

[Cite as *State v. Gilbert*, 2019-Ohio-1117.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106358

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LAURICE GILBERT

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-06-487765-B
Application for Reopening
Motion No. 523972

RELEASE DATE: March 26, 2019

FOR APPELLANT

Laurice Gilbert, pro se
Inmate No. 534161
Grafton Correctional Institution
2500 South Avon Belden Road
Grafton, Ohio 44044

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

MARY J. BOYLE, J.:

{¶1} On December 19, 2018, the applicant, Laurice Gilbert, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Gilbert*, 8th Dist. Cuyahoga No. 106358, 2018-Ohio-3789, in which this court affirmed the denial of Gilbert's motion for a new trial based on newly discovered evidence.¹ Gilbert now asserts that his appellate counsel should have argued that the trial judge erred in excluding Gilbert when there were other less restrictive means to handle the issue, such as the judge questioning the subject witness or conducting the hearing through televised means. Gilbert also complains that the judge abused his discretion in denying

¹In 2007, a jury convicted Gilbert of aggravated robbery and aggravated murder. In 2016, the trial court heard Gilbert's motion for a new trial because two of the main witnesses recanted their testimony that Gilbert killed the man. During the hearing on the new trial motion, the judge excluded Gilbert briefly from the hearing because one of the witnesses was concerned about testifying in front of him.

the motion for a new trial and that his appellate attorney failed to use better case authority.² The state filed its brief in opposition on December 28, 2018. For the following reasons, this court denies the application.

{¶2} App.R. 26(B)(1) provides in pertinent part as follows: “A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence * * *.”

As a corollary, App.R. 26(B) does not apply to post-judgment motions such as postconviction relief petitions and motions to vacate guilty pleas. In *State v. Loomer*, 76 Ohio St.3d 398, 399, 667 N.E.2d 1209 (1996), the Supreme Court of Ohio ruled that because “the judgment Loomer complains about was an appeal from a motion to dismiss, and not an appeal from a judgment of conviction and sentence, no basis existed under App.R. 26(B) to reopen this appeal.” Thus, App.R. 26(B) does not apply to motions for a new trial based on newly discovered evidence. *State v. Bolton*, 8th Dist. Cuyahoga No. 103628, 2016-Ohio-5706, *reopening disallowed*, 2017-Ohio-7062.

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

MARY J. BOYLE, JUDGE

EILEEN T. GALLAGHER, P.J., and
MICHELLE J. SHEEHAN, J., CONCUR

²Gilbert’s appellate counsel argued that the trial court erred by excluding Gilbert from the hearing because that violated his rights to due process, to confrontation, to communicate with counsel, and to participate in his own defense. Counsel also argued that the trial court abused its discretion in denying the motion for a new trial.