

[Cite as *State v. Sharp*, 2008-Ohio-5096.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87709

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL SHARP

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 409130
LOWER COURT NO. CR-472363
COMMON PLEAS COURT

RELEASE DATE: September 30, 2008

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Michael Sharp has filed an application for reopening pursuant to App.R. 26(B). He is attempting to reopen the appellate judgment in *State v. Sharp*, Cuyahoga App. No. 87709, 2006-Ohio-6413. For the following reasons, we decline to reopen his appeal.

{¶ 2} Sharp has failed to timely file his application for reopening. The appellate judgment in *State v. Sharp* was journalized on December 18, 2006, while his application for reopening was not filed until May 19, 2008. App.R. 26(B)(2)(b) requires that Sharp establish “a showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment,” which is subject to reopening. The Ohio Supreme Court, with regard to the ninety-day deadline set forth in App.R. 26(B)(2)(b), has firmly established that absent a showing of “good cause” for filing late, an application for reopening **must** be filed within ninety days of journalization of the appellate judgment that is subject to reopening. (Emphasis added.) *State v. Keith*, 119 Ohio St.3d 161, 2008-Ohio-3866, 892 N.E.2d 912. See, also, *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.

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{¶ 3} Herein, Sharp argues that the recent decision of the Ohio Supreme Court in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, provides “good cause” for the untimely filing of his application for reopening. Specifically, Sharp argues that he was not able to file his application for reopening until the Ohio Supreme Court rendered its decision in *Colon*.

{¶ 4} Sharp’s argument for “good cause,” however must fail. An App.R. 26(B) application for reopening must be premised upon a claim of ineffective assistance of appellate counsel. *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204. Appellate counsel cannot be required to anticipate future changes in the law and argue such potential changes on appeal. *State v. Williams* (1991), 74 Ohio App.3d 686, 600 N.E.2d 298.

{¶ 5} In addition, the Ohio Supreme Court recently reconsidered *Colon* and held that “[O]ur holding in *Colon I* is only prospective in nature, in accordance with our general policy that newly declared constitutional rules in criminal cases are applied prospectively, not retrospectively.” See *State v. Colon*, Slip Opinion No. 2008-Ohio-3749, ¶3.

{¶ 6} Accordingly, Sharp’s application for reopening is denied.

COLLEEN CONWAY COONEY,
PRESIDING JUDGE

CHRISTINE T. MCMONAGLE, J., and
ANN DYKE, J., CONCUR