

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-2204

STATE OF OHIO, : S.C.T. CASE NO. _____
PLAINTIFF/APPELLEE, : APP. NO. 2008CA0051
vs. : TRL. NO. 2007CR1021
WILLIAM R. ELSON, : ON APPEAL TO THE SUPREME COURT
DEFENDANT/APPELLANT. : OF OHIO, FROM THE COURT OF AP-
PEALS, RICHLAND COUNTY, FIFTH
APPELLATE DISTRICT OF OHIO.

MEMORANDUM IN SUPPORT OF JURISDICTION

ON BEHALF OF APPELLANT:

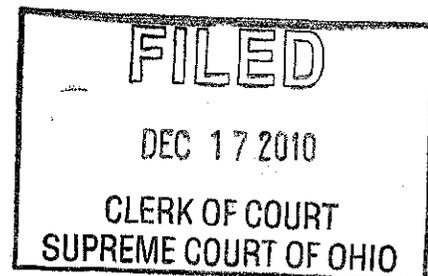
WILLIAM R. ELSON, #544-160
PICKAWAY CORRECTIONAL INST.
P.O. BOX 209
ORIENT, OHIO 43146

(PRO SE FOR APPELLANT)

ON BEHALF OF APPELLEE:

RICHARD COUNTY PROSECUTOR
OFFICE OF THE COUNTY PROSECUTOR
38 SOUTH PARL STREET
MANSFIELD OHIO 44902

(COUNSEL FOR APPELLEE)



BRIEF SUMMARY OF THE CASE AND FACTS

Defendant/Appellant, William R. Elson, on January 10, 2008, was indicted by the Richland County Grand Jury on four counts of criminal child enticement in violation of R.C. 2905.05; four counts of attempted kidnapping in violation of R.C. 2923.02 and R.C. 2905.01, and four counts of attempted kidnapping with sexual motivation specifications in violation of R.C. 2923.02, R.C. 2905.01, and R.C. 2941.147. All charges arose from several incidents wherein appellant allegedly drove up to four juveniles and them to "get in" if they wanted money.

A jury trial commenced on April 3, 2008. At the conclusion of the trial, the State of Ohio/Appellee, "dismissed" the "sexual motivation specifications" attached to the four attempted kidnapping counts. The jury found appellant guilty of all the remaining counts. On April 10, 2008, the trial "merged" the kidnapping counts and sentenced appellant to an aggregate term of thirty-two years in prison.

Appellant perfected a timely appeal to the Richland County Court of Appeals, Fifth Appellate District, raising One (1) Single Assignment of Error through Appellate Counsel. The Court of Appeals upheld the conviction and Overruled the Single Assignment of Error raised by appellate counsel. State v. Elson, (5th Dist. Mar. 26th, 2009), Richland App. No. 2008 CA 0051, 2009 WL 818754, 2009-Ohio-1481.

Appellant sent letters to his appellate attorney, asking his attorney: (1) If the appeal had yet been decided? And (2) Asking appellate counsel to send him the trial court transcript records. Appellate Counsel failed to respond to any of the letters sent to appellate counsel. As a result in breakdown in communication between counsel and Elson, resulted in a conflict of interest and structure error. Appellant did not even find out that his direct appeal was overruled and denied.

Appellant immediately filed an Application for Reopening of his direct appeal as soon as he discovered that his appellate counsel failed to contact this Appellant.

Notwithstanding the fact that Appellant was not notified of the Court of Appeals decision, the court of Appeals filed an entry dated on November 2010, ruling the Application for Reopening was time barred. Appellant is now before the Supreme Court of Ohio on a Memorandum In Support of Jurisdiction, seeking leave to appeal as a discretionare appeal, as it pertains to a felony conviction; And as a claimed appeal as of right, as it raises a substantial constitutional question.

According to the Constitution of the State of Ohio, mandates that, in cases where a defendant has raised a substantial constitutional question, automatically invokes the jurisdiction of the Ohio Supreme court.

WHEREFORE, this defendant/appellant respectfully moves the Supreme Court of Ohio to GRANT Appellant's request, seeking jurisdictional review on appeal, stemming from Appellant's Application for Reopening.

SUBSTANTIAL CONSTITUTIONAL QUESTION
GROUND FOR GRANTING JURISDICTION REVIEW

As noted in the forgoing "Propositions of Law," appellant states that his 1st, 6th, 8th, and 14th Amendment Right to Access To The Courts; Effective Assistance of Counsel on Direct Appeal and at Trial; The Right to be free from Cruel and Unusual Punishment; And The Right to Due Process and Equal Protection of the Law, was violated by the Richland County Court of Cmmn Pleas, and the Richland County Court of Appeals. Thus, Appellant states that Jurisdiction Review is necessary as mandated by the U.S. Constitution.

FIRST PROPOSITION OF LAW

DEFENDANT/APPELLANT WAS DEPRIVED OF HIS 6TH AND 14TH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL, AS WELL OF TO APPELLANT'S RIGHT TO ACCESS TO THE COURTS, IN VIOLATION OF THE 1ST AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS A RESULT OF: (a) APPELLATE COUNSEL FAILED TO NOTIFY AND/OR CONTACT THE DEFENDANT/APPELLANT OF THE FACT THAT HIS DIRECT APPEAL HAD BEEN RULED ON; AND (b) AS A RESULT OF THE FACT THAT THE CLERK OF THE COURT OF APPEALS FAILED TO NOTIFY OR CONTACT THE APPELLANT THAT THE COURT OF APPEALS HAD RULED ON AND DECIDED HIS APPEAL. AS A RESULT OF THESE FAILURE(S) TO NOTIFY AND/OR CONTACT APPELLANT, WAS THE DIRECT REASON AS TO WHY APPELLANT FAILED TO TIMELY FILE A DIRECT APPEAL WITH THE OHIO SUPREME COURT; AND PREVENTED APPELLANT FROM BEING ABLE TO TIMELY FILE AN APPLICATION FOR REOPENING WITHIN THE STATUTORY 90-DAY TIME PERIOD.

In the present case, Appellant's attorney on direct appeal, did not contact or notify this defendant that his direct appeal was decided. The Court of Appeals ruled on and decided Appellant's Direct Appeal, in a decision decided on March 26, 2009. See: State vs. Elson, (5th Dist. Mar. 26th, 2009), Richland App. No. 2008 CA 0051, 2009 WL 818754, 2009-Ohio-1481. However, as a result of the fact that neither appellate counsel, nor the Clerk of Court of appeals, inform or notify and/or contact this Appellant for purposes of notifying this Appellant of the Court of Appeals, was the reason which prevented this appellant from filing a "timely appeal" with the Supreme Court of Ohio, and for purposes of filing a "timely application" for reopening. Thus, as a result of this failure to contact, violated the Appellant's right

to access to the Courts; and violated Appellant's 6th and 14th Amendment Right to "effective" assistance of counsel on direct appeal.

It should be noted that the United States Court of Appeals, Sixth Circuit, recently ruled that, in cases where an appellate attorney fails to contact his client of the appellate court's decision, constitutes "ineffective" assistance of counsel. See: Smith vs. Ohio Dept. Of Rehab., (6th Cir. 2006), 463 F.3d 426, 431-436.

Appellant states that he first learned, through another inmate named Ted Marcum, by looking on the West Law Computer that a decision was decided. Ted Marcum told me this in January, 2010. I immediately wrote a letter to appellate counsel (Mr. William Fithian, III) asking if my appeal had been decided. I never received a reply or response. I also wrote letters to the Clerk of the Court of Appeals and to the Ohio Public Defenders Office. I receive a response a copy of the Court of Appeals from the Clerk in a response dated on March 22, 2010. I immediately filed a motion for leave to appeal with the Ohio Supreme. The Supreme Court of Ohio denied my motion for leave to file a delayed appeal in an ORDER dated on May 26, 2010. See: State vs. Elson, (2010), 125 Ohio St.3d 1436, 927 N.E.2d 9. Thus, I assert that "good cause" is shown, for purposes of filing a delayed application for reopening, in light of the fact that my appellate counsel on direct appeal failed to notify me, which caused the delay. Thus, reopening of the direct appeal should be found well taken.

SECOND PROPOSITION OF LAW

APPELLANT WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL, AND OF RIGHT TO ACCESS TO THE COURTS, IN VIOLATION OF THE 1ST, 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS RESULT OF THE FACT THAT APPELLATE COUNSEL ON DIRECT APPEAL FAILED TO PROVIDE THE TRIAL COURT TRANSCRIPT RECORD OF PROCEEDINGS OVER TO THIS INDIGENT APPELLANT, WHICH PREVENTED THIS APPELLANT FROM BEING ABLE TO TIMELY FILE AN APPEAL WITH THE SUPREME COURT OF OHIO, AND TO FILE A TIMELY APPLICATION FOR REOPENING OF THE APPEAL. THUS, APPELLANT'S RIGHTS WERE VIOLATED AS A RESULT OF APPELLATE COUNSEL'S FAILURE TO GIVE THE TRANSCRIPT RECORD OVER APPELLANT.

Appellant is an indigent offender. He was represented by court appointed counsel at arraignment as well as on direct appeal. In Griffin vs. Illinois, (1956), 351 U.S. 12, the U.S. supreme Court held that, to satisfy the dictates of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, a State may not condition a defendant's exercise of a right to appellate review upon his ability to pay for that right. Id. at: 18-20. In Britt vs. North Carolina, (1971), 404 U.S. 226, 227, the U.S. Supreme Court held that "[t]he State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal." Id. at: 227.

In Greene vs. Brigano, (6th Cir. 1997), 123 F.3d 917, the Sixth Circuit GRANTED federal habeas corpus relief to the petitioner in that case as a result of the fact that: (a) Appellate Counsel "withdrew" from the appeal; (b) Appellate Counsel never furnished a copy of the record to the Petitioner in that case (for purposes of filing a pro se brief); and (c) The trial court never provided the pro se applicant in that case with the trial court transcript record. The Sixth Circuit found that, as a matter of constitutional law, the petitioner in that case was entitled to receive the transcript record. The same applies here. Appellant/Elson has never been given the transcript record to assist him on filing an appeal or an application for reopening.

THIRD PROPOSITION OF LAW

APPELLANT'S 6TH AND 14TH AMENDMENT RIGHTS TO A FAIR TRIAL, AS WELL AS TO APPELLANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL AND AT TRIAL WERE VIOLATED, AS A RESULT OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, RESULTING FROM APPELLATE COUNSEL'S FAILURE TO RAISE THE SPECIFIC CLAIM THAT THE APPELLANT WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL, DUE TO EXTENSIVE NEWS COVERAGE, AND DUE TO THE TRIAL COURT'S FAILURE TO GRANT THE APPELLANT'S MOTION FOR A CHANGE OF VENUE.

Appellant states that his appellate counsel on direct appeal was ineffective, below an objective standard of reasonableness, as a result of appellate counsel's failure to raise, on direct appeal, a claim that the appellant was deprived of his constitutional right to a fair trial, based on news media, and due to the fact that the trial court denied trial counsel's motion requesting a change of venue.

The Ohio Supreme Court set forth the established law on both of these particular claims. See: State vs. Roberts, (2006), 110 Ohio St.3d 71, 850 N.E. (2nd) 1168 (Holding: that a trial court's order denying a motion for a change of venue, will be reversed only in cases where the trial court "abused its discretion:" and further holding that, in order to be given a new trial based on pretrial publicity, "prejudice must be shown.") Id. at: 85, 86, 850 N.E.2d at, 1182, 1183. However, the U.S. Supreme Court found that extensive pretrial publicity, does "prejudice" the defendant, thus, entitling the defendant to a new trial. See: Sheppard vs. Maxwell, (1966), 384 U.S. 333, 86 S.Ct. 1507.

In the present case, a number of jurors stated that they saw news coverage of the extensive news shown about Appellant's case. Appellant was deprived of his right to a fair trial, as well as to his right to effective appellate counsel, resulting from appellate counsel's failure to raise this claim.

FOURTH PROPOSITION OF LAW

APPELLANT WAS DEPRIVED OF HIS 6TH AND 14TH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL, RESULTING FROM THE FACT THAT APPELLATE COUNSEL, ON DIRECT APPEAL, FAILED TO RAISE A CLAIM THAT (a) THE DEFENDANT'S CONVICTION WAS NOT PROVEN BEYOND A REASONABLE DOUBT, AND IS BASED ON INSUFFICIENT EVIDENCE; AND (b) THAT THE JURY'S VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

When a reviewing court assesses the sufficiency of the evidence, "[t]he relevant inquiry is whether, after viewing the evidence in light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." State vs. Jenks, (1991), 61 Ohio st.3d 259, 574 N.E.2d 492, paragraph of the syllabus, following Jackson vs. Virginia, (1979), 443 U.S. 307. When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. State vs. Thompkins, (1997), 78 Ohio St.3d 380, 387 (Citing Tibbs vs. Florida, (1982), 457 U.S. 31, 42).

In the present case, Appellant states that there was "conflicting testimony" at trial. Appellant further states that: (a) The prosecution failed to prove, beyond a reasonable doubt, the Eight (8) Counts that the jury returned guilty verdicts on; and (b) Appellant states that his conviction, on all eight counts, are predicated on insufficient evidence, and are against the manifest weight of the evidence. Appellant additionally states that his appellate counsel on direct appeal, was ineffective, for failing to raise these assignments of errors, on direct appeal, in violation of the 6th and 14th Amendments.

FIFTH PROPOSITION OF LAW

APPELLANT WAS DEPRIVED OF HIS 6TH AND 14TH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL, AS A RESULT OF APPELLATE COUNSEL'S FAILURE TO: (a) CHALLENGE THE "SUGGESTIVE PHOTO ARRAY" SHOWN TO THE ALLEGED VICTIM'S; AND (b) DUE TO APPELLATE COUNSEL'S FAILURE TO RAISE, ON DIRECT APPEAL, A CLAIM TO THE EFFECT THAT TWO ALLEGED VICTIM'S WHO SAW THE "PHOTO ARRAY," PICKED THE PERSON IN NUMBER "6." (I WAS IN PHOTO NUMBER "2")

When a witness has been confronted with a suspect before trial, due process requires a court to suppress her identification of the suspect if the confrontation was unnecessarily suggestive of the suspect's guilt and the identification was unreliable. Neil vs. Biggers, (1972), 409 U.S. 188; State vs. Waddy, (1992), 63 Ohio St.3d 424, 438. The key question is whether: (1) the identification made was "reliable;" and (2) If not, whether the photo array process (suggestiveness) created "a very substantial likelihood of irreparable injury." See: Simmons vs. United States, (1968), 390 U.S. 377, 384.

In the present case, two of the alleged misidentified me during the photo array process (they picked the person in Nummer "6" [I was in photograph number "2"]). Secondly, the victims saw news coverage on t.v., in news papers, and heard news coverage on the radio. Additionally, the victims seen me going to court appareances; and the photo array itself was suggestive.

On direct appeal, my appellate counsel never challenged the mistaken identity; nor did my appellate counsel challenge the fact that the photo array was unduely suggestive. Thirdly, my appellate counsel never challenged the fact that the victims identified me only after having seeing, hearing, and reading extensive news media of my case. Thus, my right to effective assistance of counsel on direct appeal was violated as a result of these facts.

SIXTH PROPOSITION OF LAW

APPELLANT WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, ON DIRECT APPEAL, IN VIOLATION OF THE 6TH AND 14TH AMENDMENT RIGHTS, AS A RIGHT OF APPELLATE COUNSEL'S FAILURE TO RAISE A CLAIM THAT THE PROSECUTING ATTORNEY COMMITTED PROSECUTORIAL MISCONDUCT, BY MISLEADING WITNESSES; LEADING THE WITNESSES TESTIMONY; AND BY STANDING BEHIND THE APPELLANT POINTING DOWN AND SAYING "IS THIS THE MAN?!" AND BY USING INFLAMMATORY ARGUMENTS AND STATEMENTS TO THE JURY'S PASSIONS.

At trial, the prosecutor pointed down, from behind me, asking the witnesses "Is this the man?!" This was intimidation, and threatening gestures, that made it seem to appear that there could be no mistake in the identity. This point-blank range of identification, amounted to "leading the witnesses" in violation of the 6th and 14th Amendment rights to a fair and impartial trial.

The general rule in prosecutor misconduct cases is whether the prosecutor's conduct was so egregious as to violate the defendant's due process rights under the fourteenth amendment. If the court finds such misconduct occurred, then the defendant's conviction must be reversed, unless there was overwhelming competent evidence of guilt. See: Mostrade vs. Engle, (N.D. Ohio, 1980), 507 F.Supp. 402.

In the present case, the prosecutor's actions were grossly egregious, and severely prejudicial to the due process rights of the defendant, as guaranteed by the Fourteenth Amendment to the United States Constitution. It must be noted that the prosecution failed to offer proof, beyond a reasonable doubt, to prove each and every essential "element" of his case. Thus, Defendant's conviction rests upon insufficient evidence. Secondly, contradictory testimony was presented at trial, creating a manifest weight claim; and thirdly, the prosecutor committed so many prosecutorial misconduct violations, through physical and verbal gestures, and arguments, to inflame the prejudices and passions of the jury, for no other reason but to deny the defendant of his right to a fair trial. Thus, appellate counsel on direct appeal was ineffective for not raising this claim.

SEVENTH PROPOSITION OF LAW

APPELLANT WAS PREJUDICIALLY DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL, AS A RESULT OF APPELLATE COUNSEL'S FAILURE TO RAISE CLAIMS THAT: (a) APPELLANT'S MULTIPLE CONSECUTIVE SENTENCES, VIOLATE THE EIGHTH AMENDMENT RIGHT TO BE FREE FROM "CRUEL AND UNUSUAL PUNISHMENT;" (b) THAT THE SENTENCE IMPOSED IN THIS CASE, VIOLATES OHIO'S SENTENCING LAWS, AS DEFINED BY STATUTE, RESULTING FROM THE TRIAL COURT'S FAILURE TO MAKE THE MANDATORY-STATUTORY FINDINGS ON THE RECORD, PRIOR TO IMPOSING MULTIPLE CONSECUTIVE SENTENCES; AND (c) APPELLATE COUNSEL ON DIRECT APPEAL, WAS INEFFECTIVE, FOR FAILING TO RAISE A CLAIM THAT TRIAL COUNSEL'S ASSISTANCE WAS INEFFECTIVE, AS A RESULT OF TRIAL COUNSEL'S FAILURE TO RAISE AN OBJECTION IN OPPOSITION THE MULTIPLE-CONSECUTIVE SENTENCES, WHICH WERE IMPOSED IN VIOLATION OF FEDERAL AND STATE LAWS. THUS, APPELLANT'S 6TH, 8TH AND 14TH AMENDMENT RIGHTS WERE VIOLATED, AS A RESULT OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

First, it must be noted that a case is currently pending before the Ohio Supreme Court pertaining to the question whether a trial court is required to make statutory findings on the record, prior to imposing consecutive sentences. *State vs. Hodge*, Ohio S.Ct. Case No. 2009-1997; See, e.g., *State vs. Howell*, (July 22, 2010), Cuyahoga Appeal, 2010 WL 2377826 (Noting that the Ohio Supreme Court has accepted for review, the Hodge case on consecutive sentences). secondly, the U.S. Supreme Court stated in *Oregon v. Ice*, (2009), 129 S.Ct. 711, that a trial court has "common law" authority to make "findings on the record" when imposing "consecutive sentences." It is assumed that the holding in *Ice*, will be applied in the holding in *Hodge*, thus finding error on the part of the trial court's of this State, for failing to make the necessary statutory findings on the record, prior to imposing consecutive sentences, as required by Ohio Rev. sec. 2929.14(B). It is further noted that, a defendant is presumed to receive the least severe punishment for a first time offender offense, who had not committed the worst form of

the offense. Moreover, it has long been the law that a sentence which "shocks" community standards, and/or is "disproportionate" to the offense committed, violates the Eighth Amendment Right to be free from Cruel and Unusual Punishment. See: State vs. Chaffin, (1972), 30 Ohio St.2d 13, 282 N.E.2d 46. The Eighth Amendment prohibits the infliction of cruel and unusual punishments. See: Hutto vs. Finney, (1978), 437 U.S. 678.

In the present case, Appellate Counsel, on direct appeal, was ineffective below an objective standard of reasonableness, for failing to raise claims: (a) That Appellant's multiple/consecutive sentences, without making the necessary statutory findings on the record, violated Ohio's Sentencing Laws; And, thus, was contrary to law; (b) Appellant's Counsel was ineffective for failing to raise a claim that Appellant's multiple consecutive sentences, "shocks community standards," and, thus, amounts to Cruel and Unusual Punishments, and, thus, is gravely "disproportionate" to the nature of the alleged offenses committed, which Appellant was accused of committing; and (c) Appellate Counsel was ineffective, as a result of appellate counsel's failure to raise a claim that the Appellant's trial attorney, at trial and at sentencing, was ineffective, for failing to raise objections, which violated Appellant's 6th and 14th Amendment Rights to Effective Assistance of Counsel at trial, and on direct appeal.

WHEREFORE, for all of the above mentioned reasons, the Supreme Court of Ohio is asked to GRANT Jurisdictional Review, from Appellant's Application for Reopening, which the fifth District Court of Appeals DENIED on

(12)

November 30, 2010.

CONCLUSION

For all of the above mentioned reasons, the Ohio Supreme Court is asked to Accept Jurisdictional Review, on all Propositions of Law. Appellant states that he has raised Substantial Constitutional Claims for Relief, which entitles this Appeal to be heard as a matter of right.

Accordingly, Appellant prays for Judgment which GRANTS review to be heard in the Ohio Supreme Court as a matter of right.

Very Respectfully Submitted,



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CERTIFICATE OF SERVICE

This is hereby to verify that a true exact photo copy of the forgoing Memorandum In Support of Jurisdiction, has hereby been served upon the Richland County Prosecuting Attorney, at: 38 South Park Street, Mansfield, Ohio 44902, on the 15th of December, 2010, by: regular U.S. Mail, postage preaffixed.



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IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

COURT OF APPEALS
RICHLAND COUNTY OHIO
FILED

2010 NOV 30 AM 10:16
LINDA E. FRARY
CLERK

STATE OF OHIO

Plaintiff-Appellee

-vs-

WILLIAM R. ELSON

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 2008CA0051

This matter is before this court upon appellant's application for reopening pursuant to App.R. 26(B). Pursuant to App.R. 26(B), an application for reopening shall be filed "within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time." The appellate judgment herein was filed on March 26, 2009. Appellant filed his motion on September 1, 2010, outside the ninety day time period.

Appellant argues his appellate counsel failed to inform him of this court's decision therefore, he was unable to timely file his motion for reopening. However, in his motion, appellant explains he first learned of the decision in January 2010 when a fellow inmate found it on Westlaw. Appellant then sent a letter to the Clerk of Courts and received a copy of the decision on March 22, 2010.

Appellant first learned of the decision in January of 2010 and received a copy of it on March 22, 2010. Even going with the latter date, appellant's motion for reopening is untimely pursuant to App.R. 26(B).

Upon review, we find no showing of good cause for the late filing. App.R. 26(B)(2)(b).

Appellant's application for reopening of appeal is denied.

Julio J. Torres

Julio A. Edwards

Patricia A. Delaney

JUDGES