

[Cite as *State v. Porter*, 2018-Ohio-1178.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102257

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRIAN PORTER

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-14-586069-A
Application for Reopening
Motion No. 510335

RELEASE DATE: March 23, 2018

FOR APPELLANT

Brian Porter, pro se
Inmate No. 684607
Lake Erie Correctional Institution
P.O. Box 8000
501 Thompson Road
Conneaut, Ohio 44030

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
By: Frank Romeo Zeleznikar
Assistant County Prosecutor
Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

EILEEN T. GALLAGHER, P.J.:

{¶1} On September 13, 2017, the applicant, Brian Porter, 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. Porter*, 8th Dist. Cuyahoga No. 102257, 2016-Ohio-1115, in which this court affirmed Porter's convictions for three counts of felonious assault and one count of discharge of a firearm on or near prohibited premises, all with one- and three-year firearm specifications. Porter claims that his appellate counsel should have argued that his trial counsel was ineffective for failing to investigate, to interview witnesses and to obtain evidence; for failing to object to an incorrect jury instruction on self-defense, duty to retreat, and defense of others; and for failing to renew the motion for a directed verdict at the end of the trial.¹ On September 22, 2017, the state of Ohio filed its brief in opposition. For the following reasons, this court denies the application.

{¶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. Porter filed his application approximately 18 months after this court's March 17, 2016 decision. Thus, the application is untimely on its face. Porter tries to show good cause by arguing that the prison's limited legal assistance, as well as the public defender's continued

¹Porter's appellate counsel did argue, inter alia, ineffective assistance of trial counsel for failing to object to the jury instruction on self-defense, for not requesting a missing witness instruction, and for not objecting to the failure to instruct the jury that they were to consider the evidence of self-defense in determining whether the state met its burden of proof.

representation of him to the United States Supreme Court, caused the untimely filing. He also proffers that reopening the appeal is necessary to correct manifest injustice. These arguments are unpersuasive.

{¶3} The courts have repeatedly rejected the claim that limited access to legal materials states good cause for untimely filing. Prison riots, lockdowns, and other library limitations have been rejected as constituting good cause. *State v. Tucker*, 73 Ohio St.3d 152, 1995-Ohio-2, 652 N.E.2d 720; *State v. Kaszas*, 8th Dist. Cuyahoga Nos. 72546 and 72547, 1998 WL 598530 (Sept. 10, 1998), *reopening disallowed*, 2000 WL 1195676 (Aug. 14, 2000).

{¶4} Similarly, Porter's delay because his appellate counsel was still representing him is fatal. 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 lawyers continued to represent them, and their appellate lawyers 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, lack

of imagination, and ignorance of the law do not establish good cause for failure to seek timely relief under App.R. 26(B).

{¶5} Finally, the court rejects Porter’s claim of manifest injustice. The Supreme Court of Ohio has made it very clear that an applicant must show extraordinary reasons for not timely filing. Claims of a “dead-bang winner” do not state good cause. *State v. Howard*, 8th Dist. Cuyahoga No. 97695, 2012-Ohio-3459, *reopening disallowed*, 2018-Ohio-159, and *State v. Willis*, 8th Dist. Cuyahoga No.1010152, 2014-Ohio-3729, *reopening disallowed*, 2018-Ohio-159.

{¶6} Accordingly, this court denies the application to reopen.

EILEEN T. GALLAGHER, PRESIDING JUDGE

MELODY J. STEWART, J., and
PATRICIA ANN BLACKMON, J., CONCUR