

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 11AP-697
	:	(C.P.C. No. 10CR-05-3189)
John E. Maynard,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 7, 2013

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

John E. Maynard, pro se.

ON APPLICATION FOR REOPENING

CONNOR, J.

{¶ 1} Defendant-appellant, John E. Maynard ("appellant"), filed an application, pursuant to App.R. 26(B), seeking to reopen his appeal resolved in this court's decision in *State v. Maynard*, 10th Dist. No. 11AP-697, 2012-Ohio-2946, claiming ineffective assistance of appellate counsel. The State of Ohio has filed a memorandum in response opposing appellant's application. Because appellant's application was filed untimely without good cause, and because he failed to demonstrate a genuine issue that he was deprived of effective assistance of counsel, we deny his application to reopen.

{¶ 2} On May 27, 2010, appellant was indicted in connection with the 2003 murder of David Daniels, who was shot and killed during a home invasion in which appellant and others planned to rob a drug dealer known as James Davis. Subsequently, appellant filed a motion to suppress identification based upon a photo array. Following a

hearing on the motion, the trial court in essence denied the motion to suppress, but without issuing a formal ruling. The case proceeded to jury trial on April 18, 2011. On April 22, 2011, the jury returned verdicts finding appellant guilty of murder, aggravated robbery, aggravated burglary, felonious assault, and several firearm specifications. A sentencing hearing was held on August 5, 2011. The trial court imposed a total prison sentence of 18 years to life. A judgment entry journalizing appellant's convictions and sentence was filed on August 9, 2011.

{¶ 3} Appellant, through counsel, filed a timely direct appeal in which he asserted three assignments of error, claiming: (1) the felony-murder statute and the complicity statute are unconstitutional as applied because their application requires inference stacking; (2) appellant was denied his constitutional right to confrontation and his right to be present for all jury proceedings, pursuant to Crim.R. 43(A); and (3) prosecutorial misconduct occurred where there was improper vouching for the credibility of the witnesses and where the prosecutor argued matters of personal belief not in evidence. We rejected appellant's claims on direct appeal and affirmed his convictions. *Maynard*. An entry journalizing the appellate judgment was filed on June 28, 2012.

{¶ 4} App.R. 26(B) allows applications to reopen an appeal from a judgment of conviction and sentence based upon a claim of ineffective assistance of appellate counsel. App.R. 26(B)(1) provides that an application for reopening shall be filed within 90 days from the journalization of the appellate judgment. Additionally, App.R. 26(B)(2)(b) requires a showing of good cause for an untimely filing where the application is filed more than 90 days after the journalization of the appellate judgment.

{¶ 5} Appellant's application to reopen was filed on January 7, 2013. However, the 90-day deadline established under App.R. 26(B)(1) expired on or about September 26, 2012. Thus, appellant's application is untimely, in that the instant application was filed more than six months after the journalization of the appellate judgment in this action. In order to pursue his application, appellant must demonstrate good cause as to why he was unable to make a timely filing. For the reasons that follow, we find appellant has failed to demonstrate good cause.

{¶ 6} In an effort to demonstrate good cause, appellant asks us to excuse his untimely filing on the grounds that it is due to his appellate counsel's failure to file an application to reopen. Appellant submits that counsel who was filing his appeal in the

Supreme Court of Ohio¹ had his file and his transcripts, but failed to utilize the time to reopen his direct appeal within the 90-day deadline. Appellant further argues his counsel never informed him of any appellate procedures for reopening his direct appeal until after the Supreme Court had denied leave to appeal. He asserts it was at that time that counsel advised him he had merit in filing an application to reopen, but counsel needed additional funds to file the application and he was unable to advance the funds. Appellant claims he discussed his current proposed assignment of error with appellate counsel during the same jail visit at which she informed him the Supreme Court had denied leave to appeal.

{¶ 7} Appellant cannot establish good cause by placing the blame on his counsel. Proceedings to reopen an appeal pursuant to App.R. 26(B) are collateral postconviction proceedings. *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, syllabus. These proceedings are not part of the direct appeal process. *Id.* Consequently, indigent defendants are not entitled to counsel in an App.R. 26(B) proceeding. *Id.*

{¶ 8} Notably, the 90-day timeframe for filing an application for reopening begins to run from the date our appellate judgment is filed. In this case, that date was June 28, 2012. And, as noted above, this deadline expired on September 26, 2012. In other words, whether or not the Supreme Court declined to accept his appeal for review did not affect the calculation of the 90-day deadline for filing an application for reopening. Additionally, the fact that appellant was aware an appeal had been filed in the Supreme Court is evidence that he knew he had lost his appeal in this case, and therefore he cannot demonstrate good cause for failing to comply with the 90-day deadline.

{¶ 9} Even if appellant were to claim purported ignorance of the 90-day deadline, such a claim does not prove good cause. "Lack of effort or imagination, and ignorance of the law * * * do not automatically establish good cause for failure to seek timely relief." *State v. Reddick*, 72 Ohio St.3d 88, 91 (1995) (affirming denial of application to reopen appeal). Appellant cannot rely upon his alleged lack of legal training to excuse his failure to comply with the 90-day deadline. *State v. Farrow*, 115 Ohio St.3d 205, 206, 2007-Ohio-4792, ¶ 6. The 90-day requirement is "applicable to all appellants[.]" *Id.*, quoting *State v. Winstead*, 74 Ohio St.3d 277, 278 (1996). "Consistent enforcement of the rule's deadline by the appellate courts in Ohio protects on the one hand the state's legitimate

¹ Counsel who filed appellant's appeal in the Supreme Court of Ohio was not the same counsel who filed his appeal in our court.

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, ¶ 7.

{¶ 10} Appellant has failed to offer a sound reason as to why he (unlike other criminal defendants) could not comply with this fundamental element of the rule. Thus, denial of appellant's untimely application due to failure to demonstrate good cause is proper.

{¶ 11} Nevertheless, even if we were to consider appellant's application on the merits, the application still fails.

{¶ 12} To prevail on an application to reopen, appellant must make "a colorable claim" of ineffective assistance of appellate counsel under the standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). See *State v. Lee*, 10th Dist. No. 06AP-226, 2007-Ohio-1594, ¶ 2, citing *State v. Sanders*, 75 Ohio St.3d 607 (1996). The application "shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5).

{¶ 13} Under *Strickland*, appellant must demonstrate the following: (1) counsel was deficient in failing to raise the issues appellant now presents; and (2) appellant had a reasonable probability of success if the issue had been presented on appeal. *Lee* at ¶ 2, citing *State v. Timmons*, 10th Dist. No. 04AP-840, 2005-Ohio-3991.

{¶ 14} However, an appellate attorney has wide latitude and the discretion to decide which issues and arguments will prove most useful on appeal. Appellate counsel is not required to argue assignments of error that are meritless. *Lee* at ¶ 3, citing *State v. Lowe*, 8th Dist. No. 82997, 2005-Ohio-5986, ¶ 17.

{¶ 15} In this case, appellant proposes one assignment of error claiming his original appellate counsel should have argued that the identification testimony from co-defendant David Greenberg ("Greenberg") should have been suppressed because the photo array procedure was so unnecessarily suggestive that the identification was unreliable. Therefore, we shall focus our attention on the suppression hearing.

{¶ 16} At the conclusion of the suppression hearing, appellant's trial counsel stated he was not going to make a closing argument on the identification issue and would simply leave the decision to be made by the court. Counsel instead provided argument on a separate motion filed for the disclosure of grand jury testimony. However, during the

proceeding, trial counsel subsequently indicated that the suggestive nature of the identification here went to the weight of the evidence, rather than its admissibility. Thus, appellant's trial counsel waived all but plain error on this issue.

{¶ 17} Plain error is limited to the exceptional case in which the error, which was not objected to during the trial, " 'rises to the level of challenging the legitimacy of the underlying judicial process itself.' " *State v. Santiago*, 10th Dist. No. 02AP-1094, 2003-Ohio-2877, ¶ 11, quoting *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122 (1997).

{¶ 18} Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." We notice plain error " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph 3 of the syllabus. "By its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial." *Id.* at 27. Under the plain error standard:

First, there must be an error, i.e., a deviation from a legal rule.
* * * Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. * * * Third, the error must have affected "substantial rights." We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.

Id.

{¶ 19} Therefore, plain error is not present unless, but for the error complained of, the outcome of the trial would have been different. *Long* at paragraph two of the syllabus; *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, ¶ 78.

{¶ 20} "In order to suppress identification testimony, there must be '* * * a very substantial likelihood of irreparable misidentification.' " *State v. Jells*, 53 Ohio St.3d 22, 27 (1990), quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968). " '[R]eliability is the linchpin in determining the admissibility of identification testimony.' " *State v. Hogan*, 10th Dist. No. 11AP-644, 2012-Ohio-1421, ¶ 18, quoting *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). In determining reliability, a court must consider the totality of the circumstances. *Hogan* at ¶ 18.

{¶ 21} In this case, we believe Greenberg's identification of appellant was reliable. There was testimony that prior to viewing any of the photo arrays, Greenberg identified appellant by name as one of his accomplices and that appellant was an acquaintance of Greenberg prior to the commission of the offenses. The fact that Greenberg knew appellant from their previous interactions helps raise the level of reliability. *See State v. Monford*, 190 Ohio App.3d 35, 2010-Ohio-4732, ¶ 113 (10th Dist.) ("The fact that three of the witnesses knew defendant from previous encounters could also raise the level of reliability."). There was also identification testimony from two other witnesses who corroborated Greenberg's identification.

{¶ 22} As stated above, there were two witnesses (co-defendants) who identified appellant. Stacey Nichols made an in-court identification of appellant at trial, and Charles Danko also made an in-court identification, as well as an identification from a photo array. Consequently, even if the trial court should have suppressed Greenberg's identification, that suppression would not have affected the outcome of the trial, given the identification testimony from these two witnesses. Under those circumstances, it is unnecessary to notice plain error, given that it did not affect appellant's substantial rights, and noticing plain error would not be necessary to prevent a manifest miscarriage of justice. As a result, denial of appellant's application for reopening is proper on the grounds that appellant has failed to make "a colorable claim" of ineffective assistance of appellate counsel because he has failed to demonstrate a reasonable probability of success if the issue had been presented on appeal.

{¶ 23} In conclusion, because appellant's application was filed untimely without good cause, and because he failed to demonstrate a genuine issue that he was deprived of the effective assistance of counsel, we deny appellant's application for reopening.

Application for reopening denied.

TYACK and SADLER, JJ., concur.
