[Cite as *State v. Blackshaw*, 2004-Ohio-3466.]

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 70829

STATE OF OHIO	:	
	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	AND
v.	:	OPINION
	:	
WILLIAM BLACKSHAW	:	
	:	
	:	
Defendant-Appellant	:	

DATE OF JOURNALIZATION: June 29, 2004

CHARACTER OF PROCEEDING: Application for Reopening,
Motion No. 353608
Court of Common Pleas
Case No. CR-330884

JUDGMENT: Application Denied

APPEARANCES:

For Plaintiff-Appellee: WILLIAM D. MASON
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For Defendant-Appellant: STUART H. LIPPE

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COLLEEN CONWAY COONEY, J.

{¶1} William Blackshaw has applied to reopen this court's judgment in *State v. William Blackshaw* (May 29, 1997), Cuyahoga App. No. 70829, pursuant to App.R. 26(B) and *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204. Blackshaw argues that his appellate counsel was ineffective because he did not timely appeal the underlying conviction and, thus, did not properly submit an argument attacking the search warrant. For the following reasons, this court denies the application.

{¶2} App.R. 26(B)(1) and (2)(b) require applications claiming ineffective assistance of appellate counsel to be filed within ninety days from journalization of the decision unless the applicant shows good cause for filing at a later time. Blackshaw's application was filed over six years after this court's decision. Thus, it is untimely on its face. In an effort to show good cause, Blackshaw submits that his appellate attorney caused the delay because he pursued appeals to the Ohio Supreme Court and the United States Supreme Court. However, this court has consistently rejected reliance on counsel in an attempt to show good cause. *State v. White* (Jan. 31, 1991), Cuyahoga App. No. 57944, reopening disallowed (Oct. 19, 1994), Motion No. 249174 and *State v. Allen* (Nov. 3, 1994), Cuyahoga App. No. 65806, reopening disallowed (July 8, 1996), Motion No. 267054. Similarly, in *State v. Lamar* (Oct. 15, 1985), Cuyahoga App. No. 49551, reopening disallowed (Nov. 15, 1995), Motion No. 263398, this court held that lack of

communication with appellate counsel did not show good cause. In *State v. Rios* (1991), 75 Ohio App.3d 288, 599 N.E.2d 374, reopening disallowed (Sept. 18, 1995), Motion No. 266129, Rios maintained that the untimely filing of his application for reopening was primarily caused by the ineffective assistance of appellate counsel; again, this court rejected that excuse. Cf. *State v. Moss* (May 13, 1993), Cuyahoga App. Nos. 62318 and 62322, reopening disallowed (Jan. 16, 1997), Motion No. 275838; *State v. McClain* (Aug. 3, 1995), Cuyahoga App. No. 67785, reopening disallowed (Apr. 15, 1997), Motion No. 276811; and *State v. Russell* (May 9, 1996), Cuyahoga App. No. 69311, reopening disallowed (June 16, 1997), Motion No. 282351.

{¶3} Furthermore, a review of the docket reveals that the United States Supreme Court denied certiorari in March 1998. The reliance on counsel excuse does not explain the lapse of approximately five and one-half years. In *State v. Davis* (1999), 86 Ohio St.3d 212, 214, 714 N.E.2d 384, the Ohio Supreme Court addressed a similar situation and ruled: "Even if we were to find good cause of earlier failures to file, any such good cause 'has long since evaporated. Good cause can excuse the lack of a filing only while it exists, not for an indefinite period.' *State v. Fox* (1998), 83 Ohio St.3d 514, 516, 700 N.E.2d 1253, 1254." Accordingly, this application is properly dismissed as untimely.

{¶4} Moreover, Blackshaw fails to establish a claim for ineffective assistance of appellate counsel. In order to show such a claim, the applicant must

demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, cert. denied (1990), 497 U.S. 1011, 110 S.Ct. 3258. Therefore, even if a petitioner establishes that an error by his lawyer was professionally unreasonable under all the circumstances of the case, the petitioner must further establish prejudice: that, but for the unreasonable error, there was a reasonable probability that the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court need not determine whether counsel's performance was deficient before examining prejudice suffered by the defendant as a result of alleged deficiencies.

{¶5} In the present case, Blackshaw fails to establish prejudice. A reliable informant told the police that Blackshaw had four kilos of cocaine. This informant also provided Blackshaw's address and described his appearance and his car. The police confirmed the information and Blackshaw's history of drug offenses. This provided the basis for a search warrant for Blackshaw's residence. The search revealed four kilos of cocaine and over $20,000 in cash. The trial court upheld the search warrant after a suppression hearing and, in April 1996, found Blackshaw guilty of drug trafficking and possession of criminal tools. In May, the trial court held a forfeiture hearing and ruled that the money was properly forfeited.

{¶6} On June 17, 1996, Blackshaw's attorney appealed both the convictions and the forfeiture. However, the appeal was timely from the date of journalization of the forfeiture order but not from the date of the conviction and sentence. Thus, this court examined all of the assignments of error, but only as they related to the forfeiture and not the conviction.

{¶7} Blackshaw now complains that his attorney was ineffective for failing to timely file the notice of appeal so that his convictions could be examined. Pursuant to App.R. 26(B)(2), he submits the following assignment of error regarding what should have been argued to reverse the convictions: "The trial court erred when it ruled that the affidavit for the search warrant in this case set forth probable cause to search appellant's home." However, this court examined this very issue as it related to the forfeiture and upheld the propriety of the search warrant. Citing *Illinois v. Gates* (1983), 462 U.S. 213, 103 S.Ct. 2317 and *State v. George* (1989), 45 Ohio St.3d 325, 544 N.E.2d 640 - the same authority Blackshaw cites in his application – this court ruled that under the totality of the circumstances, the hearsay in the supporting affidavit and the subsequent confirmation made by the police were sufficient to support a finding of probable cause for the search warrant. Additionally, this court held that the search was proper under the "good faith exception" to the exclusionary rule. Therefore, even if appellate counsel had filed a timely notice of appeal, this court would have upheld the search warrant, the search, and Blackshaw's conviction. Thus, there was no prejudice.

{¶8} Accordingly, this court denies the application.

PATRICIA ANN BLACKMON, P.J. and

ANTHONY O. CALABRESE, JR., J. CONCUR

COLLEEN CONWAY COONEY
JUDGE