

IN THE SUPREME COURT OF OHIO
2015

STATE OF OHIO,

Case No. 15-30

Plaintiff-Appellee,

-vs-

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

RICKEY DYE,

Court of Appeals
Case No. 13AP-420

Defendant-Appellant

**MEMORANDUM OF PLAINTIFF-APPELLEE IN OPPOSITION
TO JURISDICTION**

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
STEVEN L. TAYLOR 0043876 (Counsel of Record)
Chief Counsel, Appellate Division
373 South High Street, 13th Floor
Columbus, Ohio 43215
Phone: 614-525-3555
Fax: 614-525-6103
E-mail: staylor@franklincountyohio.gov

COUNSEL FOR PLAINTIFF-APPELLEE

Rickey Dye
#679-767
P.O. Box 56
Lebanon, Ohio 45036

Pro se

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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

Defendant presents no compelling reason for why this Court should expend its scarce judicial resources to review his case. He presents his single proposition of law as if he were seeking review here on direct appeal. But this appeal comes from the denial of an application for reopening and therefore depends entirely on whether defendant can demonstrate appellate counsel ineffectiveness, an issue defendant barely acknowledges. Given that the issue of ineffectiveness overlays defendant's claim of evidentiary error, defendant's proposition of law is inapposite, since it does not take the issue of ineffectiveness into account.

Other problems would hinder review here. The State raised the issue that the court of appeals lacked jurisdiction to grant "reopening" a number of months after its judgment. In addition, defendant lacked "good cause" for filing the untimely application for reopening. These bars to review would hinder this Court's ability to reach the merits of defendant's claim of evidentiary error.

Defendant's proposition of law lacks merit anyway, as the admission of the evidence was subject to a plain-error analysis and defendant cannot show clear outcome determination. Nor can defendant show any error in the admission of the evidence, as the trial court did not abuse its discretion in allowing its admission. Defendant's appellate counsel was acting effectively in not raising this meritless issue.

This Court's resources would be better spent on other cases. Accordingly, the State respectfully requests that this Court decline jurisdiction in all respects.

STATEMENT OF THE CASE AND THE FACTS

The grand jury indicted defendant Dye on two counts of kidnapping and individual counts of aggravated burglary, aggravated robbery, rape, and abduction. The indictment alleged that the offenses occurred on February 2 and 3, 2012. All counts alleged that the same person, J.B., was victimized.

All but the abduction count included a repeat violent offender specification alleging that defendant had been convicted of aggravated robbery or kidnapping in Lake County in 1999.

The rape count and both kidnapping counts also alleged a sexually-violent-predator specification.

The jury found defendant guilty of all counts. In the bench trial on the specifications, the court found defendant guilty of the RVO specifications but not guilty of the sexually-violent-predator specifications.

The court imposed prison sentences totaling 28 years. The court entered its judgment of conviction on April 26, 2013.

Defendant appealed, with his appellate counsel raising four assignments of error: (1) insufficiency of evidence; (2) manifest weight; (3) failure to voir dire the jury on publicity during trial; and (4) admission of nurse's testimony that the facts gave her nightmares.

The Tenth District rejected all of the assignments of error and affirmed the convictions in a decision and judgment entered on March 20, 2014. *State v. Dye*, 10th Dist. No. 13AP-420, 2014-Ohio-1067. The State hereby incorporates by reference the

procedural and factual history as discussed in paragraphs two through eleven of that decision.

On September 25, 2014, defendant filed a “motion to re-open direct appeal,” citing App.R. 26(B). The State opposed the motion, and the Tenth District denied the motion in a memo decision on November 20, 2014.

ARGUMENT

Response to Proposition of Law: A defendant bears the burden of demonstrating that his appellate counsel was ineffective.

For the following reasons, the court of appeals was correct to deny the application for reopening.

A.

The Tenth District lacked jurisdiction. Section 3(B)(3), Article IV, of the Ohio Constitution states that “[j]udgments of the courts of appeals are final except as provided in section 2(B)(2) of this article.” Section 2(B)(2) in turn defines the Ohio Supreme Court’s appellate jurisdiction. This “final judgment” language has prompted this Court to state:

Section 3(B)(3) * * * provides that appellate judgments are final unless appealed as of right or by a request for this court’s discretionary review pursuant to Section 2(B)(2), Article IV, Ohio Constitution. The effect of this deadline is clear – if no such appeal is filed, the judgment is binding and no longer subject to the court of appeals’ jurisdiction to reconsider.

State, ex. rel. LTV Steel Co. v. Gwin, 64 Ohio St.3d 245, 249-50, 594 N.E.2d 616 (1992).

There is “no precedent that establishes a court of appeals’ jurisdiction to reconsider a

judgment after the deadline in Section 3(B)(3) * * *.” *Id.* at 250.

Since the deadline for a timely appeal to the Ohio Supreme Court had expired, granting “reopening” based on an untimely application for reopening would have violated the finality principle in Section 3(B)(3). In effect, Section 3(B)(3) assigns the review of appellate judgments to the Ohio Supreme Court. The Tenth District would have exceeded its jurisdiction if it had assumed that role and granted the “reopening.”

To the extent App.R. 26(B) attempts to expand the appellate court’s jurisdiction to do so, the rule is unconstitutional in light of Section 3(B)(3) and in light of the fact that procedural rules cannot regulate or extend a court’s jurisdiction, which is a “substantive” matter beyond the reach of the Supreme Court’s rule-making authority. Article IV, Section 5(B), Ohio Constitution; *State ex rel. Sapp v. Franklin County Court of Appeals*, 118 Ohio St.3d 368, 2008-Ohio-2637, 889 N.E.2d 500, ¶ 30 (subject matter jurisdiction “is substantive law rather than procedural”); *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872, ¶ 18 (jurisdictional statute is “substantive law of this state”).

This Ohio constitutional deadline is consistent with federal due process. The states can impose time limits on the assertion of federal constitutional rights. See *Michel v. Louisiana*, 350 U.S. 91, 97 & n. 4, 99 (1955). Courts have a responsibility “to assure finality to judgments. The purpose of a court is to resolve controversies, not to prolong them.” See *State v. Steffen*, 70 Ohio St.3d 399, 409 (1994). Ohio has the “inherent power to impose finality on its judgments.” *Id.* at 412.

B.

Another problem is untimeliness. The Tenth District entered its judgment of affirmance on March 20, 2014. Under App.R. 26(B)(1), the 90-day deadline for defendant's application was June 18, 2014. Defendant's motion/application was filed over three months after that deadline. Defendant therefore was required to make "[a] showing of good cause for untimely filing * * *." App.R. 26(B)(2)(b). Defendant failed to make such a showing.

Pro se status and ignorance of the law are not "good cause." A defendant has no right to counsel in the preparation of the application. *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110. Lack of effort or imagination and pro se status are insufficient to establish "good cause." *State v. Reddick*, 72 Ohio St.3d 88, 91 (1995). Ignorance of the law is not good cause. *State v. Forney*, 72 Ohio St.3d 563, 564 (1995); *State v. Franklin*, 72 Ohio St.3d 372, 373 (1995). "[R]eliance, even misplaced reliance, on appellate counsel does not constitute good cause for late filing." *State v. Sizemore*, 126 Ohio App.3d 143, 145 (1998).

A defendant is actually required to proceed pro se, if need be, even when the original appellate counsel is continuing to represent him. In *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, this Court stated the following:

{¶7} * * * 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.

{¶8} 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.

{¶9} To be sure, as Gumm contends, “counsel cannot be expected to argue their own ineffectiveness.” *State v. Davis* (1999), 86 Ohio St.3d 212, 214, 1999 Ohio 160, 714 N.E.2d 384. Other attorneys – or Gumm himself – could have pursued the application, however. Nothing prevented them or him from doing so, and in fact other attorneys did pursue federal habeas relief on Gumm’s behalf beginning in 1998. Those attorneys or others could have filed a timely application under App.R. 26(B) for Gumm in 1994.
* * *

{¶10} And Gumm himself 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). *State v. Reddick* (1995), 72 Ohio St.3d 88, 91, 1995 Ohio 249, 647 N.E.2d 784. 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 Gumm offers no sound reason why he – unlike so many other Ohio criminal defendants – could not comply with that fundamental aspect of the rule.

See, also, *State v. LaMar*, 102 Ohio St.3d 467, 2004-Ohio-3976, ¶ 7 (same). As further stated in *State v. Keith*, 119 Ohio St.3d 161, 2008-Ohio-3866:

{¶ 7} It is true, as Keith argues, that his counsel could not be expected to argue their own ineffectiveness. *State v. Davis* (1999), 86 Ohio St.3d 212, 214, 714 N.E.2d 384. But then, there is no right to counsel on an application to reopen. *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157, ¶ 21-22; *Lopez v. Wilson* (C.A.6, 2005), 426 F.3d 339, 352-353. Thus, lack of counsel cannot be accepted as good cause for the late filing of

Keith's application. See *State v. Twyford*, 106 Ohio St.3d 176, 2005-Ohio-4380, 833 N.E.2d 289, ¶ 8. As we explained in *Gumm* and *LaMar*, Keith could have attempted to obtain other counsel to file his application; failing that, he could have filed an application himself. "What he could not do was ignore the rule's filing deadline." *Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, ¶ 8.

Another problem arises from the fact that defendant never explained when he learned of the reopening procedure. At some point defendant obviously did learn of the procedure, but defendant did not explain when that discovery occurred. "Good cause can excuse the lack of a filing only while it exists, not for an indefinite period." *State v. Fox*, 83 Ohio St.3d 514, 516 (1998). Defendant's conclusory assertions in his application for reopening fell far short of providing "good cause" for missing the deadline by over three months.

C.

The two-pronged analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, is the appropriate standard to assess whether [the defendant] has raised a "genuine issue," as to the ineffectiveness of appellate counsel, in his request to reopen under App.R. 26(B)(5). To show ineffective assistance, [the defendant] must prove that his counsel w[as] deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims on appeal.

Moreover, to justify reopening his appeal, [the defendant] "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. Hill, 90 Ohio St.3d 571 (2001) (citations omitted). In assessing counsel competence, every effort must be made to avoid the distorting effects of hindsight.

Strickland, 466 U.S. at 690. An appellate counsel need not raise every non-frivolous issue. *Jones v. Barnes*, 463 U.S. 745, 752, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); *State v. Allen*, 77 Ohio St.3d 172, 173, 672 N.E.2d 638 (1996). The sole basis for allowing reopening is a genuine issue of appellate counsel ineffectiveness. App.R. 26(B)(5).

D.

Defendant asserts that his trial counsel was ineffective in failing to object to the qualifications of Sara Glass as an expert when she could not remember the exact numbers of PSA in semen and female urine. Glass was able to testify, however, that the testing is calibrated to the much higher levels reflective of PSA in semen. Although PSA can be found in fluids from females, it is at much lower concentrations in females, and the test used here will show a positive reaction only when the PSA is at levels that would be found in male fluid. (Vol. II, 131, 149) “The vaginal swabs were PSA positive, and our finding for that is ‘seminal fluid identified.’” (Id. 132) Glass characterized the result as a weak positive result but still strong enough to rule out female urine or other possible female sources for PSA. (Id. 149-50, 160-61)

The inability to remember the specific numbers did not make an abuse of discretion to allow this expert testimony. The inability to remember the exact numbers did not cast doubt on Glass’ overall expertise in being able to testify about large differences in PSA as between male semen and female urine. An objection by trial counsel would have been unlikely to succeed.

Defendant cannot show any reasonable probability of a different outcome in the appeal. The Tenth District affirmed the convictions after noting the strength of the

evidence in showing that J.B. was the victim of a violent attack. There was other DNA testing that yielded a partial major male contributor on the scarf used to tie up J.B., and that major contributor was consistent with defendant. And in denying the third assignment of error, the Tenth District noted the ample physical evidence supporting J.B.'s account of the crimes. Even if the Tenth District had been faced with a trial counsel ineffectiveness claim, there was no reasonable probability that the Tenth District would have sustained such a claim under both prongs of the *Strickland* standard.

Moreover, the proposition of law raised by defendant here focuses on a claim of evidentiary error in allowing the admission of the evidence, rather than trial counsel ineffectiveness in failing to object. Reviewed as a claimed evidentiary error, defendant's proposition of law would be judged under the high standards for plain error, since there was no objection preserving the issue for appeal. But defendant falls far short of showing that the admission of the evidence amounted to obvious error or that the "error" was clearly outcome determinative so as to create a manifest miscarriage of justice. All of the direct and circumstantial evidence pointed towards defendant's guilt.

Given the weakness of the trial-counsel-ineffectiveness claim, and given the further weakness of the claim of evidentiary error that defendant is now presenting in his proposition of law, appellate counsel could reasonably decide not to raise these arguments and could instead focus on other issues. Nor is there any indication that the outcome would have been different in the appeal if appellate counsel had raised these

weak and meritless arguments.

E.

In the final analysis, the application for reopening did not show that error occurred or that appellate counsel was ineffective. Nor did defendant show good cause for his untimely filing, and, in the end, the Tenth District lacked jurisdiction to grant reopening relief anyway.

Respectfully submitted,

/s/ Steven L. Taylor
STEVEN L. TAYLOR 0043876
Chief Counsel, Appellate Division
Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on January 22, 2015, to Rickey Dye, #679-767, P.O. Box 56, Lebanon, Ohio 45036.

/s/ Steven L. Taylor
STEVEN L. TAYLOR 0043876