

[Cite as *State v. Allen*, 2011-Ohio-588.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92482

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES E. ALLEN

DEFENDANT-APPELLANT

**JUDGMENT:
APPLICATION DENIED**

Cuyahoga County Common Pleas Court
Case No. CR-512641
Application for Reopening
Motion No. 434870

RELEASE DATE: February 8, 2011

FOR APPELLANT

James E. Allen, pro se
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ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: T. Allan Regas
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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} On June 16, 2010, the applicant, James E. Allen, pursuant to App. R. 26(B) and *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, applied to reopen this court's judgment in *State v. Allen*, Cuyahoga App. No. 92482, 2010-Ohio-9, in which this court

affirmed Allen’s convictions and sentences for murder and aggravated robbery.¹ Allen asserts that his appellate counsel was ineffective for failing to raise various assignments of error, including the validity of the indictments, the validity of R.C. 2929.14, the admission of a confession, and the selection of the jury. On June 21, 2010, the State of Ohio filed a brief in opposition. For the following reasons, this court denies the application to reopen.

{¶ 2} App.R. 26(B)(1) and (2)(b) require applications claiming ineffective assistance of appellate counsel to be filed within ninety days from journalization of the decision unless the applicant shows good cause for filing at a later time. The June 16, 2010 application was filed approximately 150 days after this court’s decision, journalized on January 19, 2010. Thus, it is untimely on its face.

{¶ 3} On April 1, 2010, Allen filed a “Notice of intent to file Criminal Rule 26B.” In this filing Allen complains that he needs the trial transcript in order to argue the ineffectiveness of his counsel. Thus, Allen made a timely proffer of a showing of good cause, but not a timely application. However, his proffer does not establish good cause. This court has repeatedly ruled that lack of a transcript does not state good cause for an untimely filing. *State v. Lawson*, Cuyahoga App. No. 84402, 2005-Ohio-889, reopening disallowed, 2006-Ohio-3839; *State v. Blackmon* (July 18, 1985), Cuyahoga App. No. 48787,

¹ This court stated that the trial presented overwhelming evidence of Allen’s participation in and serving as the “get-away” driver in a robbery that resulted in a murder.

reopening disallowed, (Oct. 25, 2000), Motion No. 318768; *State v. Houston* (Jan. 24, 1994), Cuyahoga App. No. 64574, reopening disallowed (Feb. 15, 1995), Motion No. 259344, affirmed *State v. Houston* (1995), 73 Ohio St.3d 346, 652 N.E.2d 1018; *State v. Morgan* (Mar. 16, 1989), Cuyahoga App. No. 55340, reopening disallowed 2007-Ohio-5532; *State v. Collins* (July 3, 1995), Cuyahoga App. No. 67265, reopening disallowed (Feb. 10, 1997), Motion No. 277984; and *State v. Booker* (Aug. 9, 1993), Cuyahoga App No. 62841, reopening disallowed (Dec. 30, 1996), Motion No. 278561.

{¶ 4} Moreover, the “Notice of intent to file Criminal Rule 26B” was ineffective to toll the time for filing an application to reopen. The rules do not provide for such a device, and this court has previously rejected such efforts. Cf. *State v. Wynn*, Cuyahoga App. No. 93057, 2010-Ohio-519, reopening disallowed 2010-Ohio-5469, in which a motion to the Supreme Court of Ohio asking additional time for the 26(B) did not extend the time for filing.

The Supreme Court of Ohio in *State v. Lamar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970, and *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, held that the ninety-day deadline for filing must be strictly enforced. In those cases the applicants argued that after the court of appeals decided their cases, their appellate counsels continued to represent them, and their appellate counsels could not be expected to raise their own incompetence. Although the supreme court agreed with this latter principle, it rejected the argument that continued representation provided good cause. In both cases the court ruled

that the applicants could not ignore the ninety-day deadline, even if it meant retaining new counsel or filing the applications themselves. The court then reaffirmed the principle that lack of effort, imagination and ignorance of the law do not establish good cause for complying with this fundamental aspect of the rule.

{¶ 5} Accordingly, this court denies the application to reopen as untimely.

FRANK D. CELEBREZZE, JR., JUDGE

MELODY J. STEWART, P.J., and
MARY J. BOYLE, J., CONCUR