[Cite as *State v. Buggs*, 2009-Ohio-6628.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NOS. 06 MA 28
	)	07 MA 187
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION AND
	)	JUDGMENT ENTRY
KENNETH BUGGS	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Application for Reopening.

JUDGMENT: Overruled.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant:

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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: December 4, 2009

[Cite as *State v. Buggs*, 2009-Ohio-6628.]
WAITE, J.

{¶1} Appellant Kenneth Buggs has filed an Application for Reopening two appeals pursuant to App.R. 26(B). In the first, we affirmed Appellant's conviction on one count of attempted rape and four counts of gross sexual imposition, but we determined that there was an error in the sentencing procedure, and remanded the case for resentencing. *State v. Buggs*, 7th Dist. No. 06 MA 28, 2007-Ohio-3148. After the trial court reimposed the same 13-year prison term, Appellant filed another appeal dealing only with sentencing errors. We overruled the assignments of error and affirmed the sentence. *State v. Buggs*, 7th Dist. No. 07-MA-187, 2008-Ohio-4809, appeal not accepted for review 120 Ohio St.3d 1507, 2009-Ohio-361, 900 N.E.2d 624. Appellant is now alleging ineffective assistance of appellate counsel. Appellant contends that his counsel should have argued that he pleaded guilty to allied offenses of similar import and could have only been sentenced for either attempted rape or gross sexual imposition, but not both.

{¶2} Appellant's application was not filed within the time frame allotted by App.R. 26(B), and he gave no reason explaining why it was late. For this reason, we must reject this application for reopening. Furthermore, since Appellant entered a guilty plea to the various charges, he waived any argument on appeal regarding allied offenses. Appellate counsel committed no error in failing to raise a futile argument on appeal. Appellant's application is hereby overruled.

{¶3} Appellant pleaded guilty to one count of rape and four counts of gross sexual imposition on February 6, 2006. He was sentenced to five years for each count of gross sexual imposition, to be served concurrently. He was also sentenced

to eight years in prison for attempted rape, to be served consecutively, for a total prison term of thirteen years. He filed a direct appeal. On June 22, 2007, we affirmed the conviction, but reversed the sentence and remanded the case for resentencing. He was resentenced to the same thirteen-year sentence on September 28, 2007. Appellant filed another appeal, and we affirmed the sentence on September 18, 2008. Appellant filed a further appeal to the Ohio Supreme Court, but it was not accepted for review.

{¶4} Appellant filed this Application for Reopening on August 10, 2009. In an Application for Reopening, the defendant must set forth any assignments of error not considered on the merits or considered on an incomplete record due to appellate counsel's deficient representation. App.R. 26(B)(2)(c). The application shall be granted if there is a genuine issue as to whether the defendant was deprived of the effective assistance of counsel. App.R. 26(B)(5).

{¶5} App.R. 26(B)(1) states: "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." Appellant failed to meet this deadline, and provided no explanation why the application was filed many months after the time limit had expired. The 90-day requirement is "applicable to all appellants". *State v. Winstead* (1996), 74 Ohio St.3d 277, 278, 658 N.E.2d 722. An appellant's failure to offer a sound reason for not complying with the 90-day deadline is a sufficient reason for overruling an application for reopening. *State v. Hoffner*, 112 Ohio St.3d 467, 2007-

Ohio-376, 860 N.E.2d 1021, ¶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." *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, ¶7.

{¶6} Even if Appellant had filed his application within the 90-day time limit, it would fail. In *State v. Reed* (1996), 74 Ohio St.3d 534, 660 N.E.2d 456, the Ohio Supreme Court held that the two-prong analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, is the appropriate standard to apply when reviewing an application for reopening pursuant to App.R. 26(B). The appellant must prove that his counsel was deficient for failing to raise the issues he now presents, and must also show that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. The appellant bears the burden of establishing that there was a genuine issue as to whether there was a colorable claim of ineffective assistance of counsel on appeal. *State v. Spivey* (1998), 84 Ohio St.3d 24, 701 N.E.2d 696, certiorari denied (1999), 526 U.S. 1091, 119 S.Ct. 1506, 143 L.Ed.2d 658.

{¶7} Appellant cannot establish that the actions of his appellate counsel were constitutionally defective. Appellant pleaded guilty to the charges of attempted rape and gross sexual imposition. We have previously held that, "a defendant who pleads guilty to multiple charges cannot challenge the sentences on appeal based on the theory of allied offenses of similar import[.]" *State v. Swanson*, 7th Dist. No. 05

MA 79, 2006-Ohio-4957, ¶14. When a criminal defendant pleads guilty to two separate crimes, even if they are allied offenses, the court may impose separate punishment for each crime. *State v. Gopp*, 154 Ohio App.3d 385, 2003-Ohio-4908, 797 N.E.2d 531, ¶8; R.C. 2941.25(B). "[I]t is disingenuous for Appellant to enter into a plea bargain * * * and then to complain on appeal that he cannot be sentenced for the additional charge that was part of the plea bargain." *State v. Hooper*, 7th Dist. No. 03 CO 30, 2005-Ohio-7084, ¶20. Any attempt by Appellant's counsel to try to reduce the prison term on the basis of allied offenses of similar import would have been pointless because it is contrary to clearly established law.

{¶8} Appellant's Application for Reopening was filed late and fails to present any deficiency in counsel's performance that would warrant further review. For these reasons, the application for reopening is overruled.

Waite, J., concurs.

Donofrio, J., concurs.

DeGenaro, J., concurs.