

IN THE SUPREME COURT OF OHIO

08-0333

State of Ohio, :
Appellee, : On Appeal from the
v. : Cuyahoga County Court
James D. Vinson, : of Appeals, Eighth
Appellant. : Appellate District
Court of Appeals
Case Nos. 87056, 87058, 87060

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT JAMES D. VINSON

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**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

Appellant James D. Vinson (“hereinafter Mr. Vinson”) presents to this Court the substantial constitutional question of whether procedurally defaulted constitutional claims that were failed to be raised in the Eighth Appellate District Court of Appeals of Ohio, Cuyahoga County, on Mr. Vinson’s behalf by court-appointed appellate counsel, Ms. Susan Moran (“hereinafter Ms. Moran”), and before this Court on discretionary review and/or jurisdictional memoranda by appointed counsel of record, Ms. Theresa Haire (“hereinafter Ms. Haire”) of the Ohio Public Defender’s Office, should be considered as a claim of ineffective assistance of appellate counsel, pursuant to *State v. Murnahan* 63 Ohio St.3d 60, 584 N.E.2d 1204, 1992 Ohio LEXIS 225 (1992), and a motion to reopen one’s direct appeal, pursuant to App.R.26(B)? See, also, *Evitts v. Lucey* 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

The incompetent, misrepresentations of, both, Ms. Haire and Ms. Moran in refusing to raise, argue, and file pleadings with their respective courts concerning the substantial constitutional issues regarding this case should excuse Mr. Vinson’s failure to abide by the statutory requirements of applicable rules of procedure, which are governed by the Ohio Rules of Court, and is the basis for Mr. Vinson having his motion for reopening denied by the Eighth Appellate District Court of Appeals, Cuyahoga County, Ohio, accordingly.

Mr. Vinson contends that Ms. Moran erroneously advised him to obtain assistance from the Ohio Public Defender’s Office if Mr. Vinson wished to seek further review of his

Convictions and/or sentences to the Ohio Supreme Court, when, in fact, because trial counsel, Mr. William Dawson (“hereinafter Mr. Dawson”), failed to file a motion to suppress the warrantless arrest, and illegal search and seizure evidence, pursuant to U.S. Const. Amends. 4, 14, and OConst. Art. I, § 14, a petition for postconviction relief pursuant to R.C. § 2953.21 would have been the more appropriate and adequate remedy, or an assignment of error claiming ineffective assistance of trial counsel before the Eighth Appellate District Court of Appeals of Ohio. *Strickland v. Washington* (1984), 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674; U.S. Const. Amend. 6, OConst. Art. I, § 10.

Furthermore, after previously appearing as counsel of record before this Court on Mr. Vinson’s behalf in Ohio Supreme Court case No. 06-1825, Ms. Haire, also, erroneously advised Mr. Vinson that to pursue further review of the affirmance of his convictions and sentence that he should file a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, before the U.S. District Court for the Northern District of Ohio (Cleveland), or any other post-judgment pleading to exhaust and preserve new claims so that he might have the merits of his case “fully and fairly” adjudicated in the state courts, accordingly.

Mr. Vinson chose to file a writ of habeas corpus action in the Eleventh Appellate District Court of Appeals, Ashtabula County, Ohio, which was denied. *State ex rel. Vinson v. Gansheimer* (Ohio App. 11th Dist., Sept. 28, 2007), 2007-Ohio-5205, 2007 WL 2822504. Ms. Haire, also, failed to raise ineffective assistance of appellate counsel against Ms. Moran due to Ms. Moran’s deficient performance in failing to address trial counsel, Mr. Dawson’s, ineffective assistance at trial.

Mr. Vinson adduced in his motion for reopening that the cause and reason for his untimely filing of said motion was because, both, Ms. Moran and Ms. Haire “ill-advised” Mr. Vinson as to the proper manner of remedies which were available to him on collateral attack pending direct review. *White v. Schotten* 201 F.3d 743 (6th Cir. 2000). See, also, *State v. Chu* (Ohio App. 8th Dist. Cuyahoga June 6, 2002) Nos. 75583, 75689, 2002-Ohio-2673, 2002 WL 1308353, 2003-Ohio-551, 2003 WL 252152. Thus, both, Ms. Moran and Ms. Haire’s deficient performance prejudiced Mr. Vinson on direct appeal, considering the U.S. 4th Amendment violations that occurred in this matter. *Fairborn v. Douglas* 49 Ohio App.3d 20, 550 N.E.2d 201.

In hindsight, Mr. Vinson contends that trial counsel, Mr. Dawson, also committed ineffective assistance of counsel by failing to address the issues of excessive use of force by law enforcement officers upon Mr. Vinson, and deadly use of force upon Mr. Vinson’s dog, and of being deprived of confrontation of witnesses. Mr. Dawson, also, failed to move the trial court for a dismissal of all charges in the case sub judice, after a mistrial was previously ordered on April 29, 2005, due to a lack of jurors; thus, violating Mr. Vinson’s right to Due Process of Law, pursuant to U.S. Const. Amend. 5 & 14,

Because law enforcement officers never established sufficient probable cause to be on Mr. Vinson’s property without a warrant, and thereafter brutally murdering Mr. Vinson’s dog because Mr. Vinson was not permitted by law enforcement officers to secure his dog, Mr. Vinson contends that this is most assuredly a case of public and great general interest to persons who should feel safe and secure in their persons against unreasonable searches and seizures, and the senseless slaughter of one’s pet. U.S. Const. Amendments. 4, 14, OConst. Art. I, § 14.

Mr. Vinson, also, presents the substantial constitutional question of whether a jury verdict of guilty for felonious assault can be sustained based on an invalid indictment consisting of insufficient evidence, and for which an acquittal of the principal offense of resisting arrest, which was rendered by the trial court, that substantiated the felonious assault charges? Mr. Vinson asserts that the Cuyahoga County Common Pleas Court lacked subject-matter jurisdiction to indict and/or convict him for the offenses of which he was found guilty, and that this Court should allow jurisdiction in this case so that the important, aforementioned claims may be reviewed, and expeditiously adjudicated, accordingly.

STATEMENT OF THE CASE AND FACTS

On April 25, 2003, a Cuyahoga County Grand Jury returned a true bill indictment against Mr. Vinson charging him with three (3) counts of felonious assault, R.C. 2903.11, each with an officer specification, and one (1) count of resisting arrest, R.C. 2921.33(C). Mr. Vinson's jury trial regarding the 3 felonious assault charges, and the resisting arrest charge involving his dog concluded on May 5, 2005, and the jury found Mr. Vinson guilty on all 3 counts of felonious assault, but not guilty of the underlying offense of resisting arrest.

On August 23, 2005, the trial court conducted a sentencing hearing, and the court sentenced Mr. Vinson to a five (5) year prison term for each felonious assault to run concurrently with one another. Also, this sentence was to run concurrently with Mr. Vinson's other cases (CR 442710, CR450233).

Mr. Vinson received seventeen (17) months, and eleven (11) months respectively for these cases. Mr. Vinson, thereafter, filed a timely notice of appeal to the Eighth Appellate District Court of Appeals, Cuyahoga County, Ohio, by and through court-appointed appellate counsel, Ms. Moran, and the Eighth District affirmed Mr. Vinson's convictions on August 3, 2006.

Pursuant to this appeal, Ms. Moran consolidated all of the aforementioned common pleas cases to the Eighth District, challenging five (5) assignments of error for review. However, after Mr. Vinson thoroughly reviewed the record in this case, Mr. Vinson discovered that Ms. Moran failed to present several errors of constitutional law that occurred during Mr. Vinson's trial, and upon obtaining counsel from the Ohio Public Defender's Office, Ms. Haire filed a notice of appeal and memorandum of jurisdiction to the Ohio Supreme Court on September 28, 2006 (case No. 06-1825). The Ohio Supreme Court denied Mr. Vinson leave to appeal on December 27, 2006, and dismissed his memorandum in support of jurisdiction as not involving a substantial constitutional question.

On April 18, 2007, Mr. Vinson filed a writ of habeas corpus with the Eleventh Appellate District Court of Appeals, Ashtabula County, Ohio (case No. 2007-A-0042), and on September 28, 2007, Mr. Vinson's writ of habeas corpus was dismissed. On October 24, 2007, Mr. Vinson filed a motion to reopen his direct appeal, pursuant to App.R.26(B), in the Eighth Appellate District Court of Appeals, Cuyahoga County, Ohio, and on January 15, 2008, Mr. Vinson's motion was denied for failing to file said motion within the required ninety (90) day time period.

This appeal of right ensues.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: A state appellate district court abuses its discretion when denying a defendant-appellant's application for reopening, pursuant to App.R.26(B), based on clearly egregious acts of appellate ineffectiveness.

In accordance with S.Ct.R.II, § 1(A)(2), "[a]n appeal that claims a substantial constitutional question, including an appeal from the decision of a court of appeals under App.R.26(B) in a non-capital case, may invoke the appellate jurisdiction of the Supreme Court and shall be designated a claimed appeal of right."

Also, an appellant's U.S. Sixth Amendment, and OConst. Art. I, § 10 rights are violated when his appellate counselors are ineffective for failing to raise several issues of substantial constitutional proportions that occur at trial, and on direct appeal.

"A convicted defendant is entitled to [competent] counsel on direct appeal, and a first appeal as of right." *Douglas v. California* (1953), 373 U.S. 353, 83 S.Ct. 814. "A defendant's whose counsel fails to provide effective representation is in no better position than one who has no counsel at all." *Evitts v. Lucey* (1985), 469 U.S. 387, 396, 105 S.Ct. 830. Therefore, a direct appeal, and a first appeal as of right is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of counsel. *Id.* at 396.

Furthermore, Ohio has adopted, essentially, the same analysis of ineffective assistance of counsel as in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, when this Court ruled in the case of *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d at 390-98 (*WRIGHT, BROWN, Justices, dissenting opinions*).

In the case at bar, Mr. Vinson asserts that he was erroneously advised by court-appointed appellate counsel, Ms. Susan Moran, on direct appeal to seek further assistance of his case through the Ohio Public Defender's Office without addressing the claims of ineffective assistance of trial counsel committed by Mr. William Dawson for postconviction purposes, pursuant to R.C. § 2953.21.

Also, after ultimately seeking, and being appointed subsequent counsel, Ms. Theresa Haire of the Ohio Public Defender's Office, Ms. Haire erroneously advised Mr. Vinson to present any other meritorious issues before the state courts, or the state federal district court for a habeas corpus action.

Mr. Vinson clearly shows that both counselors erroneously advised led him to seek improper remedies regarding the "full and fair adjudication" of the merits of Mr. Vinson's case, thus, ultimately subjecting Mr. Vinson to procedural default and bar of his claims.

The Eighth Appellate District Court of Appeals in its opinion denying Mr. Vinson's motion for reopening, at page 2, cites this Court's decision in State v. Gumm (2004), 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, stating that "gumm could have retained new attorneys * * * , or he could have filed the application on his own." This should be considered an unsound judgment for denying Mr. Vinson to reopen his appeal, and have the merits of his case properly reviewed since Mr. Vinson, himself, did not retain counsel at the appellate level, and counsel was appointed to Mr. Vinson for appeal.

So, therefore, despite the fact that Mr. Vinson was unfamiliar with the proper available remedies and appellate procedures in filing the appropriate pleading(s) to

present his claims in a timely manner, Mr. Vinson submits to this Court that his lack of knowledge and not being advised by counsel that an application for reopening, pursuant to App.R.26(B), was the proper remedy to pursue should be just cause and reason for his untimely filing of his motion to reopen.

Finally, the Eighth District expounds at page 2 of its opinion that “Ohio and other states may erect reasonable procedural requirements for triggering the right to an adjudication, * * * and that is what Ohio has done by creating a 90-day deadline for the filing of applications to reopen”; citing *Logan v. Zimmerman Brush Company*(1982), 455 U.S. 422, 437, 102 S.Ct. 1148, 71 L.Ed.2d 265.

However, in the case of *State v. Chu* (Ohio App 8th Dist. Cuyahoga June 6, 2002) Nos. 75583, 75689, 2002-Ohio-2673, 202 WL 1308353, 2003-Ohio-551, 2003 WL 252152, this appellant presented an untimely application for reopening without providing any good reason(s) or cause(s), and was allowed to reopen his direct appeal, accordingly.

Therefore, Mr. Vinsom requests that this Court resolve and/or certify this conflict, and speak out on the manifest miscarriages of justice that occurred in the courts below when Mr. Vinson’s motion to reopen was denied upon procedural timelines that Mr. Vinson indigenously attempted to pursue, and sought to have his claims and issues “fully and fairly adjudicated” according to law as well as present the profound ineffectiveness of two (2) appellate counselors deficient performance in representing Mr. Vinson.

Proposition of Law No. II: A defendant shall not be convicted of felonious assault upon peace officers when said officers conduct a warrantless arrest based on insufficient probable cause, and an illegal search and seizure, in violation of U.S. Const. Amends. 4, 5, 14, and OConst. Art. I, §§ 10, 14.

“A police officer has no legal authority to pursue a person or enter upon his property without permission, where such officer does not see, or personally know of, any violation of law perpetrated by such person, and has no warrant for the arrest of such person, but is relying solely on hearsay evidence.” *Huth v. Woodard* (1958), 108 Ohio App.3d 135, 161 N.E.2d 230, 231 at ¶ 2 of the syllabus.

Also, “[a] warrantless arrest for a misdemeanor is invalid where the arresting officer lacks a reasonable basis for believing, through his own personal observation of the act constituting the offense or the admission of the arrestee, that an offense has been committed.” *State v. Reymann* (1989), 55 Ohio App.3d 222, 563 N.E.2d 749 at ¶ 1 of the syllabus.

In the case at bar, law enforcement officers of the Cleveland Police Department alleged that they received a dispatch of a shooting incident in progress on Eaglesmere Avenue in Cleveland, Ohio, and upon arrival at the Eaglesmere location, police allegedly spoke with a female that allegedly claimed that a dark van occupied the person that fired the shots. Several minutes later, this same female pointed to a dark van driving past Eaglesmere Avenue claiming that this subsequent van belonged to the shooter, and that the shooter lived at one of the addresses on the next corner of Argus Avenue located in Cleveland, Ohio.

One of the officers testified at trial that he allegedly observed this van pull into the Argus Avenue driveway, and stated that a suspected male of the shooting incident on Eaglesmere Avenue allegedly ran from this van, and entered the rear entrance of an Argus Avenue residence. However, how these officers were able to view such activity at the Argus Avenue location when they were stationed at the Eaglesmere Avenue location is an unusual admission. Especially when the state alleged conflicting accounts of the officers "on-scene" arrivals to the incident in question at trial.

Upon the officers arrival at the Argus Avenue residence, officers testified that they used their cruiser to block the van's exit from the driveway. Then, the officers exited their cruiser with weapons drawn, and approached the van, which was parked in Mr. Vinson's backyard. Officers removed three (3) people from this van at gunpoint (Ivan Booker, Ray Walker, and Brenda "Doe"), of which Mr. Vinson was not an occupant within the van.

The officers on the scene made the three individuals line up against the fence of Mr. Vinson's property, while the officers searched for weapons within the van, and found no weapons and/or shell casings. Mr. Vinson opened the rear door of his Argus Avenue residence, and demanded to know why the police were searching his yard, and his step-father's van. Police pointed their weapons at Mr. Vinson, and ordered him to "come out the house with your hands up!" Mr. Vinson proceeded out the door of his rear entrance while Mr. Vinson's dog attempted to follow him out. Mr. Vinson pulled the door shut, but the dog's head stopped the door from closing. Mr. Vinson held onto the door with his left hand, and held his right hand out to police.

Police, then, ordered Mr. Vinson to “step away from the door!” and Mr. Vinson replied, “let me put my dog up, and I’ll talk!” Police, then, ordered Mr. Vinson to “move away from the door, and display your hands!” Mr. Vinson, then, replied, “I need to put my dog up first!” The dog tried to get out, and Mr. Vinson pivoted towards the door and attempted to move his dog back into the house so that he could close the rear door.

Officers, then, commanded Mr. Vinson, “do not move!” while simultaneously holding a shotgun to the base of Mr. Vinson’s head. Mr. Vinson was startled by these officers commands, and was unable to secure his dog, causing Mr. Vinson to utter the words “Aw F*@K!” knowing he faced the immediate threat of deadly and fatal consequences at the hands of these officers, which caused Mr. Vinson to release the door with his left hand allowing his beloved pet to escape.

The officers, then, opened fire with the shotgun, and police-issued sidearms, which blew Mr. Vinson’s dog into the middle of the driveway. These officers maliciously unloaded 14 rounds of ammunition into Mr. Vinson’s 35 pound dog, of which 5 shots were from a city-issued shotgun that Cleveland Police Officer Daniel Jopek carried, and 9 shots that were fired between Cleveland Police Officers Todd Marazzi and James Zak.

Mr. Vinson contends that his convictions and sentence are the result of a warrantless arrest, and illegal search and seizure based on insufficient probable cause because 1.) The female who identified the van was never produced at trial; 2.) the 911 dispatch call used at trial never identified the caller, or gave a description/identification of the van; 3.) state’s witness, Ivan Booker, who was an occupant of the van testified that Mr. Vinson “had nothing to do with a shooting”; and 4.) the state never presented any “prima facie” evidence that Mr. Vinson’s dog fit the statutory definition of a “deadly

weapon”, pursuant to R.C. § 955.11(A)(4)(i), (ii), (iii), to substantiate the elements of “knowingly causing or attempting to cause physical harm to another * * * by means of a deadly weapon, pursuant to R.C. § 2903.11(A)(2), (D)(1). See, also, *State v. Ferguson* (1991), 76 Ohio App.3d 747, 603 N.E.2d 345; *State v. Anderson* (1991), 57 Ohio St.3d 168, 56 N.E.2d 1224.

Also, in the case of *Blanchester v. Hester* (1992), 81 Ohio App.3d 815, 612 N.E.2d 412, 414, “When the government’s interest is only to arrest for a minor offense, the presumption of unreasonableness that attaches to a warrantless arrest in a private home is difficult to rebut.” (quoting *Welsh v. Wisconsin* (1984), 466 U.S. at 750-51, 104 S.Ct. at 2098, 80 L.Ed.2d at 743-44). Thus, “[a]bsent a rational basis, an arrest is not lawful[,]” and “[t]he absence of this element, moreover, precludes a defendant’s conviction[s] * * * .” *Garfield heights v. Simpson* (1992), 82 Ohio App.3d 286, 611 N.E.2d 892, 893 at syllabus (emphasis added).

Lastly, “[t]hat officers, in uniform and carrying weapons, approached defendant on private property, stood close to him, and [commanded defendant to “Get your hands up!” with weapons drawn and brandished upon him] was sufficient show of authority to give rise to ‘seizure’ for Fourth Amendment purposes. *State v. Ingram* (1992), 82 Ohio App.3d 341, 612 N.E.2d 454.

Proposition of Law No. III : A defendant is deprived of due process of law, pursuant to U.S. Const. Amend. 5, the Due Process Clause of U.S. Const. Amend. 14, and OConst. Art. I, § 10, when the name of the charged offense at time of arrest

is changed without a subsequent complaint being filed for the newly charged offenses.

Pursuant to CrimR 5(B)(6), Initial Appearance, and Preliminary Hearing: "In any case in which the defendant is ordered to appear for trial for any offense other than the one charged the court shall cause a complaint charging such offense to be filed."

In this case, Mr. Vinson asserts that on the date of his arrest, March 8, 2003, he was charged with Assault, pursuant to R.C. § 2903.13, and on March 10, 2003, Mr. Vinson secured bond while his case was subsequently bound over from Cuyahoga County Municipal Court to Cuyahoga County Common Pleas Court.

While on bond, Mr. Vinson received a summons to appear for arraignment in the Cuyahoga County Common Pleas Court on May 8, 2003, and during this arraignment proceeding Mr. Vinson received a copy of an indictment returned by a Cuyahoga County Grand Jury, which was filed on April 25, 2003, charging Mr. Vinson with three (3) counts of Felonious Assault w/ Peace Officer Specifications, pursuant to R.C. § 2903.11, and Resisting Arrest, pursuant to R.C. § 2921.33.

Mr. Vinson submits that he was never served with an indictment within the required fourteen (14) day requirement for the initial Assault charge, but was otherwise served with an indictment for the Felonious Assaults on Peace Officers, and Resisting Arrest charges forty-five (45) days after his initial arrest of March 8, 2003.

What is uniquely perplexing in this particular case is that there was, and currently is, no formal complaint(s) for any of the charges filed in this case, nor any formal arrest or warrant(s) made and/or issued pertaining to the Felonious Assault on Peace Officers Charges, and Resisting Arrest charge which occurred on March 7, 2003.

Mr. Vinson asserts that because of these substantial constitutional violations of procedural due process of law, due to the illegality of procuring an indictment on false information without a complaint being filed against Mr. Vinson for committing said offenses of Felonious Assault, and the absence of arrest warrant(s) for said offenses, establishes reversible error, and, in effect, a void and invalid indictment.

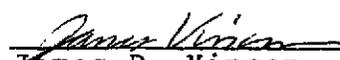
In the case of *Blackledge v. Perry* (1974), 417 U.S. 21, 94 S.Ct. 2098, 2099, 40 L.Ed.2d 628, “ * * * substitution a more serious charge for the original one, and thus, subjecting [Mr. Vinson] to a significantly increased potential period of incarceration” is a contravention of the Due Process Clause of the Fourteenth Amendment (emphasis added).

Also, the “[s]tandard for “probable cause” at preliminary hearing is whether there is sufficient credible evidence to cause court to believe that defendant committed offense.” *State v. Howell* (1994), 64 Ohio Misc.2d 23, 639 N.E.2d 531. In a dissenting opinion rendered by Judge Painter of the First Appellate District Court of Appeals, Hamilton County, Ohio, pursuant to the case of *State v. Keith* (1999), 136 Ohio App.3d 116, 736 N.E.2d 35, 39, “[c]riminal charges should never have been brought, the case should not have been prosecuted, the defendant should not have been convicted, and the case should not be remanded to continue the chain of error.”

CONCLUSION

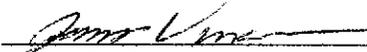
For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,
James D. Vinson, Pro se Counsel


James D. Vinson
PRO SE COUNSEL FOR APPELLANT,
JAMES D. VINSON

Certificate of Service

I hereby certify that a copy of this Memorandum in Support of Jurisdiction was served by regular/institutional U.S. Mail to counsel for appellees, William D. Mason, Cuyahoga County Prosecuting attorney, 1200 Ontario Street, Cleveland, Ohio 44113 on this 5 day of Feb., 2008.



James D. Vinson

**PRO SE COUNSEL FOR APPELLANT,
JAMES D. VINSON**

3-A

AUG 14 2006

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
 COUNTY OF CUYAHOGA
 NOS. 87056, 87058, 87060

STATE OF OHIO	:	
	:	
Plaintiff-appellee	:	
	:	JOURNAL ENTRY
vs.	:	and
	:	OPINION
JAMES VINSON	:	
	:	
Defendant-appellant	:	
DATE OF ANNOUNCEMENT OF DECISION	:	AUGUST 3, 2006
CHARACTER OF PROCEEDING	:	Criminal appeal from Cuyahoga County Court of Common Pleas Case Nos. CR-442710, 450233, 436841
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	AUG 14 2006
APPEARANCES:		
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For defendant-appellant	:	SUSAN J. MORAN Attorney at Law 55 Public Square, Suite 1010 Cleveland, Ohio 44113-1901

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KENNETH A. ROCCO, J.:

In these cases that have been consolidated for hearing and disposition, defendant-appellant James Vinson appeals from his convictions for felonious assault with peace officer specifications, aggravated assault, and possession of cocaine, and from the sentences subsequently imposed upon him.

Vinson presents five assignments of error in which he claims that his convictions for felonious assault are unsupported by either sufficient evidence or the weight of the evidence, that the trial court denied him his right to a speedy trial and also improperly accepted his guilty pleas in the other two cases, and that his sentences in these cases are contrary to law.

After a review of the record, this court cannot agree that Vinson's convictions are improper based upon either the evidence or the length of time the cases were pending against him. Vinson's convictions, therefore, are affirmed. Moreover, a perusal of the trial court's comments during the sentencing hearing reveals it complied with the Ohio Supreme Court's mandate as expressed in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Vinson's sentences, therefore, also are affirmed.

The record reflects Vinson was indicted in the earliest case, viz., CR 436841, as the result of an incident that occurred on the night of March 7, 2003. Two Cleveland Police officers, Todd Marazzi and James Zak, were in the area when they heard a radio

broadcast of shots fired at an address on Eaglesmere Avenue near East 140th Street. Marazzi, who was driving the patrol car, decided to respond.

Upon their arrival at the Eaglesmere Avenue address, they spoke to a female witness, who, during the brief conversation, pointed out a van a block away on East 140th Street, indicating the person who fired the shot was inside that vehicle. They watched as the van turned into a nearby residential driveway on Argus Avenue. The witness informed them the house belonged to Vinson. The van stopped, and a man ran to the rear entrance of the residence.

Marazzi and Zak quickly reentered their patrol car and went to Vinson's house. Marazzi parked at the end of the short driveway, thereby blocking the van. As he and Zak approached the van with their weapons drawn, another colleague arrived, Officer Jopek. Jopek assisted them in ordering the three passengers out and in placing them against a fence at the edge of the property.

Before the three officers could do anything else, the side door of the house, which was approximately nine feet away from them, opened. Vinson stepped out, closing the door behind him. Vinson's manner was irate; he demanded to know why the police were in his yard. One of the men lined up at the fence told Vinson the police wanted to speak to him.

In view of Vinson's aggressive attitude, Marazzi asked him to move away from the door and to show his hands until their

investigation could be concluded. As he spoke to Vinson, Marazzi could hear that a dog was present just inside the residence; he heard the clicking of the dog's nails on the flooring.

Rather than complying with Marazzi's request, Vinson kept one hand on the door handle and continued to curse at the officers. He further informed them that he had to "put his dog up." Marazzi could hear the dog becoming increasingly agitated; it was growling and urgently scratching at the door. Marazzi told Vinson to remain where he was.

Instead, Vinson pivoted as if he were going to reenter the house, shouted at the officers to "get off [his] property," and turned the door handle. Immediately, the dog's muzzle appeared at the door. As Vinson stood just outside, the animal pushed the door completely open and "came charging out."

Marazzi saw that what appeared to be a full-grown pitbull dog "launched itself" at him. He was only steps away from his colleagues, so he backed away as he attempted to take aim with his gun. When the dog was within a foot of his groin area, Marazzi "sidestepped," let the dog's momentum carry it past the point where a bullet might harm any of the others, and began firing his weapon at the dog. The other officers joined him; ultimately, between them, the officers discharged fourteen rounds of ammunition. Before the dog died, it continued to crawl toward Marazzi. Vinson uttered nothing throughout the incident.

Vinson at that time was arrested; on April 25, 2003 he was indicted on three counts of felonious assault, each with a peace officer specification, and one count of resisting arrest. At his arraignment, Vinson entered a plea of not guilty. The record reflects Vinson was released on bond.

While that case was pending, Vinson subsequently was indicted in two additional cases which related to later incidents. In September, 2003, in CR 442710, he was charged with felonious assault with two firearm specifications and with resisting arrest. In October 2003, in CR 450233, he was charged with possession of cocaine in an amount less than five grams.

Vinson's three cases were assigned to the same trial court. Pretrial proceedings in the cases occurred nearly every week thereafter; in nearly each instance, the court issued journal entries that stated the cases were continued "at defendant's request for completion of investigation."

In March 2004, Vinson signed written waivers of his right to speedy trials, extending the time in each case to August 31. Similarly, after additional pretrial hearings, in January 2005, Vinson again in writing extended the waivers to May 31, 2005.

Vinson's trial in the first case, CR 436841 commenced on May 2, 2005. The state presented the testimony of four witnesses: officers Marazzi and Zak, one of the passengers in the van, and John Baird, Dog Warden of the city of Cleveland. The trial court

permitted Baird to testify as an expert witness on the subject of dog breeds and behavior.

After receiving the evidence, the jury found Vinson guilty of three counts of felonious assault with peace officer specifications. The jury found Vinson not guilty of the charge of resisting arrest. Subsequently, Vinson entered into a plea agreement with respect to the other two cases. In exchange for the amendment of the indictment in CR 442710 to a charge of aggravated assault and the dismissal of both the specifications and count two, Vinson entered guilty pleas in that case and in CR 450233.

The court conducted one sentencing hearing for all three cases. In CR 436841 (App. No. 87060), it sentenced Vinson to prison terms of five years on each count of felonious assault, to be served concurrently with each other and concurrently with a term of seventeen months in CR 442710 (App. No. 87056) and eleven months in CR 450233 (App. No. 87058).

Vinson presents the following five assignments of error for review:

"I. The state failed to present sufficient evidence to sustain appellant's convictions.

"II. The appellant's convictions are against the manifest weight of the evidence.

"III. The trial court erred when it denied appellant his right to a speedy trial.

"IV. Appellant was denied his right to a fair trial when he involuntarily entered his pleas of guilt.

"V. The court's imposition of appellant's sentences is not supported by the record. Accordingly, the sentence is contrary to law and violates appellant's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and Section Sixteen of Article One (sic) of the Ohio Constitution."

In his first two assignments of error, Vinson argues that with respect to his convictions for felonious assault upon a peace officer, the trial court wrongly denied his motions for acquittal. Vinson contends his convictions are supported by neither sufficient evidence nor the weight of the evidence because the state failed to prove: 1) his dog was a "deadly weapon;" 2) he intended to use the dog as such; and 3) he intended to use it to harm either Zak or Jopek. This court remains unpersuaded.

A defendant's motions for acquittal should be denied if the evidence is such that reasonable minds could reach different conclusions as to whether each material element of the crimes has been proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 1997-Ohio-372; *State v. Jenks* (1991), 61 Ohio St.3d 259; *State v. Bridgeman* (1978), 55 Ohio St.2d 261. The trial court is required to view the evidence in a light most favorable to the state. *State v. Martin* (1983), 20 Ohio App.3d 172. Circumstantial evidence alone may be used to support a conviction. *State v.*

Gardner, Cuyahoga App. No. 85275, 2005-Ohio-3709, ¶18.

With regard to an appellate court's function in reviewing the weight of the evidence, this court is required to consider the entire record and determine whether in resolving any conflicts in the evidence, the jury "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin*, supra at 175.

This court must be mindful, therefore, that the weight of the evidence and the credibility of the witnesses are matters primarily for the jury to consider. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

R.C. 2903.11 states in relevant part that "[n]o person shall knowingly *** attempt to cause physical harm to another *** by means of a deadly weapon ***, as defined in section 2923.11 of the Revised Code." R.C. 2923.11 defines a "deadly weapon" as "any *** thing capable of inflicting death, and *** possessed, *** or used as a weapon."

In this case, both Marazzi and Zak testified that Vinson angrily emerged from his house, closing the door behind him as he came. His aggressive manner toward them already had incited his animal; the officers could hear it growling and scratching inside. Nevertheless, rather than complying with Marazzi's demand that he step away from the door, Vinson, who was cursing at the officers, turned the handle.

By this means, Vinson opened the door and permitted his agitated dog to escape from confinement into the partially-enclosed driveway area. The evidence demonstrated the driveway area was small. Marazzi estimated he stood perhaps nine feet from the side door of Vinson's residence; Zak stated he and Jopek stood nearby. A fence prevented access to the adjoining property.

Baird testified that that particular breed of dog was not only very loyal to and protective of its owner, but was used for fighting; thus, it was agile, muscular, and powerful. In particular, the dogs had jaws strong enough to "crush bones" and, once they "grab on" to something, can "just hang [on] for a half hour." Baird further testified that in 1970, the city enacted special ordinances with respect to ownership of pitbull dogs because a child had been "killed" by one.

Marazzi testified that he was directly in the dog's line of sight, and that the animal launched itself directly at him, "snarling and barking" in a vicious way. He stated he had no doubt that the animal was "attacking" him. The photographs indicate the dog was of an intimidating size.

The state presented evidence, therefore, that sufficiently proved the dog fit the statutory definition of a "deadly weapon" and that Vinson knowingly used it in that manner against all three of the officers on his property. *State v. Williams*, Cuyahoga App. No. 83402, 2004-Ohio-4085, ¶28. The testimony proved the dog

VOL 618 00227

already was restrained, because Vinson closed the door prior to confronting the officers and demanding they leave his property. Therefore, the jury reasonably could conclude his purpose in refusing to obey Marazzi's orders was not to secure the animal, but, rather, to allow the dog outside to attack them. *Id.*

For the foregoing reasons, Vinson's first and second assignments of error are overruled.

Vinson argues in his third assignment of error that the trial court denied him his right to a speedy trial in all three cases. This argument is rejected.

The record reflects not only that Vinson requested nearly every delay, but also that Vinson failed to appear for trial when it originally was scheduled, and, further, that Vinson neglected to raise this issue in the court below. Thus, he willingly relinquished his right to a speedy trial, and waived this argument for purposes of appeal. *State v. Shakoor*, Mahoning App. No. 01CA121, 2003-Ohio-5140, ¶10. Accordingly, Vinson's third assignment of error also is overruled.

In his fourth assignment of error, Vinson claims his pleas in CR 442710 and CR 450233 were neither knowingly nor intelligently made because he received "a promise *** [of] a certain sentence" from his trial counsel. This assignment of error fails for two reasons.

First, Vinson did not include a transcript of the plea hearing

in those cases in the record on appeal. Under these circumstances, this court presumes regularity, and therefore, compliance with Crim.R. 11(C) requirements, in the proceedings below. *Columbus v. Hodge* (1987), 37 Ohio App.3d 68. Second, Vinson's claim is more suited to a motion for postconviction relief, which is not a matter before this court. See, e.g., *State v. Fry* (Dec. 11, 1992), Portage App. No. 92-P-0049. Vinson's fourth assignment of error is overruled.

Vinson asserts in his fifth assignment of error that the trial court's sentence of a total of five years is "contrary to law." He claims that "the trial court heard no facts for the crimes of either the charges of possession of drugs or aggravated assault" to support the nearly-maximum terms imposed upon him for these crimes. He further claims that "the facts as they related to the three counts of felonious assault do not warrant the imposition of a five year sentence."

With respect to Vinson's sentences in CR 442710 and CR 450233, since he provided no transcript of the plea hearing, this court cannot conclude the trial court lacked a basis upon which to choose concurrent, near-maximum terms for Vinson's convictions.

Moreover, the trial court prior to imposing sentence in these cases stated that it had first considered "the records, oral statements made [at the hearing], the pre-sentence report, the purposes and principles of sentencing ***, the seriousness and

recidivism factors relevant to this offense and this offender ***, "together with the fact that Vinson had "previously served a term in prison" in choosing a total sentence of five years. Under these circumstances, the trial court complied with its duties as expressed in *State v. Foster*, supra. This court, therefore, cannot find Vinson's sentence is contrary to law pursuant to R.C. 2953.08(A)(4).

Vinson's fifth assignment of error, accordingly, also is overruled.

Vinson's convictions and sentences are affirmed.

FILED
2007 APR 18 P 4:15
CAROLA HEAD
CLERK OF COURT
COMMON PLEAS COURT
ASHTABULA COUNTY OH

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Kenneth A. Rocco
KENNETH A. ROCCO
JUDGE

SEAN C. GALLAGHER, P. J. and

MARY EILEEN KILBANE, J. CONCUR

FILED AND JOURNALIZED
PER APP. R. 22(E)

AUG 14 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY *[Signature]* DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

AUG 3 - 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY *[Signature]* DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAVERN

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COURT OF APPEALS

FILED

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT

2007 SEP 28 P 12:18

ASHTABULA COUNTY, OHIO

CAROL A. MEAD
CLERK OF COURTS
COMMON PLEAS COURT
ASHTABULA CO., OH

STATE OF OHIO ex rel. JAMES D. VINSON,	:	PER CURIAM OPINION
	:	
Petitioner,	:	
	:	CASE NO. 2007-A-0042
- vs -	:	
	:	
RICH GANSHEIMER, WARDEN,	:	
	:	
Respondent.	:	

Original Action for Writ of Habeas Corpus.

Judgment: Petition dismissed.

James D. Vinson, pro se, PID: 491-644, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030-8000 (Petitioner).

Marc E. Dann, Attorney General, and *Diane Mallory*, Assistant Attorney General, Corrections Litigation Section, 150 East Gay Street, 16th Floor, Columbus, OH 43215 (For Respondent).

PER CURIAM

{¶1} This habeas corpus action is presently before this court for consideration of the motion to dismiss of respondent, Warden Richard Gansheimer of the Lake Erie Correctional Institution. As the primary grounds for this motion, respondent asserts that the sole claim of petitioner, James A. Vinson, does not state a viable cause of action because none of his factual allegations pertain to the jurisdiction of the trial court which

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imposed his underlying conviction. For the following reasons, we hold that the motion to dismiss has merit.

{¶2} Petitioner has been incarcerated in the Ohio prison system since August 2003. According to him, his continuing confinement at this time is predicated solely on a May 2005 conviction in the Cuyahoga County Court of Common Pleas, in which a jury found him guilty of three counts of felonious assault against three police officers. The Cuyahoga County trial court then sentenced petitioner to three concurrent terms of five years in a state prison.

{¶3} In his petition before this court, petitioner maintains that his conviction for the felonious assaults was based upon an incident which initially began when officers of the Cleveland City Police Department responded to a call of a gun being fired on a local street. In light of information obtained from the person who had made the 9-1-1 call, the officers followed a van which ultimately pulled into the driveway of petitioner's home on Argus Avenue. The officers then surrounded the van, made three individuals exit that vehicle, and began to conduct a search of the individuals and the vehicle.

{¶4} During the course of the foregoing search, petitioner stepped outside the front door of his residence and asked the multiple officers why they had entered upon his property. In response, the officers ordered petitioner to put his hands up in the air and walk toward them. While standing next to his front door, petitioner told the officers that, although he was willing to comply, it would first be necessary for him to secure his dog, which was standing directly behind the door. When the officers repeated the order for petitioner to come forward, he continued to state that the dog needed to be secured. While this argument was escalating, the dog pushed open the front door and ran toward

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the vicinity of the officers. After the officers were able to subdue the dog, they placed petitioner under arrest as a result of his actions in relation to the dog.

{¶5} As the primary grounds for his instant claim in habeas corpus, petitioner asserts that his conviction for the three felonious assaults of the police officers must be declared void because the foregoing facts readily establish that his constitutional right against unreasonable searches and seizures was violated during the incident. First, he submits that the stop and search of the van in his driveway was improper because the information received from the 9-1-1 caller had not been legally sufficient to provide the officers with probable cause. Second, petitioner contends that the underlying facts also did not afford the officers probable cause to trespass upon his property and ultimately place him under arrest for the alleged offenses.

{¶6} In now moving to dismiss petitioner's claim, respondent basically argues that the foregoing allegations are insufficient to satisfy the essential elements for a writ of habeas corpus. As this court has noted in numerous prior opinions, if an inmate in a state prison has not completed his maximum sentence, a writ of habeas corpus will lie to compel the inmate's release only when the trial court in the underlying criminal case lacked the requisite jurisdiction to impose the conviction and sentence. See, e.g., *McKay v. Gansheimer*, 11th Dist. No. 2003-A-0123, 2004-Ohio-4284, at ¶4. In light of this, we have expressly concluded that a habeas corpus petition fails to state a viable claim for the writ when it does not allege that the trial court committed an error which deprived it of jurisdiction over the case. *Watson v. Altier*, 11th Dist. No. 2006-T-0097, 2006-Ohio-5831, at ¶4. Furthermore, it is well settled under Ohio law that an inmate is not entitled to the issuance of the writ when there exists an alternative legal remedy

through which he could obtain the identical relief sought under the habeas corpus claim.
Id.

{¶7} By alleging in the present matter that his Fourth Amendment rights were violated by the police, petitioner is essentially asserting that any evidence stemming from his arrest should have been suppressed. In considering this type of assertion in prior habeas corpus actions, we have held that the assertion does not state a plausible argument for the writ:

{¶8} "In light of the foregoing basic principles governing a habeas corpus action, this court has indicated that a question concerning the suppression of evidence cannot be litigated in the instant type of proceeding because, even if a trial court in a criminal case renders an erroneous ruling on such a question, it would not have any effect over that court's jurisdiction. *Johnson v. Bobby*, 11th Dist. No. 2003-T-0181, 2004-Ohio-1075, at ¶7. We have further indicated that a trial court's denial of a motion to suppress cannot form the basis of a viable habeas corpus claim because the defendant has an adequate legal remedy through a direct appeal from any resulting conviction. *State ex rel. Brown v. Logan*, 11th Dist. No. 2004-T-0088, 2004-Ohio-6951, at ¶6." Id, at ¶5.

{¶9} As part of his allegations before us, petitioner states that the issue of the constitutionality of his arrest was never raised before the Cuyahoga County trial court. However, the foregoing precedent stands for the legal proposition that, regardless of what occurred at the trial level, any error regarding the suppression of evidence cannot be contested in a habeas corpus action because such an alleged error would have no effect upon the trial court's jurisdiction to proceed. Instead, the improper admission of

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unconstitutional evidence would be a mere procedural error which must be challenged in a direct appeal from the conviction. Hence, even if the allegations as to petitioner's arrest were sufficient to establish a Fourth Amendment violation, they are insufficient to state a proper basis for a writ of habeas corpus.

{¶10} In addition to the foregoing, petitioner argues that he was denied effective assistance of counsel because: (1) his trial attorney did not contest the constitutionality of his arrest; and (2) his trial attorney failed to call certain witnesses at trial. However, the basic logic which has been followed as to "Fourth Amendment" claims would also apply to claims of ineffective assistance. That is, the propriety of an attorney's actions cannot be raised in a habeas corpus case because such an error does not pertain to a trial court's jurisdiction and is properly litigated in a direct appeal. *Johnson v. Bobby*, 11th Dist. No. 2003-T-0181, 2004-Ohio-1075, at ¶5, citing *State ex rel. Dotson v. Rogers* (1993), 66 Ohio St.3d 25.

{¶11} Although the majority of petitioner's allegations relate to the propriety of his arrest, his petition also contains references to three other issues. First, he submits that the evidence before the Cuyahoga County Grand Jury was insufficient to support an indictment on three counts of felonious assault. Second, he contends that the state failed to provide full discovery of all exculpatory evidence. Third, he argues that the trial court committed certain errors during the "voir dire" process.

{¶12} While each of these three issues raises a possible procedural error which could constitute a reason for reversing petitioner's conviction on appeal, none of them pertain to, or could have any effect upon, the jurisdiction of the Cuyahoga County trial court. Moreover, this court would emphasize that the merits of the first and third issues

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could have been properly addressed in a direct appeal from the underlying conviction. As to the "discovery" issue, we would indicate that if petitioner did not become aware of the undisclosed evidence until after his conviction had become final, he would have an adequate legal remedy through a petition for postconviction relief under R.C. 2953.21 and 2953.23(A); on the other hand, if petitioner was aware of the alleged withholding of evidence prior to the issuance of the trial court's final judgment, a direct appeal would have again been the proper means to contest the issue. As a result, none of petitioner's three separate issues can satisfy the basic elements for a writ of habeas corpus.

{¶13} Since an action in habeas corpus is considered a civil proceeding, it can be subject to dismissal under Civ.R. 12(B)(6). *McKay*, 2004-Ohio-4284, at ¶4. Under that rule, a petition can be dismissed for failing to state a viable claim for relief when the inmate's own allegations show beyond a reasonable doubt that he will not be able to prove a set of facts under which he would be entitled to the writ. *Id.*

{¶14} Pursuant to the foregoing analysis, this court concludes that the factual allegations in the instant petition are not legally sufficient to meet the Civ.R. 12(B)(6) standard. That is, even when petitioner's allegations are construed in a manner most favorable to him, he still would be unable to demonstrate a jurisdictional defect in his conviction and the lack of an adequate legal remedy. Accordingly, respondent's motion to dismiss the pending claim is granted. It is the order of this court that petitioner's entire habeas corpus petition is hereby dismissed.

DIANE V. GRENDALL, J., COLLEEN MARY O'TOOLE, J., MARY JANE TRAPP, J.,
concur.

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87056, 87058 and 87060

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES VINSON

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 402348
LOWER COURT NO. CR-442710, 450233 and 436841
COMMON PLEAS COURT

RELEASE DATE: January 15, 2008

ATTORNEY FOR PLAINTIFF-APPELLEE

WILLIAM D. MASON
Cuyahoga County Prosecutor
Mary H. McGrath
Assistant County Prosecutor
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FOR DEFENDANT-APPELLANT

James D. Vinson, pro se
Inmate No. 491-644
Lake Erie Correctional Inst.
P.O. Box 8000
Conneaut, Ohio 44030

SEAN C. GALLAGHER, J.:

James Vinson has filed an application for reopening pursuant to App.R. 26(B). Vinson is attempting to reopen the appellate judgment that was rendered in *State v. Vinson*, Cuyahoga App. Nos. 87056, 87058 and 87060, 2006-Ohio-3971, which affirmed his conviction for the offenses of felonious assault with peace officer specifications, aggravated assault, and possession of drugs. We decline to reopen Vinson's appeal.

App.R. 26(B)(2)(b) requires that Vinson establish "a showing of good cause for untimely filing if the application is filed more than 90 days after journalization of the appellate judgment," which is subject to reopening. The Ohio Supreme Court, with regard to the 90-day deadline as provided by App.R. 26(B)(2)(b), has recently established that:

"We now reject Gumm's claim that those excuses gave him good cause to miss the 90-day deadline in App.R. 26(B). The rule was amended to include the 90-day deadline more than seven months before Gumm's appeal of right was decided by the court of appeals in February 1994, so the rule was firmly established then, just as it is today. 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

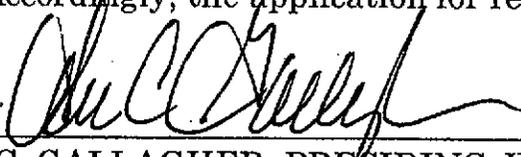
that any claims of ineffective assistance of appellate counsel are promptly examined and resolved.

“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. Gumm could have retained new attorneys after the court of appeals issued its decision in 1994, or he could have filed the application on his own. What he could not do was ignore the rule’s filing deadline. * * * 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 Gumm 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, at ¶7 (emphasis added). See, also, *State v. LaMar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970; *State v. Cooley*, 73 Ohio St.3d 411, 1995-Ohio-328, 653 N.E.2d 252; *State v. Reddick*, 72 Ohio St.3d 88, 1995-Ohio-249, 647 N.E.2d 784.

Herein, Vinson is attempting to reopen the appellate judgment that was journalized on August 14, 2006. The application for reopening was not filed until

October 24, 2007, more than 90 days after journalization of the appellate judgment in *State v. Vinson*, supra. Vinson has failed to establish “a showing of good cause” for the untimely filing of his application for reopening. *State v. Klein* (Apr. 8, 1991), Cuyahoga App. No. 58389, reopening disallowed (Mar. 15, 1994), Motion No. 49260, affirmed (1994), 69 Ohio St.3d 1481; *State v. Trammell* (July 24, 1995), Cuyahoga App. No. 67834, reopening disallowed (Apr. 22, 1996), Motion No. 70493; *State v. Travis* (Apr. 5, 1990), Cuyahoga App. No. 56825, reopening disallowed (Nov. 2, 1994), Motion No. 51073, affirmed (1995), 72 Ohio St.3d 317. See, also, *State v. Gaston*, Cuyahoga App. No. 79626, 2007-Ohio-155; *State v. Torres*, Cuyahoga App. No. 86530, 2007-Ohio-9.

Accordingly, the application for reopening is denied.

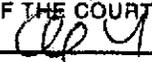


SEAN C. GALLAGHER, PRESIDING JUDGE

ANTHONY O. CALABRESE, JR., J., and
CHRISTINE T. MCMONAGLE, J., CONCUR

FILED AND JOURNALIZED
PER APP. R. 22(E)

JAN 15 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
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