

1 The State of Ohio, Appellee, v. Winstead, Appellant.

2 [Cite as *State v. Winstead* (1996), \_\_\_\_\_ Ohio St.3d \_\_\_\_\_.]

3 *Appellate procedure -- Application for reopening appeal from*  
4 *judgment and conviction based on claim of ineffective*  
5 *assistance of appellate counsel -- Application denied when*  
6 *applicant fails to show good cause for failing to file his*  
7 *application within ninety days after journalization of the court*  
8 *of appeals' decision affirming the conviction, as required by*  
9 *App.R. 26(B).*

10 (No. 95-816 -- Submitted September 12, 1995 -- Decided January 10,  
11 1996.)

12 Appeal from the Court of Appeals for Hamilton County, No. C-  
13 940046.

14 Appellant, Donald Winstead, was convicted of aggravated burglary  
15 and theft, with prior offense specifications. The conviction was affirmed on  
16 appeal. *State v. Winstead* (Sept. 28, 1994), Hamilton App. No. C-940046,  
17 unreported, 1994 WL 525535. We dismissed the appeal on March 1, 1995.  
18 *State v. Winstead* (1995), 71 Ohio St. 3d 1477, 645 N.E. 2d 1257. It is  
19 undisputed appellant filed an application to reopen his appeal pursuant to  
20 App.R. 26(B) on December 28, 1994, claiming ineffective assistance of

1 appellate counsel. He alleges he based his claim of ineffective assistance of  
2 appellate counsel on appellate counsel's failure to raise the issue of  
3 prosecutorial misconduct during closing arguments. On January 6, 1995,  
4 appellant filed a motion to rule the App. R. 26(B) application timely filed,  
5 or that good cause for a day's delay in timely filing was established, because  
6 the overnight courier that appellant's counsel had used failed to deliver the  
7 application before the deadline for filing expired. On April 6, 1995, the  
8 Court of Appeals for Hamilton County ruled that "good cause" had not been  
9 established and denied the application for reopening. Appellant then  
10 appealed to this court.

11 *Joseph T. Deters*, Hamilton County Prosecuting Attorney, and *Philip*  
12 *R. Cummings*, Assistant Prosecuting Attorney, for appellee.

13 *David H. Bodiker*, Ohio Public Defender, and *Hyrum J. Mackay*,  
14 Assistant State Public Defender, for appellant.

15 *Per Curiam*. The decision of the court of appeals is affirmed. We  
16 agree that a courier's delay in delivery is not "good cause" for accepting an  
17 App.R. 26(B) application for reopening that is untimely filed. Moreover,

1 there is no denial of due process or equal protection in applying to this  
2 appellant a rule applicable to all appellants.

3 *Judgment affirmed.*

4 MOYER, C.J., DOUGLAS, WRIGHT, RESNICK, F.E. SWEENEY, PFEIFER

5 and COOK, JJ., concur.

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