

[Cite as *State v. Clark*, 2006-Ohio-3835.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83474

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	and
-vs-	:	
	:	OPINION
DAMON CLARK	:	
	:	
Defendant-Appellant	:	
	:	

DATE OF JOURNALIZATION: JULY 25, 2006

CHARACTER OF PROCEEDING: Application for Reopening
Motion Nos. 375673 and 375674
Lower Court No. CR-430259
Common Pleas Court

JUDGMENT: APPLICATION DENIED.

APPEARANCE:

For Plaintiff-Appellee: WILLIAM D. MASON
Cuyahoga County Prosecutor
BLAISE D. THOMAS
MATTHEW E. MEYER
Assistant County Prosecutors
8TH Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

For Defendant-Appellant: JAMES E. VALENTINE
323 W. Lakeside Avenue
Suite 450 - Lakeside Place
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, J.:

{¶ 1} In *State v. Clark*, Cuyahoga County Court of Common Pleas Case No. CR-430259, applicant, Damon Clark, was convicted of aggravated murder with a firearm specification. This court affirmed that judgment.¹ Clark did not appeal to the Supreme Court of Ohio.

{¶ 2} Clark has filed with the clerk of this court an application for reopening. He asserts that he was denied the effective assistance of appellate counsel because: appellate counsel did not assign as error a purported *Miranda* violation or whether trial counsel was effective, and appellate counsel did not provide Clark with the entire transcript. We deny the application for reopening. As required by App.R. 26(B)(6), the reasons for our denial follow.

{¶ 3} Initially, we note that: "An application for reopening shall be filed *** within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time."² An application for reopening must also include "a showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment."³

¹*State v. Clark*, Cuyahoga App. No. 83474, 2004-Ohio-5964.

²App.R. 26(B)(1).

³App.R. 26(B)(2)(b).

{¶ 4} This court's decision affirming Clark's conviction was journalized on November 22, 2004. The application was filed on September 8, 2005, clearly in excess of the ninety-day limit.

{¶ 5} The Supreme Court has upheld judgments denying applications for reopening solely on the basis that the application was not timely filed and the applicant failed to show "good cause for filing at a later time."⁴ We need not, therefore, examine the merits of this application if Clark failed to demonstrate good cause for failing to file a timely application.

{¶ 6} Clark contends that the filing of his application for reopening was untimely "due to the fact that he had to first file a Motion For Leave Of Court To File Motion For New Trial and Motion For New Trial before the Trial Court ***." Application for Extension of Time Too [sic] File an Application for Reopening of Appeal, at 1. (Capitalization in original.) The reason for the motion for new trial was Clark's receipt of "a Sworn Affidavit from Jimmie Clark, a Chief Witness for the State at Appellant's Trial, in which Jimmie Clark openly admitted 'He lied under Oath, just to be given a far less Sentence", please see Sworn Affidavit of Jimmie Clark Dated; January 5, 2005 ***." Id. (Capitalization and punctuation in original.)

{¶ 7} Obviously, Jimmie Clark's affidavit was not part of the record on direct appeal.

⁴App.R. 26(B)(1); See, e.g., *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861; *State v. LaMar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970.

"Evidence discovered after a conviction that is pertinent to the conviction may be the subject of a motion for a new trial or a petition for postconviction relief, but the omission of evidence in a direct appeal that is outside the trial court record does not present a genuine issue as to the effectiveness of appellate counsel to warrant the reopening of one's appeal."⁵

Damon Clark could not, therefore, have maintained an appeal based on Jimmie Clark's affidavit. Similarly, Damon Clark has not provided this court with any authority supporting his argument that putative evidence which did not exist prior to the direct appeal either provides a basis for reopening or demonstrates good cause for the untimely filing of an application for reopening. We must, therefore, conclude that Damon Clark has not demonstrated good cause for filing an untimely application.

{¶ 8} Damon Clark's failure to demonstrate good cause is a sufficient basis for denying the application for reopening.⁶ As a consequence, he has not met the standard for reopening.

{¶ 9} Accordingly, the application for reopening is denied.

PATRICIA ANN BLACKMON
PRESIDING JUDGE

DIANE KARPINSKI, J., AND,

ANTHONY O. CALABRESE, JR., J., CONCUR.

⁵*State v. Kaszas* (Sept. 10, 1998), Cuyahoga App. Nos. 72546 and 72547, reopening disallowed (Aug. 14, 2000), Motion No. 16752, at 9 (citations deleted).

⁶See *State v. Collier* (June 11, 1987), Cuyahoga App. No. 51993, reopening disallowed 2005-Ohio-5797, Motion No. 370333; *State v. Garcia* (July 8, 1999), Cuyahoga App. No. 74427, reopening disallowed 2005-Ohio-5796, Motion No. 370916.

