

[Cite as *State v. Day*, 2010-Ohio-3862.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 83138

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAN J. DAY

DEFENDANT-APPELLANT

**JUDGMENT:
APPLICATION DENIED**

Application for Reopening
Motion Nos. 432082 and 432083
Cuyahoga County Common Pleas Court
Case No. CR-432083

RELEASE DATE: August 13, 2010

FOR APPELLANT

Dan J. Day, pro se
Inmate No. A450-702
Mansfield Correctional Institution
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Mansfield, Ohio 44901

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Diane Smilanick
Assistant County Prosecutor
8th Floor Justice Center
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MELODY J. STEWART, P.J.:

{¶ 1} In *State v. Day*, Cuyahoga County Court of Common Pleas Case No. CR-432083, applicant, Dan J. Day, was convicted of reckless homicide and murder. This court affirmed that judgment in *State v. Day*, Cuyahoga App. No. 83138, 2004-Ohio-1449. The Supreme Court of Ohio declined jurisdiction. *State v. Day*, 103 Ohio St.3d 1427, 2004-Ohio-4524, 814 N.E.3d 490.

{¶ 2} Day has filed with the clerk of this court an application for reopening. He asserts that he was denied the effective assistance of appellate counsel primarily because his appellate counsel did not assign the

ineffective assistance of trial counsel as error on direct appeal. 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 App.R. 26(B)(1) provides, in part: “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.” App.R. 26(B)(2)(b) requires that an application for reopening include “a showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.”

{¶ 4} This court’s decision affirming applicant’s conviction was journalized on April 23, 2004. The application was filed on March 16, 2010, more than five years after journalization of the decision in Day’s direct appeal and clearly in excess of the ninety-day limit. 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.” App.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.

{¶ 5} Day explains that his application for reopening was filed untimely because: his appellate counsel was unable to provide him with the

transcripts; he was unable to secure the transcripts himself; and it took him considerable time to gain an understanding of the law. “Lack of knowledge or ignorance of the 90-day time constraint, that is applicable to an application for reopening per App.R. 26(B), does not provide sufficient cause for untimely filing. * * * . In addition, reliance upon appellate counsel does not establish good cause for the untimely filing of an application for reopening. * * * . Finally, difficulty in obtaining a transcript or limited access to legal materials does not establish good cause for the untimely filing of an application for reopening. * * * . Herein, [applicant] has failed to establish ‘a showing of good cause’ for the untimely filing of his application for reopening, as premised upon a lack of knowledge, reliance upon his attorney, difficulty in obtaining a transcript, and limited access to legal materials.” (Citations deleted.) *State v. Hudson*, Cuyahoga App. No. 91803, 2009-Ohio-6454, reopening disallowed, 2010-Ohio-2879, at ¶7.

{¶ 6} Similarly, Day’s assertions regarding his inability to secure transcripts through his appellate counsel and other means as well as his difficulty in understanding the law are not sufficient to establish good cause for failure to file a timely application for reopening. Day’s failure to demonstrate good cause is a sufficient basis for denying the application for reopening. See, e.g.: *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.

{¶ 7} Although we need not reach the merits of Day’s proposed assignments of error, we also note that his primary argument in support of reopening is that his appellate counsel did not assign as error that trial counsel was ineffective. A review of the record reflects, however, that Day’s appellate counsel also represented him before the trial court. Appellate counsel is not expected to assert on appeal his or her own ineffectiveness as trial counsel. See, e.g., *State v. Smith*, Cuyahoga App. No. 91346, 2009-Ohio-1610, reopening disallowed, 2010-Ohio-897, Motion No. 421288. To the extent that Day relies on his argument that his appellate counsel was ineffective for failing to assert on appeal that trial counsel was not effective, Day is unable to demonstrate a basis for reopening his appeal.

{¶ 8} As a consequence, Day has not met the standard for reopening. Accordingly, the application for reopening is denied.

MELODY J. STEWART, PRESIDING JUDGE

ANN DYKE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR