

[Cite as *State v. Ervin*, 2009-Ohio-2574.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 87333**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**GARY ERVIN**

DEFENDANT-APPELLANT

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**JUDGMENT: APPLICATION DENIED**

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APPLICATION FOR REOPENING  
MOTION NO. 419164  
LOWER COURT NO. CR-448726  
COMMON PLEAS COURT

**RELEASE DATE:** May 29, 2009

**ATTORNEYS FOR PLAINTIFF-APPELLEE**

William D. Mason  
Cuyahoga County Prosecutor

By: John R. Kosko  
Steven E. Gall  
Katherine Mullin  
Assistant County Prosecutors  
8th Floor Justice Center  
1200 Ontario Street  
Cleveland, Ohio 44113

**FOR DEFENDANT-APPELLANT**

Gary D. Ervin, pro se  
Reg No.39414-060  
USP Lewisburg  
P.O. Box 1000  
Lewisburg, PA 17837

COLLEEN CONWAY COONEY, A.J.:

{¶ 1} Gary Ervin has filed an application for reopening pursuant to App.R. 26(B). Ervin is attempting to reopen the appellate judgment in *State v. Ervin*, Cuyahoga App. No. 87333, 2006-Ohio-4498, which affirmed his convictions for felony murder, kidnapping, aggravated robbery, grand theft motor vehicle, felonious assault, and carrying a concealed weapon, but vacated the sentences and remanded for resentencing. We decline to reopen Ervin's appeal.

{¶ 2} App.R. 26(B)(2)(b) requires that Ervin establish "a showing of good cause for untimely filing if the application is filed more than 90 days after

journalization of the appellate judgment,” which is subject to reopening. The Supreme Court of Ohio, with regard to the 90-day deadline provided by App.R. 26(B)(2)(b), has recently established that:

{¶ 3} “We now reject Gumm’s claim that those excuses gave him good cause to miss the 90-day deadline in App.R. 26(B). The rule was amended to include the 90-day deadline more than seven months before Gumm’s appeal of right was decided by the court of appeals in February 1994, so the rule was firmly established then, just as it is today. **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.**

{¶ 4} “Ohio and other states ‘may erect reasonable procedural requirements for triggering the right to an adjudication,’ *Logan v. Zimmerman Brush Co.* (1982), 455 U.S. 422, 437, 102 S.Ct. 1148, 71 L.Ed 2d 265, and that is what Ohio has done by creating a 90-day deadline for the filing of applications **to reopen**. Gumm could have retained new attorneys after the court of appeals issued its decision in 1994, or he could have filed the application on his own. What he could not do was ignore the rule’s filing deadline. \* \* \* **The 90-day requirement in the rule is ‘applicable to all appellants,’ *State v. Winstead* (1996), 74 Ohio**

**St.3d 277, 278, 658 N.E.2d 722, and Gumm offers no sound reason why he – unlike so many other Ohio criminal defendants – could not comply with that fundamental aspect of the rule.”** (Emphasis added.) *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, at ¶7.

{¶ 5} See, also, *State v. LaMar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970; *State v. Cooley*, 73 Ohio St.3d 411, 1995-Ohio-328, 653 N.E.2d 252; and *State v. Reddick*, 72 Ohio St.3d 88, 1995-Ohio-249, 647 N.E.2d 784.

{¶ 6} Ervin is attempting to reopen the appellate judgment that was journalized September 11, 2006. His application for reopening was not filed until March 2, 2009, more than 90 days after journalization of the appellate judgment in *Ervin*. He has failed to establish “a showing of good cause” for the untimely filing of his application for reopening, since an inadequate law library, ignorance of the law, and reliance on counsel do not demonstrate good cause. *State v. Arcuri* (April 29, 2004), Cuyahoga App. No. 84435, reopening disallowed, 2009-Ohio-1083. See, also, *State v. Klein* (Apr. 8, 1991), Cuyahoga App. No. 58389, reopening disallowed (Mar. 15, 1994), Motion No. 49260, affirmed (1994), 69 Ohio St.3d 1481; *State v. Trammell* (July 24, 1995), Cuyahoga App. No. 67834, reopening disallowed (Apr. 22, 1996), Motion No. 70493; and *State v. Travis* (Apr. 5, 1990), Cuyahoga App. No. 56825, reopening disallowed (Nov. 2, 1994), Motion No. 51073, affirmed (1995), 72 Ohio St.3d 317.

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

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COLLEEN CONWAY COONEY,  
ADMINISTRATIVE JUDGE

SEAN C. GALLAGHER, J., and  
KENNETH A. ROCCO, J., CONCUR