

[Cite as *State v. Jones*, 2021-Ohio-1806.]

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : Nos. 108694, 108795,
 v. : 108796, and 108797
 :
 ELBERT JONES, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: May 21, 2021

Cuyahoga County Court of Common Pleas
General Division Nos. CR-18-631648-A, CR-18-631687-A,
and CR-18-635092-A
Juvenile Division Nos. DL 18100465, DL 18102979,
and DL 18107524
Application for Reopening
Motion No. 545400

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Janna R. Lifford, Assistant Prosecuting Attorney, *for appellee*.

Tim Young, Ohio Public Defender, and Lauren E. Hammersmith, Assistant State Public Defender, *for appellant*.

KATHLEEN ANN KEOUGH, J.:

{¶ 1} Applicant, Elbert Jones, seeks to reopen his appeal in *State v. Jones*, 8th Dist. Cuyahoga Nos. 108694, 108795, 108796, and 108797, 2020-Ohio-1388. He claims that appellate counsel was ineffective for not advancing or fully arguing the following two proposed assignments of error:

I. The juvenile court erred when it found that [appellant] was not amenable to the juvenile system and transferred his case to the common pleas court for criminal prosecution.

II. The trial court erred when it sentenced [appellant] to a prison sentence of 21 years, because that sentence is not supported by the record in this case, in violation of R.C. 2953.08(G) and 2929.11(A).

The application to reopen is untimely without a showing of good cause. Therefore, it is denied.

I. Background

{¶ 2} Jones was charged across three separate criminal cases with numerous crimes stemming from three separate instances of armed robbery. Jones, with others, approached individuals getting out of their cars after parking in their driveways and robbed them at gunpoint. Two of these incidents included Jones and his co-conspirators forcing the victims into their homes to burgle them. After being bound over to the common pleas court from the juvenile court, Jones entered guilty pleas in each case. These convictions resulted in an aggregate 21-year sentence.¹

¹ A more detailed recitation of the facts underlying Jones's conviction can be found in the original opinion. *Jones* at ¶ 2-13.

{¶ 3} Jones filed four notices of appeal, which were consolidated for disposition. In the consolidated appeal, Jones sought to reverse the imposed sentences, arguing that “[i]t was error to punish appellant separately since the various counts in each case was an [sic] allied offense of similar import,” and “[i]t was error not to consider the [R.C.] 2929.12 factors.”

{¶ 4} In an opinion journalized on April 9, 2020, this court overruled these assigned errors and affirmed Jones’s convictions. On March 30, 2021, Jones filed the instant application for reopening. Jones, through counsel, argued that appellate counsel should have raised issues with Jones’s bindover from juvenile court to adult court, and that appellate counsel should have argued that Jones’s youth was a factor that precluded such a lengthy sentence in his three cases. The state filed a brief in opposition on April 16, 2021.

II. Law and Analysis

A. Standard for Reopening

{¶ 5} App.R. 26(B) provides a limited means of reopening an appeal based on claims of ineffective assistance of appellate counsel. The rule provides for a 90-day period to bring such claims. *State v. Lamar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970, ¶ 9. The failure to timely file an application requires the applicant to show, within the body of the application itself, good cause to excuse the delay. App.R. 26(B)(2)(b). The failure to show good cause is a sufficient reason to deny the application without addressing the merits. *State v. Lawrence*, 8th Dist. Cuyahoga Nos. 100371 and 100387, 2019-Ohio-65, ¶ 6, 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.

B. Good Cause

{¶ 6} Appellant's application is untimely without sufficient justification to excuse the delay.

{¶ 7} The appellate decision in this case was journalized on April 9, 2020. The application for reopening was filed on March 30, 2021. A total of 355 days has elapsed between the journalization of the appellate decision and the filing of the application. This court will presume for Jones's benefit and in spite of this court's April 7, 2020 administrative order that for the months of April, June, and July, the time for filing an application for reopening was tolled pursuant to tolling orders issued by the Supreme Court of Ohio. *In re Tolling of Time Requirements Imposed by Rules Promulgated by the Supreme Court and Use of Technology*, 158 Ohio St.3d 1447, 2020-Ohio-1166, 141 N.E.3d 974; *State v. McGill*, 8th Dist. Cuyahoga No. 108469, 2020-Ohio-5177, ¶ 10-11. Based on the assumption above, the 90-day period began to run in earnest with the expiration of the tolling order on July 31, 2020, and concluded on October 31, 2020. The application was not filed until March 30, 2021. The application is untimely by approximately 150 days.

{¶ 8} The only explanation to excuse this tardiness is that appellant was not aware of the decision in this case because his attorney did not inform him of it. The docket indicates that a copy of the appellate decision was sent to appellant separately

from the digital notification sent to appellant's counsel. Further, this court has found that the failure of counsel to inform his or her client of the appellate decision does not constitute grounds to excuse untimely filing. *State v. Futo*, 8th Dist. Cuyahoga No. 89791, 2020-Ohio-1114, ¶ 9; *State v. Alt*, 8th Dist. Cuyahoga No. 96289, 2012-Ohio-2054, citing *State v. Mitchell*, 8th Dist. Cuyahoga No. 88977, 2009-Ohio-1874; *State v. Fears*, 8th Dist. Cuyahoga No. 89989, 2008-Ohio-5342; and *State v. West*, 8th Dist. Cuyahoga No. 92508, 2010-Ohio-5576, citing, e.g., *State v. Plaza*, 8th Dist. Cuyahoga No. 83074, 2005-Ohio-5685.

{¶ 9} Finally, even if this court were to accept appellant's argument that the failure to be informed of the release of the appellate decision could excuse delay, that argument does not excuse delay indefinitely. *State v. Fox*, 83 Ohio St.3d 514, 516, 700 N.E.2d 1253 (1998), citing *State v. Hill*, 78 Ohio St.3d 174, 677 N.E.2d 337 (1997), and *State v. Carter*, 70 Ohio St.3d 642, 640 N.E.2d 811 (1994). Appellant claims in his affidavit that he learned of the appellate decision in December 2020 after speaking with the attorney who filed the present application for reopening. Jones does not explain the further three-month delay in filing the application.

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.

State v. Gumm, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, ¶ 7.

{¶ 10} Appellant has failed to show, even resolving every doubt in his favor, good cause to excuse the untimely filing. A failure to keep oneself apprised of the appellate docket does not constitute sufficient justification to excuse the delayed filing in this case. Therefore, the application is denied.

{¶ 11} Application denied.

KATHLEEN ANN KEOUGH, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and
EILEEN A. GALLAGHER, J., CONCUR