

IN THE SUPREME COURT OF OHIO

Supreme Court Case No. 06-1502

STATE OF OHIO

Appellee

v.

CLARENCE FRY, JR.

Appellant

On Appeal from the Summit
County Court of Common Pleas
Case No. 05 08 3007

CAPITAL CASE

**STATE'S OPPOSITION TO APPELLANT'S
APPLICATION FOR REOPENING**

SHERRI BEVAN WALSH
Prosecuting Attorney

HEAVEN DIMARTINO #0073423 (Counsel of Record)
Assistant Prosecuting Attorney
Appellate Division
Summit County Safety Building
53 University Avenue, 6th Floor
Akron, Ohio 44308
(330) 643-7459
Fax (330) 643 2137
Email dimartino@prosecutor.summitoh.net

Counsel for Appellee, State of Ohio

TIMOTHY F. SWEENEY #0040027 (Counsel of Record)
Law Office of Timothy Farrell Sweeney
The 820 Building
820 West Superior Ave., Suite 403
Cleveland, Ohio 44113-1800
(216) 241-5003

Counsel for Appellant, Clarence Fry, Jr.

RECEIVED

OCT 08 2012

**CLERK OF COURT
SUPREME COURT OF OHIO**

FILED

OCT 08 2012

**CLERK OF COURT
SUPREME COURT OF OHIO**

**STATE'S OPPOSITION TO APPELLANT'S
APPLICATION FOR REOPENING**

Pursuant S.Ct. Prac. R. 11.6, Fry's Motion for Reopening must be denied.

ARGUMENT

First, the State contends that the defendant's motion to reopen must be denied because it was not timely filed. S.Ct. Prac.R. 11.6 states that an appellant in a death penalty case may apply for reopening of the appeal based on a claim of ineffective assistance of appellate counsel in the Supreme Court but the application must be filed "within ninety days from the issuance of the mandate of the Supreme Court, unless the appellant shows good cause for filing at a later time." S.Ct. Prac.R. 11.6(A). The Supreme Court's mandate was issued on March 23, 2010. As such, Fry's application for reopening is clearly outside the ninety day time period.

Fry argues that his motion for reopening is timely because it was filed within ninety days of the Ninth District Court of Appeals' decision on his Motion for Post-Conviction Relief, which was issued on June 13, 2012. Fry's assertion is incorrect. The Supreme Court Rules of Practice clearly state that the ninety-day time period runs from the issuance of the mandate of the Supreme Court, not ninety days from the date of an appellate court's decision. As such, Fry's motion is not timely.

In the alternative, Fry argues that he has shown good cause for filing his motion two years later than the time period set forth in S.Ct. Prac. R. 11.6, because he filed the motion for reopening of his direct appeal within ninety days of the appellate court's decision regarding the trial court's denial of his motion for post-conviction relief. The State disagrees.

Fry could have contacted the public defender's office immediately after this Court ruled on his direct appeal and, at that time, could have attempted to raise his claims of ineffective assistance of counsel. The appellate court's recent ruling on Fry's appeal from the trial court's

denial of his motion for post-conviction relief has absolutely no bearing on Fry's failure to timely move the court to reopen his direct appeal.

In the Ninth District Court of Appeals decision, the court overruled thirteen of the fourteen grounds upon which Fry sought relief, which included claims of ineffective assistance of counsel. The Court found that, with one exception, Fry's claims were barred by *res judicata* and/or were without merit. The appellate court remanded the matter for the trial court to consider one claim finding that the trial court erred in determining that particular claim was barred by *res judicata* but the appellate court said was not barred. Specifically, the court of appeals remanded the matter to the trial court solely for it to consider evidence, outside the record, that Fry contends supports his claim that he was not allowed to testify at trial. However, the Court of Appeals did not find that the Fry's ground for relief had merit. Instead, the court simply found that the trial court had erred by finding that the claim was barred by *res judicata* and remanded so that the trial court could assess the credibility of the evidence, which is outside the record, as it relates to Fry's claim that he was not permitted to testify at trial.

As such, neither the trial court nor the court of appeals has determined that any of Fry's claims of ineffective assistance have merit. The trial court hearing to assess the credibility of the evidence *de hors* the record has not yet been held. Thus, at this point, there is nothing more than speculation as to how the trial court will rule on the credibility of the evidence supplied by Fry. Consequently, the appellate court's ruling does not provide good cause for Fry's untimely application for reopening of his direct appeal.

Moreover, after the trial court rules on the issue on remand, Fry's remedy is to appeal the trial court's decision to the court of appeals, assuming that the decision is adverse to Fry. Filing an untimely motion to reopen a direct appeal in the Supreme Court is not a proper remedy.

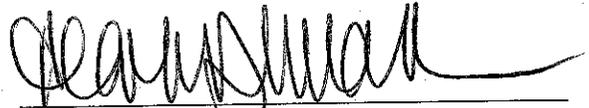
Finally, even assuming that Fry demonstrated good cause as to why his motion was not timely filed, this Court must still deny his motion to reopen. In his motion, Fry argues that appellate counsel were ineffective by failing to raise five issues on direct appeal. Since the *Strickland* test is the appropriate standard for assessing a motion for reopening, Fry must prove that his counsel were deficient for failing to raise the issues that he now presents, as well as showing that had he presented those claims on appeal, there was a “reasonable probability” that he would have been successful. See, e.g., *State v. Reed* (1996), 74 Ohio St.3d 534, 535. Fry bears the burden of establishing that there was a “genuine issue” as to whether he has a “colorable claim” of ineffective assistance of counsel on appeal. *State v. Spivey* (1998), 84 Ohio St.3d 24, 25. Fry has failed to present a colorable claim of ineffective assistance of counsel on any of the numerous issues raised by the defendant.

Furthermore, it is well-settled that appellate counsel can cast away weaker arguments when arguing a case before an appellate court. *Jones v. Barnes*, 463 U.S. 745, 751-752 (1983); *Smith v. Murray* (1986), 477 U.S. 527, 536. Fry has not shown prejudice from his appellate counsel’s failure to raise these issues before the court of appeals.

Fry’s motion for reopening is untimely. Fry has failed to show good cause for the untimeliness. Moreover, a motion for reopening is not the proper procedural remedy. The proper remedy in this case is to allow the trial court to have a hearing as directed on remand from the court of appeals with regard to the credibility of the evidence, which is outside the record. Then, after the trial court issues its decision and the trial court’s decision is not favorable to Fry, the remedy at that time is to appeal the trial court’s decision.

Respectfully submitted,

SHERRI BEVAN WALSH
Prosecuting Attorney



HEAVEN DIMARTINO
Assistant Prosecuting Attorney
Appellate Division
Summit County Safety Building
53 University Avenue, 6th Floor
Akron, Ohio 44308
(330) 643-8539
Reg. No. 0073423

PROOF OF SERVICE

I hereby certify that a copy of the foregoing was forwarded by regular U.S. First Class Mail to Attorney Timothy F. Sweeney, The 820 Building, 820 West Superior Avenue, Suite 430, Cleveland, Ohio 44113-1800, on this fifth day of October, 2012.



HEAVEN DIMARTINO
Assistant Prosecuting Attorney
Appellate Division