

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-09-058

Appellee

Trial Court No. 08 CR 408

v.

William Brown, Jr.

DECISION AND JUDGMENT

Appellant

Decided: May 27, 2011

* * * * *

William Brown, Jr., pro se.

* * * * *

PER CURIAM.

{¶ 1} This matter is before the court on William Brown, Jr.'s application to reopen his appeal pursuant to App.R. 26(B), filed March 1, 2011. In *State v. Brown*, Wood County Court of Common Pleas No. 08 CR 408, applicant was found guilty of aggravated robbery, robbery, three counts of kidnapping, grand theft of a motor vehicle, and failure to comply with the order or signal of a police officer after robbing the Fifth

Third Bank branch in Bowling Green, Ohio on July 24, 2008. The trial court sentenced Brown to the aggregate of 34 years of incarceration. Brown appealed arguing eight assignments of error. This court, in *State v. Brown*, 6th Dist. No. WD-09-058, 2010-Ohio-1698, affirmed the decision of the trial court in part, and reversed in part, remanding it to the trial court solely to conduct a limited resentencing hearing in accordance with R.C. 2929.191 to include a five-year period of postrelease control. According to Brown's motion to reopen, he was resentenced by the trial court on February 28, 2011.

{¶ 2} App.R. 26(B) requires that an application for reopening must be filed "within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time." In the matter before us, this court's decision affirming Brown's conviction was journalized on April 16, 2010. The application was filed on March 1, 2011, well in excess of the 90-day time limit. Brown states that he failed to timely file the application because, pursuant to his appellate counsel's interpretation of *State v. Bezak* (2007), 114 Ohio St.3d 94, he intended to start his appeal process anew after the trial court resentenced him. However, during the interim between this court's ruling on his direct appeal, and the trial court's resentencing, the Ohio Supreme Court issued *State v. Fischer* (2010), 128 Ohio St.3d 92. According to Brown, because the trial court failed to conduct the resentencing hearing "in a timely fashion," and because *State v. Fischer* prohibits beginning the appeal process anew, he is now forced to file this untimely motion to reopen his direct appeal. We are not persuaded by

Brown's argument, and deny his application to reopen. As required by App.R. 26(B)(6), the reasons for our denial follow.

{¶ 3} The 90-day requirement is "applicable to all appellants." *State v. Gumm* (2004), 103 Ohio St.3d 162, 163. "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." *Id.* Here, Brown's explanation of his good cause for missing the deadline is essentially that he chose to forego one possible avenue for relief—an App.R. 26(B) application to reopen—in favor of pursuing an alternative, non-mutually exclusive form of relief—an attempt at a new appeal following his resentencing. His choice to pursue one option to the exclusion of the other does not constitute good cause for missing the 90-day deadline.

{¶ 4} Further, the fact that Brown claims to have made his decision upon his counsel's interpretation of *State v. Bezak* does not change our conclusion because "[r]eliance upon appellate counsel does not establish good cause for the untimely filing of an application for reopening." *State v. Graves*, 8th Dist. No. 88845, 2010-Ohio-4881. This is especially true considering the only evidence Brown provides of his appellate counsel's advice is a letter that relates to Brown's untimely petition for postconviction relief, not to whether Brown can initiate a new direct appeal. Thus, Brown fails to demonstrate that he was even relying on his counsel's advice when he chose not to pursue

an App.R. 26(B) application to reopen. Accordingly, Brown's application to reopen is denied as being untimely.

{¶ 5} It is so ordered.

APPLICATION DENIED.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Stephen A. Yarbrough, J.

CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.