

[Cite as *State v. Hilton*, 2016-Ohio-287.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89220

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL HILTON

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-480057
Application for Reopening
Motion No. 488334

RELEASE DATE: January 26, 2016

FOR APPELLANT

Michael Hilton, pro se
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ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
By: Anthony Thomas Miranda
Assistant County Prosecutor
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MELODY J. STEWART, J.:

{¶1} On August 14, 2015, the applicant, Michael Hilton, pursuant to App.R. 26(B) and *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992), applied to reopen this court's judgment in *State v. Hilton*, 8th Dist. Cuyahoga No. 89220, 2008-Ohio-3010, in which this court affirmed in part and reversed in part Hilton's convictions for rape, gross sexual imposition, and kidnapping of his girlfriend's 12-year-old daughter. A jury convicted Hilton of 13 counts of rape, 13 counts of gross sexual imposition, and 13 counts of kidnapping. This court ruled that the state provided sufficient factual bases to differentiate five counts of rape, five counts of gross sexual imposition, and ten counts of kidnapping. It reversed the other counts and remanded for further proceedings consistent with the opinion. Hilton now maintains that his appellate counsel was ineffective and should have argued the following: (1) the trial court improperly imposed consecutive sentences, (2) maximum sentences were not warranted, (3) the offenses were not proven with sufficient specificity, (4) the state did not prove that the girl was 12 years old for all the offenses, (5) the state did not prove the offenses were within the dates alleged, and (6) the prosecutor violated Hilton's right to silence. The state filed its brief in opposition on September 14, 2015. For the following reasons, this court denies the application.

{¶2} 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 August 2015 application was filed approximately seven years after this court's decision. Thus, it is untimely on its face. In an effort to establish good cause, Hilton claims that after his resentencing on remand, his newly appointed appellate counsel never filed an appeal. Although Hilton was promised new appellate counsel, such counsel never materialized.

{¶3} A review of the relevant dockets show a different procedural history. The trial court initially resentenced Hilton on August 15, 2008, and appointed appellate counsel. No timely appeal was filed. Hilton, pro se, did file a motion to vacate or set aside judgment on September 26, 2008, which the trial court denied in early October. On October 9, 2008, the trial court issued a nunc pro tunc sentencing entry to note that the jury had convicted Hilton on Count 5, which was omitted in the earlier resentencing entry.

Hilton filed a timely pro se notice of appeal from the nunc pro tunc entry, *State v. Hilton*, 8th Dist. Cuyahoga No. 92362, but this court dismissed the appeal for failure to file a record. On April 16, 2009, the trial court appointed another appellate counsel for Hilton, who sought a delayed appeal in May 2009, *State v. Hilton*, 8th Dist. Cuyahoga No. 93284, but this court denied the motion for delayed appeal. On April 4, 2014, Hilton filed a pro se motion for resentencing, but the trial court denied that motion on April 15, 2014. In November 2014, Hilton sought a delayed appeal of the August 15, 2008 sentencing entry, *State v. Hilton*, 8th Dist. Cuyahoga No. 102207, but again this court denied the motion for delayed appeal.

{¶4} Because the trial court did appoint new appellate counsel who tried to salvage the case and given Hilton’s multiple pro se efforts to appeal his case, the claim that he was relying on new counsel to be appointed for him is unpersuasive to show good cause. 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, addressed a similar excuse. 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 have retained new counsel or filed the App.R. 26(B) application themselves. “What [the applicants] could not do was ignore the rule’s filing deadline.” *Id.* at ¶ 7. 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). Similarly, Hilton could not ignore the rule’s filing deadline while claiming to wait passively for new counsel.

{¶5} Moreover, the excuse does not explain the lapse of approximately seven 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 long lapse of time in filing the 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.”

{¶6} Accordingly, this court denies the application.

MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and
TIM McCORMACK, J., CONCUR