

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

**JASON RAPHAEL AND
GREGORY CLAYTON,**

Defendant-Appellants.

Case No. 2015-1568

**On Appeal from the Twelfth
District Court of Appeals**

**Court of Appeals Case Nos.
CA2014-11-138
CA2014-11-139**

**STATE OF OHIO'S RESPONSE TO APPLICATION
FOR REOPENING AND TO MOTION FOR RELIEF**

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Defendant-Appellant,
Gregory Clayton

MEMORANDUM

A. Procedural Posture

In March 2014, Appellant Gregory Clayton and his co-defendant Jason Raphael were each indicted for trafficking in marijuana, a felony of the second degree. Clayton was also indicted for permitting drug abuse, a felony of the fifth degree. Clayton and Raphael filed motions to suppress the evidence found in a search of the vehicle and their persons along with their statements to police, which the trial court granted in part. The trial court suppressed the evidence seized as a result of the search of the vehicle and the evidence obtained from Clayton. The State appealed. In *State v. Raphael, et al.*, 12th Dist. Warren Nos. CA2014-11-138, CA2014-11-139, 2015-Ohio-3179, the Twelfth District Court of Appeals reversed the trial court's decision suppressing the marijuana seized from the search of the vehicle. *Id.* at ¶31.

Clayton and Raphael appealed the court of appeals' decision to this Court in September 2015. This Court accepted jurisdiction in January 2016.

On March 30, 2016, this Court dismissed the appeal for want of prosecution. Clayton and Raphael's merit brief was due for filing on March 23, 2016. They did not file one.

Following dismissal of the appeal, Clayton and Raphael filed a motion for reconsideration on March 31, 2016. They asked this Court to reconsider its dismissal of the case with an explanation for why they failed to file a merit brief. This Court denied the motion on May 18, 2016.

On October 11, 2016, Clayton, acting pro se, filed an application for reopening and a motion for relief. The State responds to both herein.

B. Law and Argument

S.Ct.Prac.R. 11.06 provides that “[a]n appellant in a death-penalty case involving an offense committed on or after January 1, 1995, may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel in the Supreme Court.” The deadline for filing such application is ninety days from the issuance of the mandate of the Supreme Court, “unless the appellant shows good cause for filing at a later time.” *Id.*

Clayton is not an appellant in a death-penalty case. Rather, his appeal was discretionary under S.Ct.Prac.R. 5.02. Consequently, he cannot avail himself of the remedy in S.Ct.Prac.R. 11.06.

Furthermore, even if Clayton’s application for reopening was properly before this Court, the application was filed on October 11, 2016, which is beyond the filing deadline of ninety days. This Court dismissed Clayton and Raphael’s appeal on March 30, 2016. To be timely, an application for reopening had to be filed on or before June 28, 2016. Clayton’s explanation for filing the application out of time is that counsel did not return his calls, and he only discovered that his appeal was dismissed when he took off work and visited the Warren County Clerk of Courts on September 27, 2016. His explanation does not establish good cause for his untimely application. Nothing prevented Clayton from visiting the clerk’s office sooner or accessing this Court’s online docket to determine the status of his case. Absent a showing of good cause, the State asks this Court to deny Clayton’s application for reopening.

The State also asks this Court to deny Clayton’s motion for relief. Clayton’s motion asks this Court to reverse its judgment entry dismissing his appeal and to afford him the opportunity to file a pro se merit brief. His reasons for the relief requested are the same as those asserted in

his application for reopening, i.e., that counsel did not return his calls, and he only discovered that his appeal was dismissed when he took off work and visited the Warren County Clerk of Courts on September 27, 2016. His motion does not explain why dismissal of his appeal was not justified. Nor does it explain why his counsel did not file a merit brief. That explanation was provided to this Court in Clayton's March 31, 2016 motion for reconsideration, which this Court rejected on May 18, 2016.

Clayton's remedy for this Court's dismissal of his appeal was a request for reconsideration. He made that request, and this Court denied it. He is not permitted successive, untimely requests for reconsideration under the guise of filing a motion for relief under S.Ct.Prac.R. 4.01. The State asks this Court to deny his motion for relief.

For the reasons set forth above, the State asks this Court to deny Clayton's application for reopening and his motion for relief, both of which were filed on October 11, 2016.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was sent via regular U.S. mail on this 8th day of November, 2016 to Appellant Gregory Clayton, 1720 Freeman Avenue, Cincinnati, Ohio 45214.



KIRSTEN A. BRANDT
Assistant Prosecuting Attorney