

[Cite as *State v. Rodriguez*, 2013-Ohio-95.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 78696

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTONIO RODRIGUEZ

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Common Pleas Court
Case No. CR-379959
Application for Reopening
Motion No. 461298

RELEASE DATE: January 16, 2013

APPELLANT

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ATTORNEYS FOR APPELLEE

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Cuyahoga County Prosecutor
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KATHLEEN ANN KEOUGH, J.:

{¶1} On December 31, 2012, the applicant, Antonio Rodriguez, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Rodriguez*, 8th Dist. No. 78696 (Dec. 4, 2000), in which this court dismissed Rodriguez's appeal for failure to file the record. Rodriguez now argues that this appeal should be reinstated because his counsel abandoned him and prevented Rodriguez from having his day in court. On January 8, 2013, the state of Ohio filed its brief in opposition. For the following reasons, this court denies the application to reopen.

{¶2} In *State v. Rodriguez*, Cuyahoga C.P. No. CR-379959, Rodriguez was charged with one count each of felonious assault and aggravated robbery, both with one- and three-year firearm specifications, as well as one count of having a weapon under disability. Pursuant to a plea bargain, Rodriguez pleaded guilty to felonious assault; the state nolleed the other charges, including all of the firearm specifications, and dismissed a separate theft case; and the judge sentenced Rodriguez to an agreed two-year sentence. Between the time of the guilty plea hearing and the sentencing, Rodriguez moved to withdraw the plea. After a hearing, the trial judge, on October 10, 2000, denied that motion. Rodriguez's attorney timely appealed that denial on October 13, 2000, and asked for a transcript. However, when no transcript was filed, this court dismissed the appeal.

{¶3} App.R. 26(B)(1) and (2)(b) require applications claiming ineffective

assistance of appellate counsel to be filed within 90 days from journalization of the decision unless the applicant shows good cause for filing at a later time. The December 31, 2012 application was filed approximately 12 years after this court dismissed the case.

Thus, it is untimely on its face. To show good cause, Rodriquez argues that his appellate counsel abandoned him, costing him his day in court and that he has very limited use of English. However, these excuses do not explain the lapse of 12 years. In *State v. Davis*, 86 Ohio St.3d 212, 214, 1999-Ohio-160, 714 N.E.2d 384, the Supreme Court of Ohio addressed a similar long lapse of time in filing an App.R. 26(B) application and ruled:

Even if we were to find good cause of earlier failures to file, any such good cause “has long since evaporated. Good cause can excuse the lack of a filing only while it exists, not for an indefinite period.” *State v. Fox*, 83 Ohio St.3d 514, 516, 1998-Ohio-517, 700 N.E.2d 1253, 1254.

{¶4} Moreover, an App.R. 26(B) application to reopen can only be employed to reopen an appeal from the judgment of conviction and sentence. It does not apply to collateral remedies such as a motion to withdraw a guilty plea or a postconviction relief petition. *State v. Loomer*, 76 Ohio St.3d 398, 1996-Ohio-59, 667 N.E.2d 1209; and *State v. Alford*, 8th Dist. No. 95946, 2011-Ohio-6259. Because App.R. 26(B) applies only to the direct appeal of a criminal conviction and sentence, it cannot be employed to reopen the appeal of Rodriquez’s denial of a motion to withdraw his guilty plea.

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

KATHLEEN ANN KEOUGH, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and
EILEEN A. GALLAGHER, J., CONCUR