

[Cite as *State v. Graves*, 2010-Ohio-4881.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 88845

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

DENNIS GRAVES

DEFENDANT-APPELLANT

**JUDGMENT:
APPLICATION DENIED**

Application for Reopening
Motion No. 437513
Cuyahoga County Common Pleas Court
Case No. CR-469901

RELEASE DATE: October 5, 2010

FOR APPELLANT

Dennis Graves, pro se
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ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Mary McGrath
Assistant County Prosecutor
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MARY EILEEN KILBANE, J.:

{¶ 1} Dennis Graves has filed an application for reopening pursuant to App.R. 26(B). Graves is attempting to reopen the appellate judgment, as rendered in *State v. Graves*, Cuyahoga App. No. 88845, 2007-Ohio-5430, which affirmed his conviction for two counts of rape. We decline to reopen Graves' appeal.

{¶ 2} App.R. 26(B)(2)(b) requires that Graves 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 as provided by App.R. 26(B)(2)(b), has firmly established that:

{¶ 3} “We now reject [applicant’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 [applicant’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. [Applicant] 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. 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; State v. Reddick, 72 Ohio St.3d 88, 1995-Ohio-249, 647 N.E.2d 784.

{¶ 5} Herein, Graves is attempting to reopen the appellate judgment that was journalized on October 11, 2007. The application for reopening was not filed until September 15, 2010, more than 90 days after journalization of the appellate judgement in *State v. Graves*, supra. Graves, in an attempt to show “good cause” for the untimely filing of his application for reopening, argues that he was “under the defective advise of the Ohio Public defender’s Office who explicitly advised * * * he was not able to file any application for Re-Opening to this Court until he exhausted his Habeas Corpus Petition through the U.S. District Court” and “he is indigent and unable to effective solicit the Greater Cleveland Bar Association, the Legal Aid Society of Cleveland, and the Jail Inmate Assistance Program at the University of Akron” to obtain legal representation. Reliance upon appellate counsel does not establish good cause for the untimely filing of an application for reopening. *State v. White* (Jan. 31, 1991), Cuyahoga

App. No. 57944, reopening disallowed (Oct. 19, 1994), Motion No. 249174; *State v. Allen* (Nov. 3, 1994), Cuyahoga App. No. 65806, reopening disallowed (July 8, 1996), Motion No. 267054. See, also, *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; *State v. Russell* (May 9, 1996), Cuyahoga App. No. 69311, reopening disallowed (June 16, 1997), Motion No. 282351.

{¶ 6} In addition, lack of knowledge or ignorance of the time constraint, applicable to an application for reopening per App.R. 26(B), does not provide sufficient cause for untimely filing. *State v. Klein* (Mar. 28, 1991), Cuyahoga App. No. 58389, reopening disallowed (Mar. 15, 1994), Motion No. 249260, affirmed (1994), 69 Ohio St.3d 1481; *State v. Trammell* (July 13, 1995), Cuyahoga App. No. 67834, reopening disallowed (Apr. 22, 1996), Motion No. 270493; *State v. Travis* (Apr. 5, 1990), Cuyahoga App. No. 56825, reopening disallowed (Nov. 2, 1994), Motion No. 251073, affirmed (1995), 72 Ohio St.3d 317. See, also, *State v. Torres*, Cuyahoga App. No. 86530, 2007-Ohio-3696, reopening disallowed (Jan. 3, 2007), Motion No. 390254; *State v. Gaston* (Feb. 7, 2002), Cuyahoga App. No. 79626, reopening disallowed (Jan. 17, 2007), Motion No. 391555. Finally, indigence does not provide good cause for the untimely

filing of an application for reopening. *State v. Waller*, Cuyahoga App. No. 87279, 2006-Ohio-4891, reopening disallowed (Nov. 16, 2007), Motion No. 401158.

{¶ 7} Herein, Graves has failed to establish “a showing of good cause” for the untimely filing of his application for reopening, as premised on reliance upon appellate counsel, lack of knowledge, and an indigent status.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
JAMES J. SWEENEY, J., CONCUR