

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA**

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, :  
 : No. 110633  
 v. :  
 :  
 DAVID VITUMUKIZA, :  
 :  
 Defendant-Appellant. :

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**JOURNAL ENTRY AND OPINION**

**JUDGMENT: APPLICATION DENIED**  
**RELEASED AND JOURNALIZED: December 29, 2023**

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Criminal Appeal from the Cuyahoga County Court of Common Pleas  
Case No. CR-20-651784-A  
Application for Reopening  
Motion No. 570411

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***Appearances:***

Michael C. O'Malley, Cuyahoga County Prosecuting  
Attorney, and Alan F. Dowling, Assistant Prosecuting  
Attorney, *for appellee*.

David Vitumukiza, *pro se*.

ANITA LASTER MAYS, A.J.:

{¶ 1} Applicant, David Vitumukiza (“Vitumukiza”), seeks to reopen his  
appeal in *State v. Vitumukiza*, 8th Dist. Cuyahoga No. 110633, 2022-Ohio-1170.

Vitumukiza claims that appellate counsel was ineffective for not advancing a claim that trial counsel offered constitutionally ineffective representation during and after a change-of-plea hearing where Vitumukiza ultimately pled guilty to charges of rape, gross sexual imposition, pandering obscenity, felonious assault, kidnapping, and tampering with evidence. We deny the application because it is untimely without a showing of good cause.

## I. Facts and History

{¶ 2} Vitumukiza, along with his wife and friend, were charged in a 24-count indictment that arose from an incident where Vitumukiza engaged in sexual conduct with an unconscious female victim that was recorded and shared on social media. Vitumukiza pled guilty to six counts, for which he received an aggregate 18-year minimum sentence.

{¶ 3} On appeal, Vitumukiza's appointed counsel raised three assignments of error:

I. The trial court failed to substantially comply with Criminal Rule 11 by failing to advise appellant on the effect of a guilty plea prior to accepting the plea.

II. The trial court erred in imposing consecutive sentences.

III. The trial court erred in imposing an indefinite term as the Reagan Tokes law violates appellant's constitutional right to Due Process under the Fourteenth Amendment to the United States Constitution and Article I, Section Ten of the Ohio Constitution.

{¶ 4} In a decision issued April 7, 2022, this court overruled these assigned errors, affirmed Vitumukiza's convictions, and remanded the case to the trial court

to issue a nunc pro tunc entry to incorporate the consecutive-sentence findings into the sentencing entry that the trial court made at the sentencing hearing.

{¶ 5} On November 13, 2023, Vitumukiza filed the instant application for reopening. There, he asserted that appellate counsel was ineffective for not arguing that trial counsel rendered ineffective assistance during the plea process. Specifically, Vitumukiza asserted that there was a complete breakdown in communication due to language barriers and trial counsel misinformed Vitumukiza that if he did as counsel instructed, he would be going home. Instead, Vitumukiza argues that he was sentenced to 18 years in prison.

{¶ 6} The state did not timely file an opposition to Vitumukiza's original application. However, on December 12, 2023, Vitumukiza filed an additional application that was virtually identical to the previous one, except that the new application contained an additional page and affidavits that appear to have been inadvertently left out of the original application. The state filed a brief in opposition to the applications on December 22, 2023. There, the state argued that the application was untimely, that appellate counsel analyzed the knowing, intelligent, and voluntary nature of Vitumukiza's plea in the direct appeal, and that Vitumukiza did not show how appellate counsel was ineffective.

## **II. An Untimely Application and Good Cause**

{¶ 7} Pursuant to App.R. 26(B), an applicant may raise claims of ineffective assistance of appellate counsel that is judged using the same standard for effective assistance of trial counsel announced in *Strickland v. Washington*, 466 U.S. 668,

104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *State v. Leyh*, 166 Ohio St.3d 365, 2022-Ohio-292, 185 N.E.3d 1075, ¶ 17. However, App.R. 26(B) contains reasonable procedural requirements for advancing these claims. *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, ¶ 8. One of these requirements is that the application must be filed within 90 days of the journalization of the appellate decision that the application seeks to reopen. App.R. 26(B)(1). If the application is filed outside of this deadline, it is not automatically denied, but the application itself must set forth good cause for why the application could not be timely filed. App.R. 26(B)(1) and (B)(2)(b). Lack of knowledge of the time requirements in the rule or access to legal resources are not sufficient grounds for excusing a delayed filing. *Gumm* at ¶ 10. Further, where the application is untimely without any argument going to good cause for the delay, it must be denied. *State v. Reddick*, 72 Ohio St.3d 88, 647 N.E.2d 784 (1995); *State v. Mason*, 90 Ohio St.3d 66, 734 N.E.2d 822 (2000); and *State v. Dudas*, 8th Dist. Cuyahoga No. 110573, 2023-Ohio-366, ¶ 2-3.

{¶ 8} Here, regardless of which of Vitumukiza’s applications for reopening we examine,<sup>1</sup> they were filed well outside the 90-day period found in the rule. The appellate decision he seeks to reopen was journalized on April 7, 2022. The

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<sup>1</sup> Generally, a person is entitled to file a single application for reopening limited to ten pages and there is no right to file successive applications. *State v. Twyford*, 106 Ohio St.3d 176, 2005-Ohio-4380, 833 N.E.2d 289. Supplemental applications are generally seen as an improper means to circumvent the formatting requirements set forth in the rule. *See State v. Qunnie*, 8th Dist. Cuyahoga No. 72580; 2000 Ohio App. LEXIS 6223, 6 (Dec. 21, 2000), fn.1. (Motion No. 313499). But here, because it makes no difference to the impact of this case, we do not need to address the propriety of the supplemental application.

applications were filed on November 13, 2023, and December 12, 2023. The applications do not acknowledge the fact that they are untimely and do not offer any arguments going to good cause to excuse the delay. Therefore, the application must be denied.

{¶ 9} Application denied.

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ANITA LASTER MAYS, ADMINISTRATIVE JUDGE

MICHELLE J. SHEEHAN, J., and  
EMANUELLA D. GROVES, J., CONCUR