

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA**

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	No. 102919
	:	
v.	:	
	:	
DAVID CAPP,	:	
	:	
Defendant-Appellant.	:	

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**JOURNAL ENTRY AND OPINION**

**JUDGMENT: APPLICATION DENIED**  
**RELEASED AND JOURNALIZED: June 17, 2019**

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Cuyahoga County Court of Common Pleas  
Case No. CR-14-583833-A  
Application for Reopening  
Motion No. 523257

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***Appearances:***

Michael C. O'Malley, Cuyahoga County Prosecuting  
Attorney, and Daniel T. Van, Assistant Prosecuting  
Attorney, *for appellee*.

David Capp, *pro se*.

EILEEN A. GALLAGHER, P.J.:

{¶ 1} On November 27, 2018, David Capp (“Capp”), applied to reopen this court’s judgment in *State v. Capp*, 8th Dist. Cuyahoga No. 102919, 2016-Ohio-295, pursuant to App.R. 26(B) and *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d

1204 (1992). In his appeal, Capp claimed there was insufficient evidence to support his convictions on three, three-year firearm specifications under R.C. 2929.14(B)(1) and 2941.145(A). This court affirmed Capp's convictions, but found that the trial court had only addressed the firearm specifications associated with Counts 1 and 2 at sentencing. Because Capp had not yet been sentenced on the firearm specification for Count 3, the case was remanded to the trial court for correction of the sentence. On remand, the trial court sentenced Capp to three years in prison for the firearm specification on Count 3 to be served consecutively to the firearm specification on Count 1. Capp now claims that his appellate counsel was ineffective for failing to argue the trial court's imposition of consecutive sentences without appropriate findings. This court denies the application to reopen because it is untimely.

{¶ 2} App.R. 26(B)(1) and (B)(2)(b) require that a claim of ineffective assistance of appellate counsel be filed within 90 days from journalization of the decision unless good cause is shown. The November 2018 application was filed more than two years after this court's January 28, 2016 decision. Furthermore, Capp made no attempt to show good cause for the untimely filing of his application. It is firmly established that "[l]ack of effort or imagination, and ignorance of the law, \* \* \* do not automatically establish good cause for failure to seek timely relief." *State v. Reddick*, 72 Ohio St.3d 88, 91, 647 N.E.2d 784 (1995). The Supreme Court of Ohio has further held, "Consistent enforcement of the rule's deadline by the appellate courts in Ohio protect 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.

{¶ 3} Moreover, Capp appears to be seeking a remedy that is no longer available to him; the initial appeal was disposed when the case was remanded. Any issues stemming from the trial court’s subsequent sentencing could not have been argued on the first appeal and must be addressed pursuant to proper procedure.

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

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EILEEN A. GALLAGHER, PRESIDING JUDGE

MARY J. BOYLE, J., and  
FRANK D. CELEBREZZE, JR., J., CONCUR