

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ADELBERT CALLAHAN,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY **Case No. 97 CA 0224**

Delayed Application for Reopening

BEFORE:

Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:

Overruled.

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

Atty. Paul Mancino, Jr., 75 Public Square #1016, Cleveland, Ohio 44113 for Defendant-Appellant.

Dated: February 28, 2019

PER CURIAM.

{¶1} Appellant Adelbert Callahan has filed a delayed application to reopen his appeal pursuant to App.R. 26(B). A criminal defendant may apply for reopening of the appeal from the judgment of conviction and sentence based on a claim of ineffective assistance of appellate counsel. App.R. 26(B)(1). The application for reopening cannot merely allege that appellate counsel rendered ineffective assistance for failing to brief certain issues. Rather, the application must demonstrate that there is a “genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.” The applicant must prove both that his appellate counsel was deficient for failing to raise the issues he now presents and that he was prejudiced by this failure. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The applicant must show that there was a reasonable probability of success on appeal had counsel presented those claims. *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. The applicant “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. Spivey*, 84 Ohio St.3d 24, 25, 1998–Ohio–704, 701 N.E.2d 696.

{¶2} Appellant must include “[o]ne or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel’s deficient representation.” App.R. 26(B)(2); *State v. Ludt*, 7th Dist. No. 07 MA 107, 2009-Ohio-2214.

{¶3} Pursuant to App.R. 26(B)(1), Appellant was required to file his application for reopening within 90 days of the journalization of our judgment entry. “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.

{¶4} The judgment entry and opinion in the direct appeal giving rise to this proceeding was journalized on March 22, 2000, and to be considered timely Appellant would have had to file his application for delayed reopening on or before May 30, 2000. Appellant filed his application on October 10, 2017. If an application for reopening is not filed within the 90-day period set forth in App.R. 26(B)(1), an appellant must make a showing of good cause for the untimely filing. App.R. 26(B)(2).

{¶5} For good cause, Appellant contends that a recent Ohio Supreme Court opinion is somehow related to this case. The opinion is *State v. Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127 (2016), released on December 22, 2016, which is approximately one year before Appellant filed this delayed application. We do not consider a one-year old case to be recent in relation to the filing of an App.R. 26(B) application. Furthermore, the legal precedent at issue and relied upon in *Moore* (and thus, the case being relied upon for this reopening) is *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), released on May 17, 2010. *Graham* was released more than seven years prior to the filing of Appellant's delayed application. There is no explanation for the delay in filing either with respect to *Moore* or to *Graham*. Therefore, we cannot find good cause for the delay.

{¶6} Furthermore, even if we were to examine the merits of the application, there is no basis for granting it. The application for reopening under App.R. 26(B) must contain: "One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation." App.R. 26(B)(2)(c); *State v. Ludt*, 7th Dist. No. 07 MA 107, 2009-Ohio-2214. Appellant presents no assignments of error, but rather, simply explains some of the law and facts involved in *Moore* and leaves it to us to draw our own conclusions.

{¶7} Some minimal background of the instant case is in order here. On April 30, 1996, a group of six young men robbed the Newport Inn bar in Youngstown, Ohio. The assailants included Appellant, Willie Herring, Antwan Jones, Louis Allen, Eugene Foose and Kitwan Dalton. Appellant drove them to the bar in a van he and Jones had stolen the night before. Five of the men put on disguises and entered the bar brandishing guns, and Dalton stayed behind in the van.

{¶8} Appellant and Jones entered the bar through the front door. Herring, Foose and Allen went in through the back door. The gunmen demanded money from security guard Herman Naze, Sr., and when he stated that he had no money, one of them shot and killed him. Herring shot bartender Deborah Aziz in the hip, and she managed to crawl away and hide. Herring shot bar owner Ronald Marinelli four times in the stomach. Mr. Marinelli attempted to shoot Herring with a gun from behind the bar but was too weak from his injuries to do so. Herring took the gun off of Marinelli and shot him twice in the legs. The gunman also shot and killed Dennis Kotheimer, a customer at the bar.

{¶9} After leaving the bar, the five robbers left in the van driven by Dalton. Youngstown Police spotted the van and followed it. Dalton crashed the van and the group fled on foot. Dalton and Jones were chased and arrested immediately. Later that morning, Allen arrived at the police station and confessed to the robbery, naming all of the men in the group. Dalton later confessed to his part in the plan. That evening, Appellant turned himself in and made a videotaped statement.

{¶10} Appellant was charged with complicity to aggravated murder, two counts of aggravated murder or in the alternative complicity to aggravated murder, two counts of complicity to attempted aggravated murder; and two counts of aggravated robbery. Appellant eventually pled guilty to complicity to the aggravated murders of Herman Naze, Sr. and Dennis Kotheimer, and was convicted by a jury of the remaining counts of complicity to aggravated murder, complicity to attempted aggravated murder, and complicity to aggravated robbery, as well as the attendant firearm specifications. He was sentenced to three life sentences with the chance of parole after twenty years on each term; four indefinite terms of ten to twenty-five years; and a three-year definite term, all to run consecutively with one another, for a total term of 103-years-to-life in prison. *State v. Callahan*, 7th Dist. No. 97 CA 224, 2000 WL 309392 (Mar. 22, 2000).

{¶11} As already mentioned, Appellant presents no assignments of error. His citations to *Moore* and *Graham* are clearly inapposite as the issue under review in those cases involves nonhomicide offenders. *Moore* at ¶ 1; *Graham* at 82. This is obviously not Appellant's situation. There being no assignment of error presented and no possible assignment that can be extrapolated from Appellant's brief, Appellant cannot meet the requirements of App.R. 26(B).

{¶12} Judge Carol Ann Robb is substituted onto the panel of this appeal in place of retired Judge Joseph J. Vukovich.

{¶13} The delayed application to reopen the appeal is overruled.

{¶14} Costs taxed to Appellant.

JUDGE CAROL ANN ROBB

JUDGE GENE DONOFRIO

JUDGE CHERYL L. WAITE

NOTICE TO COUNSEL

This document constitutes a final judgment entry.