

[Cite as *State v. Churn*, 2019-Ohio-4052.]

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	No. 105782
	:	
v.	:	
	:	
EMANUEL C. CHURN,	:	
	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: October 1, 2019

Cuyahoga County Court of Common Pleas
Case No. CR-16-603947-C
Application for Reopening
Motion No. 529407

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Gregory J. Ochocki, Assistant Prosecuting Attorney, *for appellee*.

Emanuel C. Churn, *pro se*.

KATHLEEN ANN KEOUGH, J.:

{¶ 1} Emanuel C. Churn has filed an application for reopening pursuant to App.R. 26(B). Churn is attempting to reopen the appellate judgment, rendered in

State v. Churn, 8th Dist. Cuyahoga No. 105782, 2018-Ohio-1089, that affirmed his conviction and the sentence of incarceration imposed in *State v. Churn*, Cuyahoga C.P. No. CR-16-603947-C, for the offenses of murder, felonious assault, and kidnapping. We decline to reopen Churn=s appeal because the application for reopening is untimely filed, fails to demonstrate any prejudice, and exceeds the maximum page limitation of ten pages.

{¶ 2} App.R. 26(B)(2)(b) requires that Churn establish “a showing of good cause for untimely filing if the application is filed more than 90 days after journalization of the appellate judgment” that is subject to reopening. The Supreme Court of Ohio, with regard to the 90-day deadline provided by App.R. 26(B)(2)(b), has established that:

[W]e now reject [the applicant=s] claims that those excuses gave good cause to miss the 90-day deadline in App.R. 26(B). * * * 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.

Ohio and other states may erect reasonable procedural requirements for triggering the right to an adjudication,@ *Logan v. Zimmerman Brush Co.* (1982), 455 U.S. 422, 437, 102 S.Ct. 1148, 71 L.Ed.2d 265, and that is what Ohio has done by creating a 90-day deadline for the filing of applications to reopen. * * * *The 90-day requirement in the rule is Applicable to all appellants*,@ *State v. Winstead* (1996), 74 Ohio St.3d 277, 278, 658 N.E.2d 722, and [the applicant] offers no sound reason why he is unlike so many other Ohio criminal defendants who could not comply with that fundamental aspect of the rule.

(Emphasis added.) *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, & 7. *See also State v. Lamar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970; *State v. Cooley*, 73 Ohio St.3d 411, 653 N.E.2d 252 (1995); and *State v. Reddick*, 72 Ohio St.3d 88, 647 N.E.2d 784 (1995).

{¶ 3} Herein, Churn is attempting to reopen the appellate judgment that was journalized on March 22, 2018. The application for reopening was not filed until June 14, 2019, more than one year after journalization of the appellate judgment in *Churn, supra*. Thus, the application for reopening is untimely on its face.

{¶ 4} In an attempt to argue good cause for the untimely filing of the application for reopening, Churn argues that:

There would be a total miscarriage of justice if this court were not to review Appellant's delayed appeal on the grounds of that the appellant is currently serving time on a void sentence, which is "unlawful," as well as a violation of his Ohio and Federal constitutional right to due process and equal protection of the laws.

{¶ 5} Churn's argument for good cause is that he was unable to discover the issue or issues now raised because he was ignorant of the law, did not have the benefit of counsel after his appeal was affirmed, and that he was not immediately able to discover the alleged error or errors after his appeal was affirmed. This court has firmly established that such arguments do not constitute good cause. *State v. Orr*, 8th Dist. Cuyahoga No. 96377, 2014-Ohio-2384 ("lack of knowledge or ignorance of the law does not provide sufficient cause for untimely filing."); *State v. Russell*, 8th Dist. Cuyahoga No. 69311, 1997 Ohio App. LEXIS 2663 (June 16, 1997),

quoting *State v. Miller*, 8th Dist. Cuyahoga No. 59987, 1997 Ohio App. LEXIS 1120 (Mar. 18, 1997) (“neither lack of counsel nor ignorance of the law have been accepted as constituting good cause for delayed filings.”).

{¶ 6} It must also be noted that Churn’s argument regarding the failure of the trial court to impose postrelease control at sentencing did not result in a void sentence and does not establish good cause for the reopening of his appeal. At sentencing, the trial court merged the offenses of murder, felonious assault, and kidnapping based upon the offenses being allied offenses of similar import. The state elected to have Churn sentenced on the one count of murder. Murder is an unclassified felony offense that does not require nor allow the trial court to impose postrelease control. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462; R.C. 2967.28; *State v. Evans*, 8th Dist. Cuyahoga No. 95692, 2011-Ohio-2153.

{¶ 7} In addition, the Supreme Court of Ohio has established that good cause cannot excuse the lack of timely filing for an indefinite period of time: “Even if we were to find good cause of earlier failures to file, any such good cause ‘has long since evaporated. Good cause can excuse the lack of filing only while it exists, not for an indefinite period.’” *State v. Davis*, 86 Ohio St.3d 212, 214, 714 N.E.2d 384 (1999); *State v. Fox*, 83 Ohio St.3d 514, 516, 700 N.E.2d 1253 (1998).

{¶ 8} Finally, Churn’s application for reopening is procedurally defective because it exceeds the ten-page limitation established by App.R. 26(B)(4). Churn’s application for reopening consists of 23 pages, which does not include his sworn

affidavit. Exceeding the ten-page limitation of App.R. 26(B)(4) constitutes a valid basis for the denial of Churn's application for reopening. *State v. Murawski*, 8th Dist. Cuyahoga No. 70854, 2002- Ohio- 3631; *State v. Caldwell*, 8th Dist. Cuyahoga No. 44360, 2002 Ohio 2751; *State v. Graham*, 8th Dist. Cuyahoga No. 33350, 1975 Ohio App. LEXIS 6710 (June 12, 1975), *reopening disallowed* (July 21, 1994), motion No. 252743; *State v. Schmidt*, 8th Dist. Cuyahoga No. 57738, 1991 Ohio App. LEXIS 5787 (Dec. 5, 1991), *reopening disallowed* (Aug. 10, 1994), motion No. 142174; and *State v. Peebles* 8th Dist. Cuyahoga No. 54708, 1988 Ohio App. LEXIS 5294 (Dec. 22, 1988), *reopening disallowed* (Aug. 24, 1994), motion No. 254080, *aff'd*, 71 Ohio St.3d 349, 643 N.E.2d 1112 (1994).

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

KATHLEEN ANN KEOUGH, JUDGE

MICHELLE J. SHEEHAN, P.J., and
PATRICIA A. BLACKMON, J., CONCUR