

[Cite as *State v. Thomas*, 2015-Ohio-1944.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 96146

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHRISTOPHER THOMAS

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-10-535943-A
Application for Reopening
Motion No. 482189

RELEASE DATE: May 20, 2015

ATTORNEY FOR APPELLANT

Albert L. Purola
38298 Ridge Road
Willoughby, Ohio 44094

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
By: Brett S. Hammond
Assistant County Prosecutor
9th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, J.:

{¶1} On January 23, 2015, the applicant, Christopher Thomas, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Thomas*, 197 Ohio App.3d 176, 2011-Ohio-6073, 966 N.E.2d 939 (8th Dist.), in which this court affirmed in part and vacated in part his convictions and sentences for sexual battery, illegal use of a minor in nudity-oriented material, importuning, endangering children, and possession of criminal tools, and remanded his case for resentencing. Thomas now argues that his appellate counsel was ineffective for not arguing that the nude pictures were protected speech under the First Amendment and could not be used as the basis for conviction. The state of Ohio filed its brief in opposition on February 23, 2015. For the following reasons, this court denies the application to reopen.

{¶2} Thomas was a teacher who had inappropriate relations with two of his female students, aged 13 and 14. He had a sexual encounter with the 13-year-old. He also sent sexually explicit electronic messages to the girls and convinced them to take sexually explicit photographs of themselves and send them to his cell phone. Thomas then transferred the pictures from his cell phone to his computer.

{¶3} Thomas pleaded no contest to one count of sexual battery, 22 counts of illegal use of a minor in nudity-oriented material, seven counts of importuning, six counts of endangering children, and one count of possession of criminal tools. The trial judge sentenced him to a total of 93 years in prison.

{¶4} In the subject appeal on November 23, 2011, this court overruled Thomas's arguments that his plea was improper and involuntary and that his trial counsel was ineffective for not challenging the propriety of the indictment. However, this court upheld his argument that the charges of child endangerment merged with other counts in the indictment. Thus, this court vacated the sentences and remanded the case so the state could elect on which charges it would proceed and the judge could impose a proper sentence.¹

{¶5} On December 5, 2011, Thomas filed an App.R. 26(A) motion for reconsideration, and this court denied the motion on March 5, 2012. On April 23, 2012, Thomas sought appeal to the Supreme Court of Ohio, Case No. 2012-0650. The Supreme Court denied leave to appeal on July 10, 2012.

{¶6} On remand in October 2012, the trial court conducted a complete de novo sentencing on all counts and reduced the total sentence to 21 years. On appeal, Thomas, through his current attorney, argued ineffective assistance of counsel and sufficiency of evidence. On May 2, 2013, this court dismissed the appeal for lack of a final, appealable order because the resentencing entry did not comply with *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142. *State v. Thomas*, 8th Dist. Cuyahoga No. 99162, 2013-Ohio-1804.

{¶7} Before the trial court, Thomas on May 23, 2013, filed a motion for

¹*State v. Thomas*, 8th Dist. Cuyahoga No. 96798, was consolidated with the subject appeal. This court affirmed the trial court's decision denying Thomas's motion to withdraw his plea, and Thomas does not seek to reopen Case No. 96798.

postconviction relief, which is apparently still pending. On October 31, 2013, the trial court resentenced Thomas and did not impose sentences for the merged counts of child endangerment. Thomas, through his current attorney, appealed and again argued that his original appellate counsel was ineffective and that there were insufficient facts to support his convictions entered upon a no-contest plea. This court ruled that these arguments are barred by res judicata, and affirmed. *State v. Thomas*, 8th Dist. Cuyahoga No. 100749, 2014-Ohio-2410. Thomas now brings this App.R. 26(B) application to reopen.

{¶8} 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.

Thomas filed his application approximately three years after the 90-day limitation period had expired. Thus, it is untimely on its face. To show good cause, Thomas argues that the remand for resentencing meant that the case was pending in the trial court, and he could not pursue an App.R. 26(B) application while the case was before the trial court. However, he cites no authority for that proposition, and the case did not return to the trial court until July 2012, because he had filed an App.R. 26(A) motion for reconsideration and then appealed to the Supreme Court of Ohio. Supreme Court of Ohio Rule of Practice 7.01(D) provides that after an appeal is perfected to the Supreme Court, a court of appeals retains jurisdiction to rule on a timely App.R. 26 application. Thus, this argument is unpersuasive.

{¶9} Thomas also argues that he could not pursue an App.R. 26(B) application

because he was still represented by his original appellate counsel, who could not be expected to argue his own incompetence. The Supreme Court of Ohio explicitly rejected this argument 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, and held that the 90-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 lawyers continued to represent them, and their appellate lawyers 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 90-day deadline, even if it meant retaining new counsel or filing the applications themselves. The court then reaffirmed the principle that lack of effort, lack of imagination, and ignorance of the law do not establish good cause for failure to seek timely relief under App.R. 26(B). Thomas does not establish good cause for his untimely filing.

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

PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, J., and
MELODY J. STEWART, P.J., CONCUR

