v. Moore*, 93 Ohio St.3d 649, 650, 2001-Ohio-1892, 758 N.E.2d 1130.

State v. Moon, 8th Dist. Cuyahoga No. 93673, 2014-Ohio-108, ¶ 12.

{¶ 6} The newly obtained information that Weems claims was needed for the application for reopening is not contained within the record on appeal. Claims based on this new information cannot properly be raised in an application for reopening. The time necessary to obtain evidence or information, therefore, cannot constitute good cause for an untimely application.

{¶ 7} Weems also claims that he had difficulty in obtaining transcripts of the proceedings. This court has found that lack of access to materials such as transcripts does not constitute good cause for an untimely application. *State v. White*, 8th Dist. Cuyahoga No. 101576, 2017-Ohio-7169. Further, this claimed lack of access to a transcript does not explain or excuse the three-year delay in the filing of the application.

{¶ 8} The application for reopening is untimely without a showing of good cause. This is sufficient grounds to deny it without addressing the merits. *State v. Lawrence*, 8th Dist. Cuyahoga Nos. 100371 and 100387, 2019-Ohio-65, citing *State v. Woods*, 8th Dist. Cuyahoga No. 82789, 2014-Ohio-296, ¶ 4, citing *State v. McNeal*, 8th Dist. Cuyahoga No. 91507, 2009-Ohio-6453, ¶ 4. *See also State v. 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.

{¶ 9} Application denied.

RAYMOND C. HEADEN, JUDGE

**EILEEN A. GALLAGHER, P.J., and
MICHELLE J. SHEEHAN, J., CONCUR**