

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

CLIFTON J. PANEZICH,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 MA 0087

Motion to Reopen

BEFORE:

Carol Ann Robb, Gene Donofrio, Kathleen Bartlett, Judges.

JUDGMENT:

Denied.

Atty. Paul J. Gains, Mahoning County Prosecutor, *Atty. Ralph M. Rivera*, Assistant Prosecutor, 21 W. Boardman St., 6th Floor., Youngstown, Ohio 44503, for Plaintiff-Appellee and

Clifton J. Panezich, *pro se*, Inmate No. 700-011, Richland Correctional Institution, P.O. Box 8107, Mansfield, Ohio 44905 for Defendant-Appellant.

Dated: October 25, 2018

PER CURIAM.

{¶1} Applicant Clifton Panezich filed an application to reopen his direct appeal pursuant to App.R. 26(B). He is attempting to reopen the appellate judgment rendered in *State v. Panezich*, 7th Dist. No. 17 MA 0087, 2018-Ohio-2812, that affirmed his guilty pleas.

{¶2} Pursuant to App.R. 26(B)(1) an application for reopening must be filed within ninety days from the journalization of the appellate judgment. Panezich's August 27, 2018 application was filed within 90 days of this court's June 29, 2018 decision and thus, is timely.

{¶3} An application to reopen is employed to reopen an appeal from the judgment of conviction and sentence based upon a claim of ineffective assistance of appellate counsel. App.R. 26(B). The application shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal. App.R. 26(B)(5).

{¶4} The appropriate standard to determine whether a defendant has received ineffective assistance of appellate counsel is the two-pronged analysis found in United State Supreme Court decision *Strickland v. Washington*. *State v. Were*, 120 Ohio St.3d 85, 2008–Ohio–5277, 896 N.E.2d 699, ¶ 10. The test is a two prong test. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052. Applicant “must prove that his counsel [was] deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims on appeal.” *Were* at ¶ 11, quoting *State v. Sheppard*, 91 Ohio St.3d 329, 330, 744 N.E.2d 770 (2001). Applicant also “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.” *Were*, quoting *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

{¶5} Panezich argues trial counsel was ineffective for failing to file an affidavit to disqualify the trial judge from his case. As aforementioned, the scope of App.R. 26(B) is limited to claims of ineffective assistance of appellate counsel. Panezich's argument asserts trial counsel was ineffective and thus, this argument does not clearly provide a basis for reopening. However, trial counsel was appellate counsel.

Therefore, it appears Panezich is arguing counsel was ineffective for failing to raise this issue in the trial court and failing to raise his own ineffectiveness on appeal.

{¶16} The Eighth Appellate District has stated, “It is well-established that appellate counsel is not expected to assign as error his or her own purported ineffectiveness as trial counsel.” *State v. Clementson*, 8th Dist. No. 94230, 2011-Ohio-1798, ¶ 16. An attorney “cannot realistically be expected to argue his own incompetence.” *State v. Cole*, 2 Ohio St.3d 112, 114, 443 N.E.2d 169, fn. 1 (1982). Based upon that reasoning, the Eighth Appellate District has concluded an applicant cannot demonstrate his appellate counsel was ineffective for failing to assign his own ineffectiveness as trial counsel. *Clementson*.

{¶17} Regardless, the argument raised in the application fails to demonstrate there is a genuine issue as to whether Panezich was deprived of the effective assistance of counsel on appeal regarding the disqualification issue. Pursuant to R.C. 2701.03(A), if a party believes the judge is biased against them and wants to have the judge disqualified, the party is required to file an affidavit of disqualification with the clerk of the Ohio Supreme Court. The decision as to whether the judge is biased and disqualification is necessary is within the exclusive jurisdiction of the Chief Justice of the Supreme Court of Ohio. R.C. 2701.03(A); Ohio Constitution, Article IV, Section 5(C). Nothing in the record before this court suggests the trial judge was biased and that the Ohio Supreme Court would have granted a disqualification request had it been filed. Accordingly, Panezich has failed to show there is a genuine issue as to whether he was deprived of the effective assistance of counsel on appeal.

{¶18} Panezich’s application to reopen the appeal is denied.

Presiding Judge Carol Ann Robb

Judge Gene Donofrio

Judge Kathleen Bartlett

NOTICE TO COUNSEL

This document constitutes a final judgment entry.