

ORIGINAL

IN THE SUPREME COURT OF OHIO

09-1266

GARY D. ERVIN,
Petitioner.

vs.

STATE OF OHIO,
Respondant.

On Appeal from a Appellate
Rule 26(B) Application to
Reopen Direct Appeal,
Cuyahoga County, Eighth
Appellate District

Court of Appeals Case No.
87333

MEMORANDUM IN SUPPORT OF JURISDICTION
OF PETITIONER GARY D. ERVIN

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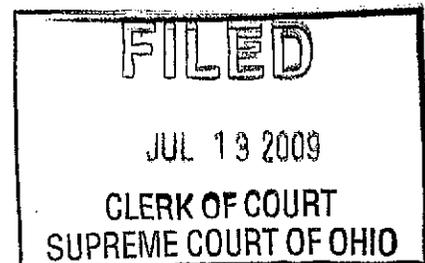


TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION	1
STATEMENT OF THE CASE AND FACTS	3
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW	3
Proposition of Law No. 1: Is the State's failure to provide a out-of-state defendant with the statutes and procedural rules he must submit his claims under on appeal, violates the defendant's Due Process and Equal Protection rights as set-forth by the Fourteenth Amendment to the United States Constitution, when the State bar the defendant a opportunity to have his claims heard on appeal for failing to file timely, although the defendant demonstrated he had no knowledge that such statutes and procedural rules existed due to a inadequate law library, and the State's refusal to provide him such information upon request; and if so, does such a state-created impediment establishes good cause for untimely filings?	3, 4
CONCLUSION	7
CERTIFICATE OF SERVICE	7

APPENDIX

	<u>Appx. Page</u>
OPINION OF THE EIGHTH DISTRICT COURT OF APPEALS (May 29, 2009)	1
JUDGMENT ENTRY OF THE EIGHTH DISTRICT COURT OF APPEALS	1

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

This memorandum presents this Court with a opportunity to adjudicate the sufficiency of a prominent constitutional question that is attributable to great general interest and of public concern. Therein, it is adverted, that the State is unjustly depriving out-of-state defendants a opportunity to have their claims heard on appeal by depriving them access to the court. Specifically; Whether the State's failure to provide a out-of-state defendant with the statutes and procedural rules he must submit his claims under on appeal, violates the defendant's Due Process and Equal Protection rights as set-forth by the Fourteenth Amendment to the United States Constitution, when the State bar the defendant a opportunity to have his claims heard on appeal for failing to file timely, although the defendant demonstrated he had no knowledge that such statutes and procedural rules existed due to a inadequate law library, and that the State failed to provide him such information upon request; and if so, does such a state-created impediment establishes good cause for untimely filings?

In calling the Court's attention to set precedent in regard to the equal protection and due process that must be afforded to defendants imprisoned out-of-state. Also to have this Court set precedent as to what exactly establishes good cause for untimely appeals, and the analysis that should be applied when determining such. Whereas, the U.S. Supreme Court made evident that the states "must assure ... defendant[s] an adequate opportunity to present his claims fairly." Ross v. Moffitt, 417 U.S. 600, 616 (1974), and "meaningful access" to the court is a touchstone. Id.

Although it is unarguable to say, the State does not provide an accuse the opportunity to present his claims fairly with unlimited access to the court on

direct review. Where the State, afford the accuse with the right to competent counsel to properly present prejudicial errors that occurred within the proceedings. However, it could be arguable to say that, out-of-state defendants are without the unlimited access to the court and have unequalable resources to obtain information regarding what statutes and procedural rules that apply when exhausting appellate remedies in collateral proceedings, as those defendants imprisoned in Ohio or out-of-state defendants who are able to employ an attorney with the resources he lacks.

On the contrary, an indigent out-of-state defendant, who is confined in a prison that law library is inadequate and does not provide the accuse with the very statutes and rules he must submit his claims under, could result in a injurious effect. Particularly, when the accuse acts in due diligent and discover the existence of an available appellate vehicle, but has already exceeded the applicable time-frame, which renders the appeal courts to deny review for failure to comply with such time-limit. Thus, results in a denial of due process of law and equal protection.

The constitutional principles of due process and equal protection form the basis for the requirement, that the State expand resources in support of a convicted defendant's right to appeal, whether direct review or collateral review. Therefore, the State cannot adopt procedures which leave out-of-state defendants entirely cut off from any appeal at all, by virtue of his lack of means. The State chose to establish appellate review in collateral proceedings, therefore, it may not foreclose access of that procedure by hindering the accuse from discovering the existence of such a procedure. The Due Process Clause, at a minimum, requires that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing. Lack of notice, inadequate law library, and the State's refusal to provide the accuse of very statute and

rules it used to bar the accused his opportunity to be heard, is the opposite of that mandated by the Due Process Clause.

STATEMENT OF THE CASE AND FACTS

This case arises out of Cuyahoga County Court of Common Pleas, wherein, the Petitioner was indicted for one count of felony murder, three counts of kidnapping, one count of aggravated robbery, one count of grand theft motor vehicle, six counts of felonious assault, one count of drug possession, and one count of carrying a concealed weapon, each count containing a one and three year firearm specification.

Petitioner entered a plea of not guilty and went forward with a jury trial. Prior to trial the State dismissed the drug count. Thereafter, the jury found Petitioner guilty of all counts except for two kidnapping counts. Petitioner filed a timely notice of appeal with the Eighth District Court of Appeals. On August 31, 2006, the Appeals Court affirmed Petitioner's conviction but vacated his sentence and remanded for resentencing, which has yet to take place.

On March 2, 2009, the Petitioner filed a Delayed Appellate Rule 26(B) application to reopen direct appeal, and a petition for Post-Conviction Relief. The petition for post-conviction relief is still pending before the trial court, and the Court of Appeals denied Petitioner's App.R. 26(B) application for failing to make a showing of good cause for his untimely filings on May 29, 2009.

Petitioner now wishes to attest the Appeal Court's findings in the denial of his App.R. 26(B) application within this Court's jurisdiction. In support of this contention, Petitioner submits the following argument.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Is the State's failure to provide a out-of-state

defendant with the statutes and procedural rules he must submit his claims under on appeal, violates the defendant's Due Process and Equal Protection rights as set-forth by the Fourteenth Amendment to the United States Constitution, when the State bar the defendant a opportunity to have his claims heard on appeal for failing to file timely, although the defendant demonstrated he had no knowledge that such statutes and procedural rules existed due to a inadequate law library, and the State refusal to provide him such information upon request; and if so, does such a state-created impediment establishes good cause for untimely filings?

Due Process, emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. Equal Protection, on the other hand, emphasizes disparity in treatment by the State between classes of individuals whose situation are arguably indistinguishable. Ross v. Moffitt, 417 U.S. 600, 616 (1974). The Petitioner was afforded neither due process of law or the treatment of equality in the denial of his Appellate Rule 26(B) application to Reopen Direct Appeal.

Therein, the Petitioner, in a delayed application to reopen direct appeal, asserted he was deprived of effective assistance of appellate counsel, and raised eleven constitutional errors that appellate counsel failed to raise on direct appeal. Petitioner also made a substantial showing of good cause for failing to file timely. Wherein, he present by affidavit and letters; that he is imprisoned out-of-state in a federal prison in Lewisburg, Pennsylvania, that does not and is not required to provide him with Ohio law books; that he is without the statutes and procedural rules pertaining to the filing requirements of App.R. 26(B); that he has been acting diligently in trying to obtain such information through various sources within the Ohio judicial tribunal; that the State refused to provide him with Ohio law books, or in the alternative, inform him of the available appellate remedies afforded him and it's procedural rules; and he had just recently discovered that Ohio App R. 26(B) application to reopen direct appeal existed, and immediately filed upon discovery. The Court determined

Petitioner's showing does not constitute good cause for failing to comply with the applicable time-frame.

In barring Petitioner's claims from being heard, the Appellate Court held, that lack of knowledge and inadequate law libraries is not an excuse for Petitioner's untimely filings, (citing precedent cases). However, the Court's analysis and reliance on precedent case law, in denying Petitioner's App.R. 26(B) application was error for a number of reasons.

Particularly; after it was determined that the circumstances of Petitioner's case differentiate from those defendants imprisoned within the state of Ohio, the Court should have conducted a fact-basis analysis, rather than rely on precedent case law. Whereas, a defendant imprisoned in Ohio, could hardly allege he is without a adequate law library, and that such inadequate law library prevented him from discovering the existence of any applicable collateral remedy. Nor would lack of knowledge excuse such a defendant of his untimely filings. Where it is well established, that a state must provide defendants held in their custody, with a adequate law library to help facilitate access to the courts for the accused, see Younger v. Gilmore, 404 U.S. 15 (1972), which could be ascertain the State complied with such mandate.

While on the other hand, however, a defendant in the Petitioner's situation, who is imprisoned out-of-state in the custody of another sovereignty, and without the funds to employ an attorney; who alleges he had no knowledge of the very statute he seeks relief from due to a inadequate law library, that his only source for discovering the statute at the time was if the State provided him such; (which the State failed to do so), the Court would have to determine; (1) whether the defendant's place of confinement, in fact, does not provide him with the statute he alleges to have no knowledge of; (2) whether there was any other alternative for the accuse to discover the statute's existence; (3) whether the

accused acted diligently in trying to obtain such information; (4) if in fact, the State failed to provide the accuse with such information upon request; (5) whether the accuse was prejudice by the State's actions; and (6) the time-frame it took the accuse to file for relief once discovering the statute's existence.

Although Ohio has a liberal analysis for evaluating what might constitute good cause for a untimely appeal, the analysis enumerated here, is more so, the most seemingly evaluation when determining the rare and exceptional circumstances of a defendant in Petitioner's situation. Especially so, where it is evident that untimely filings is sometimes beyond their control and unavoidable although acting in due diligent.

While it is true, Ohio has a mandatory rule that is applicable when filing for relief pursuant to App.R. 26(B), and that out-of-state defendants is non-excludable from abiding by this rule, nevertheless, if it is found to be true that the Petitioner was hindered from discovering this rule by an act that is totally beyond his control, then, the Petitioner was not afforded due process of law. Furthermore, if it is found to be true that the State refused to provide the Petitioner with this rule due to his place of confinement and whose custody he is under, then, the Petitioner was not afforded the equal protection as guaranteed by the U.S. Constitution. Especially so, where the Petitioner has been punished in a court of law in the state of Ohio for violating it's laws.

Both equal protection and due process emphasize the central aim of our entire judicial system - all people charged with crime must, so far as the law is concerned, "stand on an equality before the bar of justice in every American court." Chambers v. Florida, 309 U.S. 227, 241 (1940).

The State "cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate

tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed." Griffin v. Illinois, 351 U.S. 12, 23 (1956).

The Court's expression in Griffin is precisely the miscarriage of justice that resulted in the Petitioner's case when the State foreclosed him his opportunity to be heard in his App.R. 26(B) application. Which is a infringement of the constitutional safeguard of equality and due process of law. Had the State provided Petitioner with the statutes and rules it used to bar him appellate review when asked for, it would be fair to assume, that the Petitioner would have complied with the statutory time period imposed.

CONCLUSION

In accordance with the Due Process Clause and Equal Protection Clause as set forth by the Fifth, and Fourteenth Amendments to the United States Constitution, and the substantial constitutional question that is of great general interest and of public concerns, submitted in this memorandum, Petitioner respectfully request that this Court exercise it's jurisdiction in this matter to set right this miscarriage of justice imposed by the Cuyahoga County and the Eighth District Court of Appeals.

In exercising this Court's jurisdiction, Petitioner respectfully request this Court to review the merits of those claims submitted in his App.R. 26(B) application, which are the following:

- (1) Ervin's Sixth, and Fourteenth Amendments Confrontation Clause right were violated;
- (2) Trial counsel was ineffective for failing to object to Ervin's Sixth, and Fourteenth Amendments Confrontation Clause right being violated;
- (3) Appellate counsel was ineffective for failing to raise each Confrontation Clause violation;
- (4) Ervin' Fifth, Sixth, and Fourteenth Amendments were violated when the trial court denied Ervin's request for a expert witness to present a meaningful defense, violating his Compulsory Process Clause and Due Process Clause rights;
- (5) Ervin's Fifth, Sixth, and Fourteenth Amendments Due Process Clause, Grand

- Jury Clause, and Fair Trial rights were violated when the trial court tried and sentenced him to a defective indictment;
- (6) Trial counsel was ineffective for failing to object to Ervin's Due Process Clause, Grand Jury Clause, and Fair Trial rights being violated when trial court tried and sentence him to a defective indictment;
 - (7) Ervin's Fifth, and Fourteenth Amendments Double Jeopardy right violated when the trial court sentenced him to consecutive offense for the same offense;
 - (8) Trial counsel was ineffective for failing to object to Ervin's Double Jeopardy right being violated;
 - (9) Ervin' Fifth, and Fourteenth Amendments Double Jeopardy right were violated when the trial court sentenced him for two similar allied offenses;
 - (10) Trial counsel was ineffective for failing to object and eliciting evidence about Ervin's prior convictions and other acts of wrongdoing, violating his Fifth, Sixth, and Fourteenth Amendments Due Process, Fair Trial, and Effective Assistance of Counsel rights; and
 - (11) Ervin's Fifth, Sixth, and Fourteenth Amendments Due Process, Equal Protection, and Effective Assistance of Counsel rights were violated when the State and appellate counsel failed to supply him a copy of his trial transcripts.

Each of these claims shows a substantial infringement of constitutional rights and errors that occurred throughout the trial proceedings. Petitioner also suggest in the alternative of this Court granting jurisdiction in this case, that this Court remand his case back to the Eighth District Court of Appeals, with instruction for that Court to review Petitioner's claims on it's merits.

In the interest of justice, it is so requested,

Respectfully submitted,

Gary D. Ervin
Gary D. Ervin

CERTIFICATE OF SERVICE

It is hereby certified that a true and complete copy of the foregoing was sent to William D. Mason (Respondant), at 1200 Ontario Street, Cleveland, Ohio 44113, by delivering the same to the proper prison officials here at USP Lewisburg, this 2 day of July, 2009, first-class postage prepaid.

Duly sworn,

Gary D. Ervin
Gary D. Ervin

APPENDIX

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87333

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GARY ERVIN

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 419164
LOWER COURT NO. CR-448726
COMMON PLEAS COURT

RELEASE DATE: May 29, 2009

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COLLEEN CONWAY COONEY, A.J.:

Gary Ervin has filed an application for reopening pursuant to App.R. 26(B). Ervin is attempting to reopen the appellate judgment in *State v. Ervin*, Cuyahoga App. No. 87333, 2006-Ohio-4498, which affirmed his convictions for felony murder, kidnapping, aggravated robbery, grand theft motor vehicle, felonious assault, and carrying a concealed weapon, but vacated the sentences and remanded for resentencing. We decline to reopen Ervin's appeal.

App.R. 26(B)(2)(b) requires that Ervin 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 Supreme Court of Ohio, with regard to the 90-day deadline 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.” (Emphasis added.) *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, at ¶7.

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; and *State v. Reddick*, 72 Ohio St.3d 88, 1995-Ohio-249, 647 N.E.2d 784.

Ervin is attempting to reopen the appellate judgment that was journalized September 11, 2006. His application for reopening was not filed until March 2,

2009, more than 90 days after journalization of the appellate judgment in *Ervin*. He has failed to establish “a showing of good cause” for the untimely filing of his application for reopening, since an inadequate law library, ignorance of the law, and reliance on counsel do not demonstrate good cause. *State v. Arcuri* (April 29, 2004), Cuyahoga App. No. 84435, reopening disallowed, 2009-Ohio-1083. See, also, *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; and *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.

Accordingly, the application for reopening is denied.


COLLEEN CONWAY COONEY,
ADMINISTRATIVE JUDGE

SEAN C. GALLAGHER, J., and
KENNETH A. ROCCO, J., CONCUR

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

MAY 29 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY  DEP.