[Cite as *State v. Clark*, 2015-Ohio-2584.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	CASE NO. 08 MA 15
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	OPINION AND
	)	JUDGMENT ENTRY
DAMON CLARK,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Appellant's Delayed Application for Reopening

JUDGMENT: Denied.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
Assistant Prosecuting Attorney
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For Defendant-Appellant:

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JUDGES:
Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: June 16, 2015

[Cite as *State v. Clark*, 2015-Ohio-2584.]
PER CURIAM.

{¶1} Defendant-appellant Damon Clark ("Appellant") has filed an untimely application for reopening of his appeal under App.R. 26(B). He posits that his attorney should have argued that the state presented perjured testimony. Appellant has failed to show good cause for seeking reopening nearly six years after the release of our appellate decision in the direct appeal of his criminal conviction. For this and the following reasons, Appellant's application for reopening is denied.

STATEMENT OF THE CASE

{¶2} According to the testimony presented at Appellant's jury trial, Appellant went to visit his cousin, Joseph Moreland, on Stewart Street in Youngstown, Ohio on May 5, 2007. Due to a conflict between Appellant and DeJuan Thomas, Joseph Moreland told Appellant to leave. Joseph Moreland pushed Appellant, causing him to fall into a children's power vehicle, and he and Appellant argued. Joseph Moreland said Appellant made a threatening statement implying he would return with a gun.

{¶3} Appellant left driving a blue Buick that belonged to the mother of his children. He dropped his brother and another cousin off at a party where he picked up Stoney Williams, who had been seen carrying a gun at the party earlier. Appellant and Stoney Williams then picked up Darryl Mason, who had never met Appellant. Darryl Mason testified that Appellant was acting mad and wild as he drove. He heard Appellant say that someone was "trying to play him."

{¶4} Appellant called Joseph Moreland to report he would be returning shortly. From the conversation, Joseph Moreland worried that Appellant was threatening to come back shooting. He exited his house while arguing loudly on the phone. Upon hearing this, his cousin (Jean Madison) and his aunt (Angela Moreland) walked over to his house. Angela Moreland was holding the hand of her three-year-old niece, Cherish Moreland. They stood by the front porch talking to Joseph Moreland as he stood on his front porch.

{¶5} As Appellant's vehicle approached the house, Darryl Mason heard Appellant ask Stoney Williams if he was ready. There was testimony that the driver side window was up, but the passenger side window was down. Appellant then

yelled something which Darryl Mason could not understand. While sitting on the door frame of the passenger window, Stoney Williams fired two shots over the car at the house.

{¶6} Joseph Moreland testified that he saw Appellant driving toward his house as the front seat passenger fired shots over the top of the car. He testified that one bullet hit the ground before reaching his porch. The other bullet grazed Angela Moreland and passed through the back of Cherish Moreland's head. She died from the wound within two days. Angela Moreland and Jean Madison confirmed that the shots came from the car Appellant drove.

{¶7} As relatives converged on the scene later, Appellant joined them. When a cousin asked if he shot Cherish, Appellant responded, "I think Stoney shot in the air." Appellant's brother also heard him make his statement. The police quickly found the car Appellant had been driving; it was parked at the house of his children's mother, who owned the car. A spent shell casing was found between the windshield and the hood on the passenger side of the vehicle. When Stoney Williams was arrested, his hands tested positive for gunshot residue. As Appellant was being led to jail, he declared, "It was fucking Stoney, Stoney did it, I'm sorry."

{¶8} At trial, Appellant testified that Joseph Moreland had a firearm as he was coming off the porch. He said this caused him to duck as he drove by. The defense also presented the testimony of a jail inmate who said he heard Joseph Moreland admit to Appellant while in jail that he was armed with a mini-14 at the time. Joseph Moreland testified that he did not have a weapon when he went outside. Jean Madison testified that she could not recall whether she saw Joseph Moreland with a gun that night.

{¶9} Appellant was convicted by way of complicity of two counts: murder in violation of R.C. 2903.02(B) (also called felony murder) for causing a death as a proximate result of committing a second degree felony of violence, and improper discharge in violation of R.C. 2923.161(A) for knowingly discharging a firearm into or at a habitation. The jury found him not guilty of two counts of aggravated murder: one involving purpose and prior calculation and design, and one involving purpose to

cause the death of a child under thirteen. On January 16, 2008, the trial court imposed consecutive sentences of fifteen years to life for felony murder, five years for improper discharge, and five years for a firearm specification.

{¶10} Appellant filed a timely notice of appeal. His trial counsel represented him in the direct appeal. He raised six assignments of error alleging the following errors: (1) failure to suppress his statement after an arrest without probable cause; (2) failure to suppress his statement as the fruit of an earlier statement that the trial court did suppress; (3) failure to merge allied offenses of similar import; (4) insufficient evidence; (5) the verdict was against the manifest weight of the evidence; and (6) deficient indictment due to failure to specify a separate mental state for felony murder. This court overruled Appellant's assignments of error and upheld his convictions. *State v. Clark*, 7th Dist. No. 08MA15, 2009-Ohio-3328, appeal not accepted for review in 123 Ohio St.3d 1473, 2009-Ohio-5704, 915 N.E.2d 1255.

{¶11} On September 4, 2009, Appellant filed a pro se motion for a new trial based upon newly discovered evidence without describing the evidence or seeking leave to file an untimely motion under Crim.R. 33(B). The trial court did not rule on the motion. On June 21, 2010, Appellant filed another pro se motion for a new trial based upon newly discovered evidence. He attached a letter from a Gerald Johnson, who said Stoney told him Appellant was not involved. The trial court denied the motion on July 21, 2010.

{¶12} On August 16, 2010, Appellant's former attorney, who represented him at trial and on appeal, filed a motion to withdraw and asked for the appointment of new counsel. On August 25, 2010, the trial court granted the request and appointed new counsel "with regards to Defendant's wishes to file a Motion for a New Trial."

{¶13} On January 26, 2011, his new attorney filed a motion for leave to file a motion for new trial under Crim.R. 33(B). Attached was an affidavit from Gerald Johnson, who said he was at the scene of the shooting and saw Joseph Moreland with a mini assault rifle. Gerald Johnson testified at a February 22, 2011 hearing held on the motion. He explained that he was placed in jail in April 2010, where he

met Appellant. He expressed that he did not come forward with his observation earlier because Joseph Moreland threatened him.

{¶14} On February 24, 2011, the trial court denied leave to file a motion for new trial. The court concluded that Appellant did not show by clear and convincing evidence that he was unavoidably prevented from discovering the evidence or filing the motion sooner. It was also noted that the witness did not see the actual shooting. This court affirmed the trial court's decision in *State v. Clark*, 7th Dist. No. 11MA38, 2010-Ohio-2434.

{¶15} On April 30, 2015, Appellant filed the within application for delayed reopening of the appeal of his conviction under App.R. 26(B).[1] Attached to his application is the affidavit of a Henry Edmonds who states that he spoke with DeJuan Thomas while in jail in 2014. Henry Edmonds states that DeJuan Thomas told him that he saw Joseph Moreland shooting at a vehicle driven by Mr. Clark and that Joseph Moreland accidentally shot the little girl. DeJuan Thomas is said to have expressed his belief that the shooter could not have been in the vehicle because the windows were up. Henry Edmonds then states that DeJuan Thomas told him that Joseph Moreland told him that "he paid a family member to say the bullet came from the direction of the car that killed the little girl."

REOPENING

{¶16} A criminal defendant may apply for reopening of the appeal from the judgment of conviction and sentence based on a claim of ineffective assistance of appellate counsel. App.R. 26(B)(1). If reopening is permitted, the court appoints counsel for an indigent and supplemental briefing is ordered. App.R. 26(B)(6)(a).

{¶17} The applicant for reopening cannot merely allege appellate counsel rendered ineffective assistance for failing to brief certain issues. Rather, it must be demonstrated that there is a "genuine issue as to whether the applicant was deprived

[1] He also recently filed another motion for leave to file a motion for new trial, which is pending in the trial court. *See* April 24, 2015 Motion for Leave to File Motion for New Trial.

of the effective assistance of counsel on appeal." App.R. 26(B)(5). *See also Tenace,* 109 Ohio St.3d 451 at ¶ 8.

{¶18} The standard two-part test for ineffective assistance of counsel governs: deficient performance of counsel and resulting prejudice. *See State v. Tenace,* 109 Ohio St.3d 451, 2006-Ohio-2987, 849 N.E.2d 1, ¶ 5 (2006), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); App.R. 26(B)(2)(d). *See also* App.R. 26(B)(9) (appellate court cannot vacate its prior judgment unless it finds appellate counsel's performance deficient and the deficiency prejudiced the applicant's appeal).

{¶19} To set forth the alleged ineffective assistance of appellate counsel, the application for reopening must contain: "One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation." App.R. 26(B)(2)(c). Appellant presents two proposed assignments of error, with related arguments under each, that he claims were not considered on the merits:

{¶20} "Defendant Mr. Clark was denied his right to a fair trial and due process, when the State allowed perjured testimony to go uncorrected, violating the defendant's [F]ourteenth Amendment right to the U.S. Constitution."

{¶21} "Defendant Mr. Clark was denied fair trial, when, trial counsel failed to investigate facts of his case and interview essential witnesses, violating his Sixth Amendment right to the U.S. Constitution."

{¶22} Appellant alleges that the state committed prosecutorial misconduct by allowing perjured testimony to be presented. He states that the testimony had inconsistencies that no one objected to. He urges that the state and defense counsel had respective duties to inform the trial court that Joseph Moreland and Angela Moreland were lying. Without discussing angles or movements, he expresses a belief that Angela Moreland's back could not have been grazed by a bullet from the approaching vehicle if she was facing that vehicle as the testimony suggests. He concludes that it was Joseph Moreland who shot the child. Appellant also asserts

that the state and defense counsel failed to investigate. He points to the affidavit of Henry Edmonds concerning what DeJuan Thomas allegedly told him: confirming Appellant's trial position that Joseph Moreland had a gun and proposing that a witness may have information that he (rather than Stoney Williams) shot Cherish.

{¶23} Appellant's claim that the state or defense counsel failed to investigate as there may be witnesses to a different theory of the shooting is largely based upon speculation and evidence outside of the record. A direct appeal can only refer to evidence in the trial record. *State v. Hartman*, 93 Ohio St.3d 274, 299, 754 N.E.2d 1150 (2001) (if establishing ineffective assistance of counsel requires proof outside the record, then such claim is not appropriately considered on direct appeal); *State v. Ishmail,* 54 Ohio St.2d 402, 406, 377 N.E.2d 500 (1978) (the appellate court is limited to what transpired as reflected by the record on direct appeal). An appellate attorney is therefore not ineffective for failing to brief an issue that requires evidence outside of the record. *State v. Brown*, 7th Dist. No. 11 MA117, 2014-Ohio-4831, ¶ 9. *See also State v. Croom*, 7th Dist. No. 12MA54, 2014-Ohio-1945, ¶ 10-12 (if a proposed error concerns a matter outside the trial record, it is not a basis for reopening the direct appeal on the theory that appellate counsel rendered ineffective assistance in failing to raise that issue).

{¶24} Prosecutorial misconduct via the presentation of perjured testimony requires the defendant to show that the prosecution knew the testimony was false. *State v. Iacona*, 93 Ohio St.3d 83, 97, 752 N.E.2d 937 (2001). The *Napue* case Appellant cites does not apply in the case at bar. That case involved a *post-conviction relief petition* which established that the state failed to correct testimony the state knew to be false (as it dealt with the very promise the state made to the witness). *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). Reopening of a direct appeal is not similar to a post-conviction petition. A post-conviction petition can refer to evidence outside of the record, but a direct appeal cannot.

{¶25} In addition, an *alleged* failure to investigate all possible theories is not akin to the knowing presentation of perjured testimony. Confusing or inconsistent

statements within a state witness's testimony do not equate with the state suborning perjury. Instead of "objecting" to the testimony of Joseph Moreland or Angela Moreland, counsel employed the typical trial strategy of cross-examining the witnesses. Furthermore, Appellant testified at trial. He insisted that Joseph Moreland had a firearm as he was coming off the porch. The defense also presented the testimony of an inmate who said he heard Joseph Moreland tell Appellant, while in jail, that he was armed with a mini-14 at the time of the shooting. As there is no indication *in the trial record* that the witnesses' testimony involved prosecutorial misconduct, neither trial counsel nor appellate counsel could be characterized as rendering deficient performance by failing to present an argument that the state knowingly presented perjured testimony. *State v. Monford*, 10th Dist. No. 09AP-274, 2012-Ohio-5247, ¶ 14-17 (speculation or evidence outside of the record cannot be used to argue ineffective assistance of counsel regarding the failure to raise an argument on prosecutorial misconduct on the alleged ground that the state suborned perjury).

{¶26} We also note that appellate counsel raised an assignment of error on sufficiency of the evidence and an assignment of error on weight of the evidence in the direct appeal. *See Clark*, 7th Dist. No. 08MA15 at ¶ 45-73. *See also State v. Williams*, 8th Dist. No. 98528, 2014-Ohio-199, ¶ 12 (stating that counsel was not ineffective for failing to argue prosecutorial misconduct for subornation of perjury and it was proper for counsel to challenge the evidence within assignments of error dealing with sufficiency and weight of the evidence). We reviewed the testimony about whether Joseph Moreland had a firearm out. *Clark*, 7th Dist. No. 08MA15. We concluded that the jury was free to believe Joseph Moreland's testimony that he did not have a firearm. *Id.* at ¶ 67-69. We also stated that, regardless of whether Joseph Moreland had a gun in response to Appellant's threats, the jury could rationally find that Appellant drove to Joseph Moreland's house knowing that Stoney Williams was going to fire shots at the house from the vehicle. *Id.* at ¶ 70-73.

{¶27} Appellate counsel provided this court with six well-briefed assignments of error (outlined supra). Appellate counsel had wide discretion to choose the errors

to be assigned and was not required to raise every possible issue in order to render constitutionally effective assistance. *Tenace*, 109 Ohio St.3d 451 at ¶ 7, citing *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Attempting to brief too many issues in the limited page allowance can result in a dilution of the force of the stronger arguments. *Jones*, 463 U.S. at 751-752 ("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal"). Counsel's judgments are entitled to strong deference as there is a wide range of reasonable professional assistance. *State v. Smith*, 95 Ohio St.3d 127, 2002-Ohio-1753, 766 N.E.2d 588, ¶ 8.

{¶28} In summary: evidence outside the record purporting to establish a witness lied is not within the purview of a direct appeal or the reopening of a direct appeal; and based upon the trial record in this case, failing to accuse the prosecutor of knowingly permitting perjured testimony did not constitute deficient performance of trial or appellate counsel. Regardless of any items in the trial record that could have been explored further at trial or on appeal, Appellant's application for reopening must be denied as he has failed to show good cause for the untimely filing.

UNTIMELINESS OF APPLICATION

{¶29} An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time. App.R. 26(B)(1). *See also* App.R. 26(B)(2)(b) (the application shall contain a showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment). Our judgment in the direct appeal of Appellant's conviction was journalized on June 29, 2009. The last day for a timely reopening application would have been September 27, 2009. Appellant filed this application on April 30, 2015. This is nearly 6 years after our appellate decision and more than 5.5 years late.

{¶30} In arguing good cause for an untimely filing, Appellant claims that his attorney failed to respond to a letter he sent asking what avenues he could take while awaiting our appellate decision in his appeal "and avenues he would need to take

after the decision." He notes that appellate counsel was the attorney who represented him at trial. He reiterates his argument that counsel should have presented arguments on appeal regarding prosecutorial misconduct for allowing perjured testimony and the failure of trial counsel to object to this misconduct.

{¶31} Appellant points out that he is untrained in the law. He discloses that when he found out about the existence of an application for reopening, "it seemed too late to file, as it was way passed [sic] the time prescribed." Then, in March of 2015, he discovered a federal case which he believes allows his untimely filing, citing *Gunner v. Welch*, 749 F.3d 511 (6th Cir.2014). He concludes that ineffective counsel constitutes an excuse for his procedural default.

{¶32} However, this federal case *released in June 2014* dealing with a procedural default *in filing for habeas relief* does not provide an excuse for filing an untimely application for reopening in a state appellate court *on April 30, 2015*. In order for the federal court to reach the merits of the petitioner's habeas petition, the petitioner in *Gunner* was required to show cause as to why he did not file a timely petition for post-conviction relief in the state trial court on the claim raised.

{¶33} The Sixth Circuit found that the petitioner's *appellate counsel knew of an argument his client had regarding post-conviction relief* but failed to inform him of the filing deadline for a post-conviction relief petition (even though counsel had no obligation to file such a petition). *Gunner*, 749 F.3d 511. The Court concluded that such ineffective assistance constituted cause and allowed the habeas petition to proceed on the merits notwithstanding the petitioner's procedural default. *Id.*

{¶34} If Appellant is suggesting that appellate counsel should have informed him of the deadline for filing a timely post-conviction petition, this is unrelated to the topic of reopening of an appeal. This is because a post-conviction petition involves arguments based upon evidence outside of the trial record that could not have been raised in the direct appeal, whereas a reopening involves items in the record that should have been raised in the direct appeal. *See, e.g., Brown*, 7th Dist. No. 11 MA117 at ¶ 9; *Croom*, 7th Dist. No. 12MA54 at ¶ 10-12.

{¶35} If Appellant is suggesting that the failure to brief the two assignments proposed herein is the type of ineffective assistance that can excuse an untimely application, we point out that ineffective assistance of appellate counsel is the sole reason for an application for reopening. *See* App.R. 26(B). The failure to file an assignment of error desired by an appellant is why an applicant seeks to reopen, not why there is good cause for untimely filing. *See, e.g.,* App.R. 26(B)(1), (2)(b)-(c).

{¶36} If Appellant is suggesting that appellate counsel should have informed him of the deadline for a timely reopening when there is no indication counsel was informed that Appellant believed he rendered ineffective assistance on appeal, there is no support for this position. Appellate attorneys are not expected to spontaneously advise their clients how to argue that they rendered ineffective assistance of counsel. We also note that counsel filed notice of appeal and a memorandum in support of jurisdiction in the Ohio Supreme Court on Appellant's behalf, which would have fulfilled Appellant's question as to what needed to be done after the appellate decision.

{¶37} Additionally, although counsel cannot be expected to argue their own ineffectiveness, merely having the same attorney through multiple proceedings does not provide good cause for untimely reopening. *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, 863, ¶ 8; *State v. LeMar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 170, ¶ 6-8. "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." *Gumm*, 103 Ohio St.3d 162 at ¶ 7.

{¶38} Furthermore, good cause which purportedly existed at one point in time can "evaporate" as it does not last indefinitely. *State v. Davis*, 86 Ohio St.3d 212, 214, 714 N.E.2d 384 (1999). We note that the "on the record" claims Appellant now invokes were not complex; (and, the "off the record" allegations cannot be used in a direct appeal). For instance, Appellant insists his trial attorney should have specifically objected to certain testimony as constituting perjury due to perceived

hesitancies, inconsistencies, and/or confusion in the testimony. Yet, Appellant did not seek reopening on the issue until *almost six years after our decision in his appeal*.

{¶39} Appellant admits he contemplated filing for reopening earlier. He refers to his lack of legal training and suggests he could not envision an argument in support of good cause for an untimely filing until March 2015, when he read the June 2014 *Gunner* case dealing with federal habeas. Notably, Appellant filed various motions in the trial court after his appeal was decided. In fact, the trial court appointed new counsel for Appellant in 2010 for purposes of assisting him in having his claim heard regarding new evidence which he believes shows witnesses were lying as to whether Joseph Moreland had a weapon.

{¶40} In any event, the lack of legal training or "[l]ack of effort or imagination" in configuring an argument at an earlier time is not good cause for an untimely reopening application. *Gumm*, 103 Ohio St.3d 162 at ¶ 9. Good cause for the inordinate delay in filing the within application for reopening has not been demonstrated. Accordingly, Appellant's application for reopening is denied.

Robb, J., concurs.

Donofrio, P.J., concurs.

Waite, J., concurs.