

[Cite as *State v. Tribble*, 2010-Ohio-1108.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 07 MA 205
	)	
PLAINTIFF-APPELLEE	)	
	)	JUDGMENT ENTRY
VS.	)	AND OPINION
	)	
JAMES TRIBBLE	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Application for Reopening Pursuant to App.R. 26(B)  
Case No. 06 CR 1078

JUDGMENT: Application Dismissed.

APPEARANCES:

For Plaintiff-Appellee: Atty. Paul J. Gains  
Mahoning County Prosecutor  
Atty. Ralph M. Rivera  
Assistant Prosecuting Attorney  
21 West Boardman Street, 6<sup>th</sup> Floor  
Youngstown, Ohio 44503

For Defendant-Appellant: James Tribble, Pro se  
#540-199  
B.E.C.C.  
P.O. Box 540  
St. Clairsville, Ohio 43950

JUDGES:

Hon. Cheryl L. Waite  
Hon. Gene Donofrio  
Hon. Mary DeGenaro

Dated: March 19, 2010

PER CURIAM.

{¶1} Appellant James Tribble has filed an Application for Reopening his appeal pursuant to App.R. 26(B)(5), which states: “An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.” Appellant appealed his resentencing on a probation violation stemming from his conviction for having a weapon while under a disability and improperly handling a firearm in a motor vehicle. We affirmed the judgment, and Appellant appealed our decision to the Ohio Supreme Court. The case was not accepted for review. *State v. Tribble*, 122 Ohio St.3d 1458, 2009-Ohio-3131, 908 N.E.2d 947. Appellant now claims that his counsel on appeal failed to raise issues regarding prior appeals of the original criminal charge and previous probation violations. For the following reasons, we find that Appellant’s application for reopening was not filed within the time period allowed by App.R. 26, and we hereby dismiss the application.

{¶2} Appellant was indicted on October 26, 2006, on one count of having a weapon under a disability, a third degree felony under R.C. 2923.13(A)(3), and one count of improperly handling a firearm in a motor vehicle, a fourth degree felony under R.C. 2923.16(B). Appellant entered into a Crim.R. 11 guilty plea on March 1, 2007. Appellant was sentenced to five years in prison on count one and 18 months on count two, to be served concurrently. The sentence was held in abeyance while Appellant participated in substance abuse treatment. Appellant did not appeal this sentence.

{¶13} Appellant was charged with a probation violation in July of 2007 based on his use of alcohol during his substance abuse treatment program. On September 13, 2007, the court, with agreement by the parties, entered judgment that Appellant would be placed on two years of community control to be supervised by the Adult Parole Authority. As a condition of parole, Appellant was required to successfully complete another in-house substance abuse treatment program.

{¶14} On October 19, 2007, the state filed another notice of probation violation after Appellant had been arrested for possession of crack cocaine and possession of drug paraphernalia. Appellant stipulated to the probable cause for his probation violation. The court entered judgment on October 31, 2007, reimposing the original prison terms that had been held in abeyance. Appellant filed a direct appeal with this Court, and we affirmed the judgment on March 19, 2009.

{¶15} Appellant's current application was not filed within the time frame allotted by App.R. 26(B)(1), which states: "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." Appellant failed to meet this deadline. Our decision was journalized on March 19, 2009, but the application for reopening was not filed until September 10, 2009. This was well after the 90-day deadline. Appellant states that he was delayed because his attorney told him not to file it so that they could first pursue an appeal to the Ohio Supreme Court. There is no affidavit from his attorney confirming this statement. We are not inclined to find good cause for the late filing

simply because Appellant alleges he was told not to file the application. “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.” *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, ¶7.

{¶6} Furthermore, Appellant’s explanation as to why he failed to file the application for reopening on time does not provide a legally sufficient reason for explaining why the application was filed late. Appellant claims that he delayed filing, or was told to delay filing, because the application for reopening would somehow conflict with a direct appeal to the Ohio Supreme Court. It is clear, though, that a direct appeal to the Ohio Supreme Court would have no bearing on Appellant’s ability to file an application for reopening. A timely application for reopening under App.R. 26 is collateral to the direct appeal and may be filed and considered before, during, or after the Ohio Supreme Court resolves the direct appeal. “The provisions of App.R. 26(B) were specifically designed to provide for a specialized type of postconviction process. The rule was designed to offer defendants a separate collateral opportunity to raise ineffective-appellate-counsel claims beyond the opportunities that exist through traditional motions for reconsideration and discretionary appeals to our court or the Supreme Court of the United States.” *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157, ¶8.

{¶17} “After an appeal is perfected from a court of appeals to the Supreme Court, the court of appeals is divested of jurisdiction, except to take action in aid of the appeal, to rule on an application timely filed with the court of appeals pursuant to App.R. 26, or to rule on a motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution.” (Emphasis added.) S.Ct.Prac.R. 2.2(D)(1).

{¶18} In *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221, the Ohio Supreme Court held: “The filing of a motion seeking a discretionary appeal in this court does not create a bar to a merit ruling on a timely filed application to reopen an appeal claiming ineffective assistance of appellate counsel under App.R. 26(B).” *Id.* at syllabus. In *Davis*, the defendant filed his appeal to the Supreme Court on August 7, 2006, and filed an App.R. 26(B)(5) application for reopening with the First District Court of Appeals on September 14, 2006. The fact that the defendant had already filed his appeal to the Supreme Court did not prevent him from subsequently filing his application for reopening, nor did it change the deadline for filing an application for reopening.

{¶19} Appellant’s reason for failing to file his application for reopening on time is based on some misunderstanding of the law. The Ohio Supreme Court has held time and again that ignorance of the law, whether by the criminal defendant or his attorney, does not establish good cause for failure to seek timely relief under App.R. 26(B). *State v. Reddick* (1995), 72 Ohio St.3d 88, 91, 647 N.E.2d 784; *Gumm*, *supra*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, ¶10. Regardless of whether Appellant intended to pursue a direct appeal with the Ohio Supreme Court,

he was required to file his application for reopening within 90 days of the journalization of our judgment.

{¶10} Appellant has failed to file this application for reopening within the time allowed by App.R. 26(B)(1), and therefore, we dismiss the application.

Waite, J., concurs.

Donofrio, J., concurs.

DeGenaro, J., concurs.