

[Cite as *State v. Wellington*, 2015-Ohio-2095.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

| | | |
|----------------------|---|--------------------|
| STATE OF OHIO, |) | CASE NO. 14 MA 115 |
| |) | |
| PLAINTIFF-APPELLEE, |) | |
| |) | |
| VS. |) | OPINION AND |
| |) | JUDGMENT ENTRY |
| DANIEL WELLINGTON, |) | |
| |) | |
| DEFENDANT-APPELLANT. |) | |

CHARACTER OF PROCEEDINGS: Appellant's Motion for Reconsideration Pursuant to App.R. 26(A)

JUDGMENT: Denied.

APPEARANCES:
For Plaintiff-Appellee:

Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant:

Daniel Wellington, Pro Se
#641-742
P.O. Box 57
Marion, Ohio 43301

JUDGES:
Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: May 28, 2015

[Cite as *State v. Wellington*, 2015-Ohio-2095.]
PER CURIAM.

{¶1} On April 20, 2015, Appellant Daniel Wellington (“Appellant”) pursuant to App.R. 26(A) filed an application for reconsideration asking us to reconsider our ruling in *State v. Wellington*, 7th Dist. No. 14MA115, 2015-Ohio-1359 (“*Wellington I*”), which upheld his ten-year sentence for involuntary manslaughter. Appellant asserts that in upholding the sentence we failed to consider House Bill 86 (“H.B. 86”), which requires judges to make consecutive sentencing findings prior to imposing consecutive sentences.

{¶2} The standard for reviewing an application for reconsideration pursuant to App.R. 26(A) is whether the application “calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been.” *State v. Phillips*, 7th Dist. Mahoning No. 14 MA 34, 2015-Ohio-69, ¶ 2, quoting *Columbus v. Hodge*, 37 Ohio App.3d 68, 523 N.E.2d 515 (10th Dist.1987), paragraph one of the syllabus.

{¶3} App.R. 26(A) provides that an application for reconsideration “shall be made in writing no later than ten days after the clerk has both mailed to the parties the judgment or order in question and made a note on the docket of the mailing as required by App. R. 30(A).” App.R. 26(A)(1)(a).

{¶4} Our decision in *Wellington II* was time-stamped March 31, 2015. The Mahoning County Clerk of Courts entered the opinion on the docket on April 1, 2015. Accordingly, this April 20, 2015 application is untimely since it was filed beyond the 10 day time limit.

{¶5} However, it is acknowledged that the language in the application could potentially be construed as a simultaneous request for leave to file a motion for delayed reconsideration and an application for delayed reconsideration. For instance, the title of the application is “Leave for Motion for Reconsideration.” The language in the argument section of application further indicates that Appellant is seeking “leave for reconsideration.”

{¶6} App.R. 14(B) provides, “For good cause shown, the court, upon motion, may enlarge or reduce the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of the prescribed time.” The rule further states, “Enlargement of time to file an application for reconsideration * * * pursuant to App. R. 26(A) shall not be granted except on a showing of extraordinary circumstances.” App.R. 14(B). See also *Deutsche Bank Natl. Trust Co. v. Knox*, 7th Dist. No. 09-BE-4, 2011-Ohio-421, ¶ 6.

{¶7} Consequently, this court does have the authority to grant leave to file a delayed motion for reconsideration if there is a showing of extraordinary circumstances. In this instance, however, Appellant does not indicate what extraordinary circumstances prevented him from filing a timely request for reconsideration. Hence, even if we were to construe the application as a simultaneous request for leave to file an application for delayed reconsideration and a delayed application for reconsideration, the request still fails.

{¶8} If this court could get beyond the untimeliness of the application and to the merits of Appellant’s reconsideration argument, the request for reconsideration fails. Appellant argues that this court failed to consider H.B. 86 and its mandate that the trial court is required to make consecutive sentencing findings prior to imposing consecutive sentences. This argument fails for two reasons.

{¶9} First, in *Wellington II* we were not asked to review consecutive sentences. The assignment of error presented to this court was, “The trial court erred when it failed to make the required findings for imposing a maximum sentence pursuant to the pre-House Bill 86 version of the Revised Code Section 2929.14(C).” *Wellington II*, 2015-Ohio-1359, ¶ 6-20. Thus, the only argument presented to this court concerned a maximum sentence, not a consecutive sentence. An application for reconsideration is not a mechanism to raise an entirely new argument and issue to the appellate court that was not raised in the appellate brief. *E. Liverpool v. Columbiana Cty. Budget Comm.*, 116 Ohio St.3d 1201, 2007-Ohio-5505, 876 N.E.2d 575, ¶ 3 (Motion for reconsideration raised an entirely new argument. Supreme Court stated argument deemed abandoned.); *Walter v. Walter*, 7th Dist. No. 04–JE–27, 2005–Ohio–5632, ¶ 3 (“A motion for reconsideration pursuant to App.R. 26(A) is

not an opportunity to raise new arguments that a party simply neglected to make earlier in the proceedings, but rather, is an opportunity to correct obvious errors in the appellate court's opinion in order to prevent a miscarriage of justice.”)

{¶10} Second, in the underlying case, Appellant was not subject to a consecutive sentence. Appellant was indicted by the Mahoning County Grand Jury in the underlying case number 11CR886 for murder. *State v. Wellington*, 7th Dist. No. 13MA90, 2014-Ohio-1179, ¶2 (*Wellington I*). A plea agreement was reached between the state and Appellant and he pled guilty to involuntary manslaughter. *Id.* at ¶ 3. Appellant was not sentenced on multiple convictions in case number 11CR886; he was solely sentenced on the involuntary manslaughter conviction. *Wellington I*; *Wellington II*; 5/8/13 JE in 11CR886 (original sentencing entry); 8/14/14 JE in 11CR886 (resentencing entry). Furthermore, the sentencing entries do not indicate that Appellant’s sentence for involuntary manslaughter was ordered to run consecutive with any other sentence he received in another case. Therefore, since Appellant was not sentenced to consecutive sentences, there was no basis for the trial court to comply with H.B. 86 and its mandate of consecutive sentencing findings prior to the imposition of consecutive sentences. A consecutive sentencing argument is irrelevant and provides no basis to reconsider our decision in *Wellington II*.

{¶11} In conclusion, the application is untimely and does not provide a showing of extraordinary circumstances for this court to grant leave to consider the untimely application. However, even if we were to consider the merits of Appellant’s argument for reconsideration it provides no basis for granting the application. For those reasons and the ones elaborated in depth above, the application for reconsideration is hereby denied.

Robb, J., concurs.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.