

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : Case No. **13-1691**
 Plaintiff-Appellee : On Appeal from the Court of Appeals
 vs. : Third Appellate District, Crawford County
 MICHAEL R. WEESE : CA Case No. 3-10-0013
 Defendant-Appellant :

**MEMORANDUM OPPOSING JURISDICTION
 OF APPELLEE STATE OF OHIO**

Michael R. Weese, Inmate # 583018
 Lorain Correctional Institute
 2075 S. Avon-Belden Road
 Grafton, OH 44044
 Defendant-Appellant, Pro Se

COUNSEL FOR THE APPELLANT

MATTHEW E. CRALL, ESQ. – 0075047
 Crawford County Prosecuting Attorney
 RYAN M. HOOVLER, ESQ.
 Assistant Prosecuting Attorney - 0073078
 Crawford County Prosecutor's Office
 112 E. Mansfield Street – Suite 305
 Bucyrus, OH 44820
 Phone: (419) 562-9782
 Fax: (419) 562-9533
 ryanh@crawford-co.org

COUNESL FOR APPELLEE

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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

The Defendant is appealing the Third District Court of Appeals decision in *State v. Michael R. Weese*, 3rd District No. 3-10-13 to deny the Defendant/Appellant application for a delayed appeal. The application was untimely and the defendant was unable to show good cause why it was filed untimely. The Court further found that the three additional assignments of error raised in the application did not set forth any genuine issue as to whether Appellant was deprived of the effective assistance of counsel on appeal. Accordingly, this is not a matter of great public concern, nor does it involve a substantial constitutional question.

STATEMENT OF THE CASE AND THE FACTS

On November 9, 2009, the Defendant/Appellant was indicted by the Crawford County Grand Jury in Case 09-CR-0179 for one count of Aggravated Burglary, O.R.C. 2911.11(A)(1), a felony of the first degree, one count of Aggravated Robbery, O.R.C. 2911.01(A)(3), a felony of the first degree, and one count of Felonious Assault, O.R.C. 2903.11(A)(1), a felony of the second degree. On January 21, 2010, the Defendant/Appellant with his counsel, J. Andrew Motter, Esq., entered a no contest plea, to all three counts as stated in the indictment. On March 31, 2010 the trial court denied a motion of “merger” made by the Defendant/Appellant and sentenced the Defendant/Appellant to 10 years prison on count I, 10 years prison on count II, and 8 years prison on count three; all consecutive for a total of 28 years prison.

On April 27, 2010 a notice of appeal was filed by Defendant/Appellant and the Third District Court of Appeals denied the appeal and upheld the trial court’s decision on November 22, 2010. Over two years and eight months later, the Defendant/Appellant filed a “Delayed

Application for Reopening” pro-se on August 26, 2013. On September 13, 2013, the Third District Court of Appeals denied the defendant’s application for delayed appeal. On October 29, 2013, the Defendant filed a notice of appeal in the Supreme Court of Ohio.

AGRUGMENT

The Defendant/Appellant has failed to argue why the Third District was wrong for denying his delayed appeal application. Instead he goes on in his First and Second Proposition of Law to argue the merits of his anticipated Third District Appeal argument. Without demonstrating a reason to have his delayed appeal heard, the Defendant/Appellant does not have the opportunity to argue the merits of his appeal at the Ohio Supreme Court level.

Response to First and Second Proposition of Law:

The application for a delayed appeal was untimely and the defendant is unable to show good cause why it was filed untimely. The Defendant/Appellant in his Motion for a “Delayed Application for Reopening”, states the following reasons for the Court to allow the delayed filing:

“I would not have been so confused if my Court Appointed Attorney Geoffrey L. Stoll would have acted within his professional manner. Mr. Stoll was performing in an unprofessional manner in two ways. One, Stoll caused me so much confusion because he never sent me any notification of my appeal status letting me know that he had lost my appeal and that he was done representing me any further.

Two, Stoll’s unprofessional manners are the sole reasons that my application for reopening is being filed delayed. I could have filed in a

timely manner if Stoll would have informed me he was done representing me. He failed to do this so now, I have filed this delayed application.”

Appellate Rule 26 states the burden for applications for reconsideration.

“(B) Application for reopening”

(1) “A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.”

(b) “A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.”

The Defendant/Appellant corroborates his argument for good cause by conveniently only mentioning two letters he received from his appellant counsel. According to Defendant/Appellant’s own argument, if Appellant counsel notified him of the decision of the Third District Court of Appeals, dated on November 22, 2010, the Defendant/Appellant would not have any cause to file an over two and half year old application for reopening. There is no actual record kept of Appellate counsel’s correspondence with the Defendant/Appellant. It is hard to believe that after 90 days or even six months elapsing, the Defendant/Appellant would not start questioning the status of his appeal. Instead he argues that only after two years his concern reached a level to write his counsel a letter. This argument seems to be only self-serving to try to file yet another appeal in this case.

In Defendant/Appellant’s assignments of error in support of his delayed application, the Defendant/Appellant is trying to raise the following arguments:

- 1) "Trial Counsel Andrew Motter was ineffective for not requesting Relief from Prejudicial Joinder from Co-Defendants that made prejudicial statements against defendant-appellant."

This case did not proceed to a jury or bench trial. The Defendant/Appellant pled no contest. There seems to be no harm in this argued misconduct by trial counsel.

- 2) "Trial Counsel Andrew Motter was ineffective for not raising Allied Offenses for the convictions of, Agg. Robbery & Agg. Burglary, to which they are Allied Offenses of similar import. AND

"The offenses of Agg. Robbery & Agg. Burglary are Allied Offenses of similar import within the contemplation of O.R.C. 2945.25(A) and the separate convictions violate Appellant's rights against Double Jeopardy."

These issues were the main issues argued and decided at the trial level. The Defendant/Appellant pled no contest and argued at sentencing that the three counts were allied offenses of similar import. The trial court disagreed and sentenced the counts individually and consecutively. The Third District Court of Appeals upheld the trial court's decision in a decision filed on November 22, 2010. There seems to be no basis to argue ineffective assistance of counsel when counsel did exactly what he is argued by the Defendant/Appellant of not doing.

There are no reasons set forth in Defendant/Appellant's Delayed Application for Reopening that show a good cause of why the appeal needs to be re-opened. The Defendant/Appellant's arguments have already been heard by the Trial Court and upheld by the Third District Court of Appeals. The ineffective assistance of appellate counsel is non-existent and does not rise to the level to allow a two and half year old Application for Reopening to be granted.

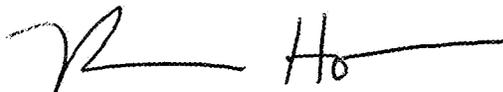
For these reasons, Defendant/Appellant's Application for Reopening should be denied.

CONCLUSION

The Defendant/Appellant has failed to argue why the Third District was wrong for denying his delayed appeal application. Instead he goes on in his First and Second Proposition of Law to argue the merits of his Third District Appeal argument. Without demonstrating a reason to have his delayed appeal heard, the Defendant/Appellant does not have the opportunity to argue the merits of his appeal at the Ohio Supreme Court level.

Respectfully submitted,

MATTHEW E. CRALL
COUNTY PROSECUTOR



Ryan M. Hoover – 0073078
Assistant County Prosecutor
Counsel of Record
112 E. Mansfield Street – Suite 305
Bucyrus, OH 44820
419-562-9782
419-562-9533 (Fax)

CERTIFICATE OF SERVICE

I hereby certified that a copy of the foregoing MEMORANDUM OPPOSING JURISDICTION OF APPELLEE STATE OF OHIO was served by depositing it in the United

States Mail addressed to Michael R. Weese, Inmate # 583018, Lorain Correctional Institute,
2075 S. Avon-Belden Road, Grafton, OH 44044 on this ____ of November 2013.

By: 

Ryan M. Hoovler -- 0073078
Assistant County Prosecutor

COUNSEL FOR THE APPELLEE