

[Cite as *State v. Zimmer*, 2017-Ohio-8309.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104946

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LEO ZIMMER

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-16-602862-A
Application for Reopening
Motion No. 510574

RELEASE DATE: October 23, 2017

FOR APPELLANT

Leo Zimmer, pro se
Inmate No. 684988
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Marion, Ohio 43301

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
By: Andrew F. Rogalski
Assistant County Prosecutor
8th Floor Justice Center
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PATRICIA ANN BLACKMON, J.:

{¶1} On September 21, 2017, the applicant, Leo Zimmer, pursuant to App.R. 26(B) and *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992), applied to reopen this court's judgment in *State v. Zimmer*, 8th Dist. Cuyahoga No. 104946, 2017-Ohio-4440, in which this court affirmed Zimmer's convictions for five counts of rape, five counts of kidnapping, and one count of gross sexual imposition. Zimmer asserts that his appellate counsel should have argued (1) error in denying Zimmer's pro se motion for new trial, (2) ineffective assistance of trial counsel for not calling additional witnesses to testify on behalf of Zimmer, and (3) ineffective assistance of trial counsel in forcing Zimmer to accept a bench trial. Zimmer also complains that his appellate counsel refused to communicate with him. Sua sponte, for the following reasons, this court denies the application to reopen.

{¶2} App.R. 26(B)(1) and (2)(b) require applications claiming ineffective assistance of appellate counsel to be filed within 90 days from journalization of the decision unless the applicant shows good cause for filing at a later time. This court issued its decision on June 22, 2017, and Zimmer filed his application one day late on Thursday, September 21, 2017. Eight (remaining days in June) + 31 (July) + 31 (Aug.) + 21 (Sept.) = 91. Thus, this application is untimely. Zimmer did not proffer any explanation to show good cause.

{¶3} The Supreme Court of Ohio in *State v. Lamar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970, and *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, held that the 90-day deadline for filing must be strictly enforced. In those cases, the applicants argued that after the court of appeals decided their cases, their appellate counsel continued to represent them, and their appellate counsel could not be expected to raise their own incompetence. Although the Supreme Court agreed with this latter principle, it rejected the argument that continued representation provided good cause. In both cases the court ruled that the applicants could not ignore the 90-day deadline, even if it meant retaining new counsel or filing the applications themselves. The court then reaffirmed the principle that lack of effort, imagination, and ignorance of the law do not establish good cause for complying with this fundamental aspect of the rule. As a corollary, miscalculation of the time needed for mailing would also not state good cause. *State v. Agosto*, 8th Dist. Cuyahoga No. 87283, 2006-Ohio-5011, *reopening disallowed*, 2007-Ohio-848; *State v. Ellis*, 8th Dist. Cuyahoga No. 91116, 2009-Ohio-852, *reopening disallowed*, 2009-Ohio-2875; *State v. Peyton*, 8th Dist. Cuyahoga No. 86797, 2006-Ohio-3951, *reopening disallowed*, 2007-Ohio-263 (App.R. 26(B) application to reopen denied as untimely because it was filed two days late).

{¶4} Accordingly, the application for reopening is denied.

PATRICIA ANN BLACKMON, JUDGE

EILEEN T. GALLAGHER, P.J., and
FRANK D. CELEBREZZE, JR., CONCUR