

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 109238
 v. :
 :
 ALONZO THORPE, JR., :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: December 6, 2021

Cuyahoga County Court of Common Pleas
Case No. CR-18-634964-A
Application for Reopening
Motion No. 549886

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Anthony T. Miranda, Assistant Prosecuting Attorney, for appellee.

Meredith A. O'Brien, *for appellant.*

EILEEN T. GALLAGHER, J.:

{¶ 1} On October 14, 2021, the applicant, Alonzo Thorpe, Jr., pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Thorpe*, 8th Dist. Cuyahoga No. 109238, 2021-Ohio-1295, in which this court affirmed his conviction

for reckless homicide. He now argues that his appellate counsel should have raised the following: (1) the trial court erred in instructing the jury on the lesser included offense of reckless homicide, (2) prosecutorial misconduct denied him his right to a fair trial, and (3) appellate counsel failed to secure a complete record, especially regarding a juvenile's testimony. On November 12, 2021, the state of Ohio filed its brief in opposition. For the following reasons, this court denies the application.

{¶ 2} On January 6, 2018, then 15-year-old Thorpe went to Garfield Heights to babysit his aunt's daughter, while the aunt went out with a friend. Because the aunt did not return until after 2:00 a.m., Thorpe stayed the night and into January 7. Thorpe was still at his aunt's house when the daughter's father picked her up in the afternoon. Thorpe later called a friend and briefly showed the friend his aunt's dead body. The friend testified that Thorpe was crying and did not know what to do. The aunt's body was found on January 8, 2018. A search of Thorpe's room discovered a handgun with Thorpe's DNA on it and on a round in the magazine. Forensic testing showed that this handgun fired the shot that killed the aunt.

{¶ 3} After being bound over from the juvenile court to the common pleas court, Thorpe faced two charges of murder and two counts of felonious assault. The trial judge instructed the jury on the lesser included offense of reckless homicide. The jury convicted him of that charge and found him not guilty on the other three charges. The trial judge sentenced him to three years on the firearm specification consecutive to 36 months for reckless homicide.

{¶ 4} Appellate counsel argued the following: (1) the trial court erred in instructing the jury on the lesser included offense of reckless homicide, (2) the trial court erred in not instructing the jury on negligent homicide, (3) the trial court erred in allowing the ballistics expert to testify in conflict with the court's ruling on a motion in limine, (4) the state engaged in prosecutorial misconduct, (5) the trial court erred in permitting the ballistics expert to testify outside the scope of his expert opinion, (6) the trial court improperly denied the defense's motion to suppress without a hearing, and (7) cumulative errors demanded reversal.

{¶ 5} App.R. 26(B)(1) and (2)(b) require applications claiming ineffective assistance of appellate counsel to be filed within 90 days from the journalization of the appellate judgment unless the applicant shows good cause for filing at a later time. The Supreme Court of Ohio has ruled that this deadline must be strictly enforced. *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, and *State v. Keith*, 119 Ohio St.3d 161, 2008-Ohio-3866, 892 N.E.2d 912. In the present case, this court journalized its decision on April 15, 2021. Thus, the October 14, 2021 application is untimely on its face.

{¶ 6} Thorpe asserts that the application is timely pursuant to App.R. 4, which is the rule governing when to file the initial appeal, not an application to reopen. Beyond this, he does not discuss timeliness.

{¶ 7} The court notes that on April 26, 2021, he filed motions for reconsideration, for certification of conflict, and for en banc consideration. This

court denied the motions for reconsideration and for certification of conflict on July 15, 2021, 91 days before his filing of the application. It denied the motion for en banc consideration on October 8, 2021. However, such post-judgment motions do not toll the time for the timely filing of an App.R. 26(B) application. In *State v. Jacinto*, 8th Dist. Cuyahoga No. 108944, 2021-Ohio-855, this court held an App.R. 26(A) motion for reconsideration does not toll the time for filing an application. In *State v. Johnson*, 8th Dist. Cuyahoga No. 105560, 2018-Ohio-2836, this court rejected the argument that an en banc motion tolls the time.

{¶ 8} Accordingly, this court denies the application to reopen as untimely.

EILEEN T. GALLAGHER, JUDGE

MARY J. BOYLE, A.J., CONCURS;
MARY EILEEN KILBANE, J., DISSENTS