

[Cite as *State v. Brown*, 2015-Ohio-793.]
STATE OF OHIO, MAHONING COUNTY

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STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)

RESPONDENT,)

V.)

CASE NO. 12-MA-118

MILOUS BROWN,)

OPINION

PETITIONER.)

AND

JUDGMENT ENTRY

CHARACTER OF PROCEEDINGS:

Application for Reopening

JUDGMENT:

Dismissed

APPEARANCES:

For Petitioner

Milous Brown, Pro-se

#603-569

Belmont Correctional Inst.

P.O. Box 540

St. Clairsville, Ohio 43950

For Respondent

Paul Gains

Prosecutor

Ralph Rivera

Assistant Prosecutor

21 West Boardman St.

Youngstown, Ohio 44503

JUDGES:

Hon. Mary DeGenaro

Hon. Cheryl L. Waite

Hon. Carol Ann Robb

Dated: March 6, 2015

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PER CURIAM.

{¶1} Appellant Milous Brown has filed a delayed application for reopening of his appeal.¹ Brown was indicted on two counts of gross sexual imposition, both third degree felonies, and rape, a felony punishable by life imprisonment. The gross sexual imposition counts were severed and tried separately resulting in convictions. Regarding the rape charge, Brown was convicted of the lesser included offense of gross sexual imposition. This court affirmed the conviction and sentence in *State v. Brown*, 7th Dist. No. 12 MA 118, 2014-Ohio-4158. Brown filed a petition for postconviction relief in July of 2013 which the trial court denied as untimely and this court affirmed. *State v. Brown*, 7th Dist. No. 13 MA 176, 2014-Ohio-4008.

{¶2} On January 26, 2015, Brown filed this delayed application for reopening. Brown now argues that his appellate counsel was ineffective for failing to raise "winning issues." Appellee, State of Ohio filed a response on February 25, 2015.

{¶3} App.R. 26(B)(1) states:

A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. 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.

{¶4} The purpose of reopening an appeal under App.R. 26(B) is to allow a criminal defendant to establish ineffective assistance of appellate counsel as part of the direct appeal. *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221, ¶ 13. Brown must prove both that his appellate counsel was deficient for failing to raise the issues he now presents and that he was prejudiced by this failure. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

¹ The application for reopening shall not exceed ten pages. App.R. 26(B)(4). Brown's application and attachments totaled 14 pages.

Brown must show that there was a reasonable probability of success on appeal had counsel presented those claims. *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. Brown "bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998-Ohio-704, 701 N.E.2d 696.

{¶5} Pursuant to App.R. 26(B) Brown was required to file his application for reopening within 90 days of the journalization of our judgment entry. "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." *State v. Gumm*, 103 Ohio St.3d 162, 2004–Ohio–4755, 814 N.E.2d 861, ¶ 7.

{¶6} This court issued its judgment entry and opinion in the direct appeal giving rise to this proceeding on September 16, 2014, and to be considered timely Brown would have had to file his application for delayed reopening on or before December 15, 2014. Brown filed his application on January 26, 2015 and concedes that his filing is untimely. If an application for reopening is not filed within the 90–day period set forth in App.R. 26(B)(1), an appellant must make a showing of good cause for the untimely filing. App.R. 26(B)(2).

{¶7} As good cause, Brown claims that he never received any notice from this Court that his appeal had been denied. Brown states that he discovered his appeal was unsuccessful at the end of December, after the deadline to file a timely application had passed, by putting his name into the law library computer. The clerk's docket reflects that a copy of this Court's September 16, 2014 was mailed to Brown's counsel of record. Even assuming that Brown's counsel did not forward a copy of the entry to him, "[s]imple attorney neglect is not a reason for excusing a litigant's failure to comply with time requirements." *State ex rel. Lindenschmidt v. Board of Commissioners of Butler County*, 72 Ohio St.3d 464, 466, 650 N.E.2d 1343 (1995).

As such, Brown has failed to demonstrate good cause for the delay in reopening.

{¶18} Even if Brown were able to establish good cause for the delay, he has failed to raise a genuine issue as to whether he was deprived of the effective assistance of counsel on appeal. Brown states that his appellate counsel was deficient because he "failed to raise winning issues." Brown faults his appellate counsel for failing to argue in the direct appeal that his trial counsel was ineffective; discussing his trial counsel's alleged deficient performance, specifically for the failure to call several alibi witnesses² during the trial. Brown attached affidavits to the present application of the five witnesses he wanted called at trial. "[G]enerally, an attorney's determination of which witnesses to call falls within the realm of trial strategy. Further, a court will not second-guess the trial attorney's tactical decisions. It follows that the mere failure to call witnesses does not render counsel's assistance ineffective absent a showing of prejudice." *State v. Hector*, Montgomery App. No. 18653, 2002-Ohio-1200, 2002 WL 360649, at *4 (internal citations omitted).

{¶19} Brown did not argue any prejudice from trial counsel not calling these witnesses but merely states that the testimony would "further discredit" the testimony of the victim. Brown makes conclusory statements but provides no legal basis as to how there would be a reasonable probability of success on appeal if those witnesses had testified.

{¶10} In conclusion, Brown did not establish good cause for the delay in filing the application for reopening. Further, assuming arguendo that he had, Brown did not establish the existence of a colorable claim of ineffective assistance of appellate counsel. Brown's arguments lack merit and his delayed application for reopening is hereby denied.

² It should be noted that trial counsel did call Julie Mulac during the trial. Brown attached her affidavit to his application in the present matter. At trial Mulac contradicted her testimony and admitted seeing Brown in the swimming pool. (Brown, 12 MA 118 at paragraph 12). Interestingly, she states in her attached affidavit that she never saw Brown in the swimming pool.

DeGenaro, J., concurs.

Waite, J., concurs.

Robb, J., concurs.