

IN THE SUPREME COURT OF OHIO

14-1884

STATE OF OHIO

CASE NO.

Appellee/Respondent

ON APPEAL FROM THE EIGHTH APPELLATE DISTRICT OF OHIO

-vs-

PATRICK WILLIAMS,

COURT OF APPEALS CASE NO. 90845, MOTION NO. 475308

Appellant/Petitioner

MEMORANDUM IN SUPPORT OF JURISDICTION

ADAM CHALOUPKA ASSISTANT COUNTY PROSECUTOR CUYAHOGA CTY. PROSECUTOR OFFICE 1200 Ontario St. - 9th Floor Cleveland, Ohio 44113 Counsel for Respondent

GREGORY S. ROBEY #0055746 ROBEY & ROBEY 14402 Granger Road Cleveland, Ohio 44137 (216) 581-8200 Counsel for Petitioner

CERTIFICATE OF SERVICE

A copy of this motion was SENT to the Prosecutor on this 10/29/2014.

GREGORY S. ROBEY

Handwritten signature of Gregory S. Robey

RECEIVED OCT 30 2014 CLERK OF COURT SUPREME COURT OF OHIO

FILED OCT 30 2014 CLERK OF COURT SUPREME COURT OF OHIO

MEMORANDUM IN SUPPORT OF JURISDICTION

**I. ISSUES PRESENTED FOR REVIEW**

**A. WHETHER THE LOWER COURT ERRED IN FINDING THAT PETITIONER FAILED TO ESTABLISH GOOD CAUSE FOR UNTIMELY FILING OF A MOTION TO REOPEN APPEAL**

Appellate Rule 26(B) provides that a motion to reopen appeal must be filed within 90 days from journalization of the appellate court judgement, unless the applicant shows *good cause* for filing at a later time.

In this case, and in all others like it, when an applicant does demonstrate good cause for a late filing, to wit: Petitioner, who was just 17 years old at the time, was never notified by counsel of the appellate decision denying his appeal, nor of the option of possibly filing to reopen his appeal; but the lower court erred and finds a failure to demonstrate same; the interests of justice are not served and the rights of all Ohio citizens are endangered.

The proposition of law on this issue, which Petitioner urges the Court to adopt is:

1. In a motion to re-open appeal, where the applicant demonstrates good cause for late filing, due to tender age and detrimental reliance upon appellate counsel; re-opening should be granted by the lower court.

**B. WHETHER APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN SPECIFICALLY FAILING TO RAISE THE ISSUE OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, FOR FAILING TO MOVE FOR A MISTRIAL BASED UPON THE STATE'S IMPROPER ATTACK UPON THE DEFENSE ALIBI.**

It is well established that an accused is entitled to effective assistance of appellate counsel.

In the case at bar, and all other cases like it, when appellate counsel is ineffective, the interests of justice are not served and the rights of all Ohio citizens are endangered.

The proposition of law on this issue, which Petitioner urges the Court to adopt is:

2. An accused is entitled to effective assistance of assistance of appellate counsel, in order to raise a *specific* assignment of error relating to ineffective assistance of trial counsel in failing to move for a mistrial.

**C. WHETHER APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN SPECIFICALLY FAILING TO RAISE THE ISSUE OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, FOR FAILING TO LITIGATE A MOTION TO SUPPRESS IDENTIFICATION EVIDENCE.**

It is long established that an accused is entitled to effective assistance of appellate counsel.

In the case at bar, and all other similar cases, when appellate counsel is ineffective, the interests of justice are not served and the rights of all Ohio citizens are endangered.

The proposition of law on this issue, which Petitioner urges

the Court to adopt is:

3. An accused is entitled to effective assistance of appellate counsel, in order to raise a specific assignment of error relating to ineffective assistance of trial counsel in failing to litigate a motion to suppress identification evidence.

**D. WHETHER APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO RAISE THE ISSUE OF PROSECUTORIAL MISCONDUCT THAT IS SUPPORTED BY THE RECORD.**

It is well established that an accused is entitled to effective assistance of appellate counsel.

In the case at bar, and all other cases like it, when appellate counsel is ineffective, the interests of justice are not served and the rights of all Ohio citizens are endangered.

The proposition of law on this issue, which Petitioner urges this court to adopt is:

4. An accused is entitled to effective assistance of appellate counsel in order to raise the issue of prosecutorial misconduct, that is supported by the record.

**II. STATEMENT OF FACTS**

The Cuyahoga County grand jury indicted Petitioner on five counts: aggravated murder, murder, and three counts of felonious assault. All contained one and three year firearm specifications.

On the evening of December 30, 2006, the victim, Tynell Anderson, and his girlfriend, Erika Wright, walked to Dave's Supermarket at East 40<sup>th</sup> Street and Quincy Ave. At the supermarket, Erika Wright and Martese Williams, Petitioner's sister, got in to a fight. The fight was broken up by the victim, Tynell Anderson. Subsequently, Wright and Anderson, returned back to Wright's mother's home at Arbor Park Village. A short time later, Petitioner's mother came to the entranceway to Wright's home demanding to see Wright and Anderson. An argument ensued when Wright came to the entranceway.

At this point, Petitioner allegedly exited a car and walked past Wright and asked where the victim was at. Petitioner allegedly fired several shots as the victim attempted to flee back in to the house. Petitioner then allegedly returned to the car which drove off. The victim was later pronounced dead from multiple gun shot wounds.

At trial, issues were raised as to the identification of Petitioner and alibi. At the close of the State's case, a Crim. R. 29 acquittal was granted on one of the felonious assault counts. The defense did not present a case. The jury found Petitioner guilty of aggravated murder, murder, two counts of felonious assault and all firearm specifications. Petitioner was sentenced to an indefinite prison term of 23 years - life.

Petitioner timely appealed and his appointed counsel raised

four assignments of error: sufficiency of the evidence; manifest weight of the evidence; flight instruction to the jury; and ineffective assistance of trial counsel for failing to subpoena an alibi witness and for failure to question/challenge a prospective juror during voir dire.

Petitioner's convictions were affirmed on appeal.

Petitioner has been imprisoned continuously since February 22, 2007. Since that time he has had no personal contact with his appointed appellate lawyer. Although a notice of appeal and merit brief were filed on his behalf, he was not given copies of same, nor copies of the State's reply brief.

Petitioner's appeal was denied on April 30, 2009. However, he was never notified by his appellate lawyer that the appeal had been denied, and was not given a copy of the decision. Petitioner did not know the basis for the denial, nor was he aware of what assignment of errors that were raised. Further, his appellate lawyer never advised him of the option of appealing to the Ohio Supreme Court or moving to re-open the appeal pursuant to Rule 26(B). In short, not being a lawyer himself, *being only 17 years old* at the time of the trial, Petitioner relied upon his appellate lawyer to his detriment to raise all issues - yet this did not occur.

On May 29, 2014, Petitioner, through new counsel filed his motion to reopen appeal. A sworn statement of counsel was also

filed. Subsequently, this motion was denied. Petitioner now appeals that decision.

**III. STATEMENT OF THE LAW AND ARGUMENT**

**1. PROPOSITION OF LAW:**

**In a motion to re-open appeal, where the applicant demonstrates good cause for late filing, due to tender age and detrimental reliance upon appellate counsel; re-opening should be granted by the lower court.**

Petitioner respectfully contends that he demonstrated good cause for late filing of his motion to re-open appeal. First, Petitioner has been continuously imprisoned since February 22, 2007, shortly after the incident. He had very minimal contact with his trial lawyers and NO personal contact with his appointed appellate attorney. Second, Petitioner was never given a copy of the transcript, the appellate briefs or the appellate decision. He did not know the basis for the denial of his appeal or even the issues raised by his appellate counsel. He only found out through family members that his appeal had been denied. Third, Petitioner was never advised by his appellate lawyer, or anyone, that he had the option of moving to re-open the appeal. Lastly, being only 17 years old at the time, and having no prior experience with the criminal justice system, he detrimentally relied upon appellate counsel who ultimately failed him in this regard.

While it is true that misplaced reliance upon counsel and lack of communication with counsel, do not create good cause for

late filing, State v. Gray, 2012-Ohio-3565; there is a factual distinction to be drawn. In this case, there was not a simple lack of communication, but rather a TOTAL lack of any communication between Petitioner and appellate counsel. Further, this was not a case of misplaced reliance, but rather genuine reliance upon an appointed and well trained appellate counsel, by a 17 year-old who had been sentenced to LIFE IN PRISON. Simple logic begs the question - who was Petitioner supposed to rely upon in navigating the complicated waters of the appellate court?

Lastly, while it is true that lack of legal training does not establish good cause for late filing, State v. Mosley, 2005-Ohio-4137, this case is steps beyond a simple lack of legal training argument. In this case, Petitioner was just 17 years old, had limited education and no previous familiarity with the criminal justice system. Common sense alone begs the question - how could Petitioner be reasonably expected to know the filing and time requirements of Appellate Rule 26(B)? Knowing the speed limit is one thing, but knowing these complicated requirements is quite a different thing.

2. PROPOSITION OF LAW:

**An accused is entitled to effective assistance of assistance of appellate counsel, in order to raise a specific assignment of error relating to ineffective assistance of trial counsel in failing to move for a mistrial.**

Petitioner respectfully contends that appellate counsel

failed to raise the specific issue of ineffective assistance of trial counsel for failure to move for a mistrial based upon the State's unfair, deliberate and improper attack upon the defense alibi. This unfair, deliberate and improper attack upon the defense had a devastating effect upon the defense theory and undermined the credibility of defense counsel, thereby prejudicing Petitioner's right to a fair trial.

3. **PROPOSITION OF LAW:**

**An accused is entitled to effective assistance of appellate counsel, in order to raise a specific assignment of error relating to ineffective assistance of trial counsel in failing to litigate a motion to suppress identification evidence.**

Petitioner respectfully contends that appellate counsel failed to specifically raise the issue of ineffective assistance of trial counsel for failing to litigate a motion to suppress identification evidence.

In this case, there was only one eye witness to purportedly identify Petitioner through a photo array. Identification and alibi were the cornerstones of Petitioner's trial defense. Yet, trial counsel never challenged the circumstances surrounding the alleged pre-trial identification via photo array. As such, it was never determined whether or not the array and surrounding circumstances were unduly suggestive. This was a critical error by trial counsel that was never raised on direct appeal.

4. PROPOSITION OF LAW:

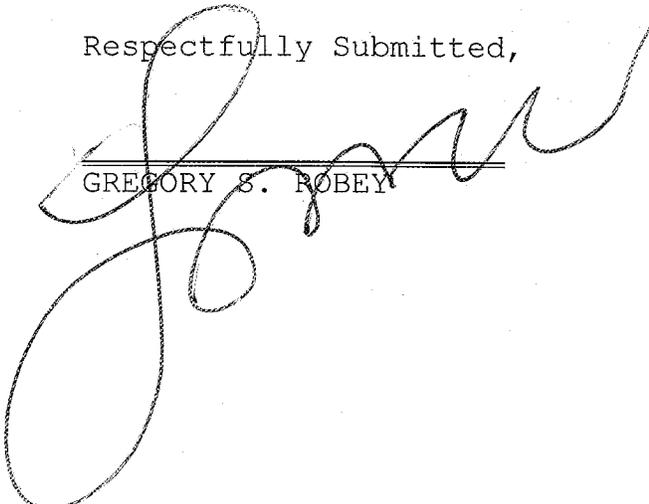
An accused is entitled to effective assistance of appellate counsel in order to raise the issue of prosecutorial misconduct, that is supported by the record.

Petitioner respectfully contends that appellate counsel was ineffective in failing to raise the issue of prosecutorial misconduct which was established in the record. Appellant incorporates and restates the argument set forth in Section III, Proposition of Law 1 above, as if fully rewritten here.

IV. CONCLUSION

For all the foregoing reasons, this Court should accept jurisdiction in this case in order to clarify the law of Ohio on this vital point, which is of great importance to not only Petitioner, but all others who will follow.

Respectfully Submitted,



~~GREGORY S. ROBEY~~

SEP 23 2014

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Andrea Rocco, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.  
90845

LOWER COURT NO.  
CR-07-494311-A

COMMON PLEAS COURT

-vs-

PATRICK WILLIAMS

Appellant

MOTION NO. 475308

Date 09/23/14

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Journal Entry

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Motion by appellant for leave to reopen appeal is denied. See journal entry and opinion of same date.

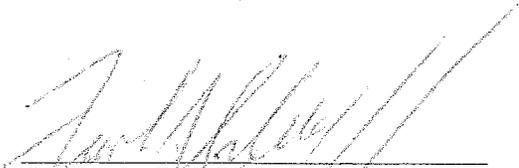
FILED AND JOURNALIZED  
PER APP.R. 22(C)

SEP 23 2014

CUYAHOGA COUNTY CLERK  
OF THE COURT OF APPEALS  
By                      Deputy

Judge KENNETH A. ROCCO, Concur

Judge EILEEN T. GALLAGHER, Concur

  
FRANK D. CELEBREZZE, JR.  
Presiding Judge

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 90845

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**PATRICK WILLIAMS**

DEFENDANT-APPELLANT

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**JUDGMENT:  
APPLICATION DENIED**

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Cuyahoga County Court of Common Pleas  
Case No. CR-07-494311-A  
Application for Reopening  
Motion No. 475308

**RELEASE DATE:** September 23, 2014

**ATTORNEY FOR APPELLANT**

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**ATTORNEYS FOR APPELLEE**

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

SEP 23 2014

CUYAHOGA COUNTY CLERK  
OF THE COURT OF APPEALS  
By                      Deputy

FRANK D. CELEBREZZE, JR., P.J.:

{¶1} Patrick Williams has filed an application for reopening pursuant to App.R. 26(B). Williams is attempting to reopen the appellate judgment, as rendered in *State v. Williams*, 8th Dist. Cuyahoga No. 90845, 2009-Ohio-2026, which affirmed his convictions for aggravated murder, murder, and felonious assault. For the reasons that follow, the application to reopen is denied.

{¶2} The appellate judgment was released on April 30, 2009, and journalized on May 11, 2009. The application for reopening was not filed until May 29, 2014. This falls well outside the time limits of App.R. 26(B)(1), which requires applications to be filed within 90 days after journalization of the appellate judgment. The only exception that would permit us to review an untimely application is if applicant establishes good cause for filing at a later time. *Id.*

{¶3} The Supreme Court of Ohio, with regard to the 90-day deadline provided by App.R. 26(B)(2)(b), has firmly established that

[c]onsistent 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.*, 455 U.S. 422, 437, 102 S.Ct 1148, 71 L.Ed.2d 265 (1982), and that is what Ohio has done by creating a 90-day deadline for the filing of applications to reopen. [The

applicant] 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, 1996-Ohio-52, 658 N.E.2d 722, and [the applicant] 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. 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, 653 N.E.2d 252 (1995); *State v. Reddick*, 72 Ohio St.3d 88, 647 N.E.2d 784 (1995).

{¶4} Applicant has failed to establish "good cause" for the untimely filing of his application for reopening. He maintains that there is good cause for his delayed filing because he has had "no personal contact" with his appointed appellate lawyer, and he did not receive copies of the appellate filings nor notice of the decision. Additionally, applicant asserts that he was only 17 years old at the time of the trial and relied on his appellate lawyer to raise all possible issues, to his detriment.

{¶5} Applicant cites no case that has found any of the foregoing grounds as good cause for an application to reopen that is filed approximately five years after the appellate decision was journalized. However, there is ample authority that has found these reasons do not establish good cause for an untimely application to reopen.

{¶6} Appellate counsel cannot be considered ineffective for failing to raise every conceivable assignment of error on appeal. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); *Gumm, supra*; *State v. Campbell*, 69 Ohio St.3d 38, 630 N.E.2d 339 (1994). The United States Supreme Court has upheld the appellate attorney's discretion to decide which issues he or she believes are the most fruitful arguments and the importance of winnowing out weaker arguments on appeal and focusing on one central issue or at most a few key issues. *Jones*.

{¶7} It is well settled that "neither misplaced reliance on counsel nor lack of communication between counsel and appellant provides good cause for a late filing of his application for reopening." *State v. Gray*, 8th Dist. Cuyahoga No. 92646, 2012-Ohio-3565, ¶ 3, citing *State v. Alt*, 8th Dist. Cuyahoga No. 96289, 2012-Ohio-2054; *State v. Austin*, 8th Dist. Cuyahoga No. 87169, 2012-Ohio-1338; *State v. Alexander*, 8th Dist. Cuyahoga No. 81529, 2004-Ohio-3861.

{¶8} Citing the applicant's young age is the equivalent of arguing that his ignorance of the law or lack of legal training and knowledge should establish good cause for the delayed filing. However, it is equally well established that these grounds do not provide good cause to allow review of an application that is filed five years beyond the deadline. *See State v. Mosley*, 8th Dist. Cuyahoga No. 79463, 2005-Ohio-4137, ¶ 4 ("it is well-established that a lack of legal

training does not establish 'good cause' for the untimely filing of an application for reopening").

{¶9} Applicant also "cannot rely on his own alleged lack of legal training to excuse his failure to comply with the deadline. 'Lack of effort or imagination, and ignorance of the law \* \* \* do not automatically establish good cause for failure to seek timely relief' under App.R. 26(B)." *LaMar*, 102 Ohio St.3d 467 at ¶ 9, quoting *Reddick*, 72 Ohio St.3d at 91.

{¶10} It is proper to deny applications for reopening solely on the basis that they are untimely filed and without good cause for the delay. *Gumm*, 103 Ohio St.3d 162, and *LaMar*. Applicant's failure to demonstrate good cause is a sufficient basis for denying his application for reopening. *See, e.g., State v. Almashni*, 8th Dist. Cuyahoga No. 92237, 2010-Ohio-898, *reopening disallowed*, 2012-Ohio-349.

{¶11} Applicant has not established good cause for filing an untimely application for reopening.

{¶12} Accordingly, the application for reopening is denied.

  
FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

KENNETH A. ROCCO, J., and  
EILEEN T. GALLAGHER, J., CONCUR