

[Cite as *State v. Berry*, 2020-Ohio-1595.]

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA**

STATE OF OHIO :  
 :  
 Plaintiff-Appellee, :  
 : No. 83756  
 v. :  
 :  
 TRACY BERRY, :  
 :  
 Defendant-Appellant. :

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JOURNAL ENTRY AND OPINION

**JUDGMENT: APPLICATION DENIED**  
**RELEASED AND JOURNALIZED: April 17, 2020**

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Cuyahoga County Court of Common Pleas  
Case No. CR-03-436143-B  
Application for Reopening  
Motion No. 536791

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***Appearances:***

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Jennifer M. Meyer, Assistant Prosecuting Attorney, *for appellee*.

Patituce & Associates, L.L.C., Kimberly Kendall Corral, and Megan M. Patituce, *for appellant*.

EILEEN T. GALLAGHER, A.J.:

{¶ 1} Tracy Berry has filed an application for reopening pursuant to App.R. 26(B). Berry is attempting to reopen the appellate judgment rendered in *State v.*

*Berry*, 8th Dist. Cuyahoga No. 83756, 2004-Ohio-5485, which affirmed the conviction and the sentence of incarceration imposed in *State v. Berry*, Cuyahoga C.P. No. CR-03-436143-B for the offenses of aggravated robbery (R.C. 2911.01) and murder (R.C. 2903.02(B)). We decline to reopen *Berry*'s appeal.

{¶ 2} App.R. 26(B)(2)(b) requires that *Berry* establish a showing of good cause for untimely filing if the application is filed more than 90 days after journalization of the appellate judgment that is subject to reopening. The Supreme Court of Ohio, with regard to the 90-day deadline provided by App.R. 26(B)(2)(b), has established that

[W]e now reject [the applicant's] claims that those excuses gave good cause to miss the 90-day deadline in App.R. 26(B). \* \* \* 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.* (1982), 455 U.S. 422, 437, 102 S.Ct. 1148, 71 L.Ed.2d 265, 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* (1996), 74 Ohio St.3d 277, 278, 658 N.E.2d 722, 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.

(Emphasis added.) *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, ¶ 7. 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); *State v. Reddick*, 72 Ohio St.3d 88, 647 N.E.2d 784 (1995).

{¶ 3} Herein, Berry is attempting to reopen the appellate judgment that was journalized on October 25, 2004. The application for reopening was not filed until March 11, 2020, more than 90 days after journalization of the appellate judgment in *Berry, supra*. Thus, the application for reopening is untimely on its face.

{¶ 4} In an attempt to argue good cause for the untimely filing of the application for reopening, Berry argues that this court, as well as other appellate districts, have “a history of overlooking procedural deficiencies to ensure a just result.” Berry cites to three appellate decisions in support of his argument that procedural deficiencies should be overlooked in order to ensure justice. *See State v. Hiu Hing Chu*, 8th Dist. Cuyahoga Nos. 75883 and 75689, 2002-Ohio-4422; *State v. Gillard*, 5th Dist. Stark No. CA-6701, 1998 Ohio App. LEXIS 1966 (Apr. 27, 1998); *State v. Bradley*, 4th Dist. Scioto No. 95CA2364, 1996 Ohio App. LEXIS 5560 (Dec. 2, 1996).

{¶ 5} Each of the cases cited in support of Berry’s claim for justification of the untimely filing of his application for reopening were decided before the Ohio Supreme Court defined the need for good cause in *State v. Gumm, supra*, and it’s progeny. Berry cannot rely upon the cases that he has cited. Berry has failed to establish a showing of good cause for the untimely filing of his application for reopening. *State v. Orr*, 8th Dist. Cuyahoga No. 96377, 2014-Ohio-2384; *State v. Russell*, 8th Dist. Cuyahoga No. 69311, 1997 Ohio App. LEXIS 2663 (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 (Mar. 18, 1997).

{¶ 6} In addition, the Supreme Court of Ohio has established that good cause cannot excuse the lack of timely filing for an indefinite period of time:

Good cause can excuse the lack of a filing only while it exists, not for an indefinite period. *See State v. Hill* (1997), 78 Ohio St.3d 174, 677 N.E.2d 337; *State v. Carter* (1994), 70 Ohio St.3d 642, 640 N.E.2d 811. We specifically reject [applicant's] claim that once an applicant has established good cause for filing more than ninety days after journalization \* \* \*, it does not matter when the application is filed.

*State v. Davis*, 86 Ohio St.3d 212, 214, 1999-Ohio-160, 714 N.E.2d 384.

{¶ 7} Herein, the appellate judgment subject to reopening was journalized on October 25, 2004. More than 15 years have passed since we rendered our appellate opinion. Thus, we find that even if good cause was established, the time for filing an application for reopening has long passed. *State v. Williams*, 8th Dist. Cuyahoga No. 106266, 2019-Ohio-4780; *State v. Churn*, 8th Dist. Cuyahoga No. 105782, 2019-Ohio-4780; *State v. Marshall*, 8th Dist. Cuyahoga No. 87334, 2019-Ohio-1114.

{¶ 8} Accordingly, the application for reopening is denied.

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EILEEN T. GALLAGHER, ADMINISTRATIVE JUDGE

SEAN C. GALLAGHER, J., and  
PATRICIA ANN BLACKMON, J., CONCUR