

[Cite as *State v. Montgomery*, 2016-Ohio-378.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102043

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KENNY MONTGOMERY

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-14-584876-A
Application for Reopening
Motion No. 488660

RELEASE DATE: February 2, 2016

FOR APPELLANT

Kenny Montgomery, pro se
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ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
By: Gregory Ochocki
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TIM McCORMACK, J.:

{¶1} On August 27, 2015, the applicant, Kenny Montgomery, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Montgomery*, 8th Dist. Cuyahoga No. 102043, 2015-Ohio-2158, in which this court affirmed his conviction for felonious assault.¹ Montgomery now claims that his appellate counsel was ineffective in the following ways: (1) he had to ask for two extensions of time to file the brief, (2) he did not raise the claim of ineffective assistance of trial counsel as Montgomery requested, (3) he did not argue that words were added and changed in the trial transcripts, (4) he did not review the entire record of the case, (5) he did not notify Montgomery of the appellate decision for three weeks, (6) he did not also appeal *State v. Montgomery*, Cuyahoga C.P. No. CR-14-584761-A, and (7) he did not inform Montgomery if oral argument had been requested. On September 23, 2015, the state of Ohio filed its brief in opposition. For the following reasons, this court denies the application to reopen.

{¶2} App.R. 26(B)(2)(c) provides that an application for reopening shall contain one or more assignments of error or arguments in support of assignments of error that were not considered on the merits or considered on an incomplete record. Moreover, in order to establish a claim of ineffective assistance of appellate counsel, the applicant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768 (1990); and *State v. Reed*, 74 Ohio St.3d 534, 660 N.E.2d 456 (1996).

¹Montgomery and his girlfriend got into a fight, during which Montgomery hit her in her face and body. The medical records indicated a diagnosis of head injury and nasal fracture. Montgomery's appellate attorney argued that the verdict was against the manifest weight of the evidence because the state did not prove that Montgomery caused serious physical harm to his girlfriend.

{¶3} Several of the deficiencies that Montgomery lists — taking two extensions of time, failing to review the record, delaying in notifying Montgomery of this court’s decisions, and failing to inform him about oral argument — are not authentic assignments of error. They do not address mistakes in the trial court that could be rectified on appeal. Several of these arguments also rely on matters outside the record, e.g., the communications between appellate counsel and Montgomery, and cannot provide a basis for reopening. *State v. Bonneau*, 8th Dist. Cuyahoga No. 97565, 2013-Ohio-696, and *State v. Saunders*, 8th Dist. Cuyahoga No. 96643, 2012-Ohio-4586. Thus, they are beyond the scope of App.R. 26(B).

{¶4} Montgomery lists his points in one long paragraph and generally fails to argue them. In *State v. Kelly*, 8th Dist. Cuyahoga No. 74912, 2000 Ohio App. LEXIS 2907 (Nov. 18, 1999), this court ruled “that the mere recitation of assignments of error is not sufficient to meet the applicant’s burden to ‘prove that his counsel were deficient.’” *State v. Jackson*, 8th Dist. Cuyahoga No. 100215, 2015-Ohio-1946. We note that Montgomery stated that he wanted ineffective assistance of trial counsel to be argued, but he does not state how his trial counsel was deficient. Without that information, this court cannot determine whether there is a genuine issue on the ineffective assistance of appellate counsel, as required by App.R. 26(B)(5).

{¶5} Even when Montgomery proffers some explanation, he fails to show deficiency and prejudice. He points to a discrepancy in the sentencing hearing. After the judge explained postrelease control, he sentenced Montgomery to three years on Count 2. However, Montgomery pleaded to Count 1, felonious assault, and the sentencing entry shows that the three-year sentence was imposed on Count 1. Appellate counsel was not deficient in trying to argue a misstatement by the trial court judge, when it would not have changed the sentence, and the journal entries were correct.

{¶6} Similarly, Montgomery posits that failing to appeal the other case deprived this court and his appellate counsel from information that would have been helpful in the current appeal.² However, Montgomery does not state what that information was and how it could have helped him. Finally, he indicates that his counsel's delay in informing him of the appellate court's decision precluded him from appealing to the Supreme Court of Ohio. Even though such arguments are outside the scope of App.R. 26(B), Montgomery does not establish that he could not have appealed in the remaining time, and whether or not the Supreme Court of Ohio would have taken his case, presumably on the manifest weight argument, and decided in his favor is pure speculation. He has not shown prejudice. *State v. Piggee*, 8th Dist. Cuyahoga No. 101331, 2015-Ohio-546.

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

TIM McCORMACK, JUDGE

LARRY A. JONES, SR., A.J., and
MARY EILEEN KILBANE, J., CONCUR

²In the other case, Montgomery pleaded guilty to burglary and attempted felonious assault. The trial judge merged the two counts, and pursuant to the state's election to proceed on the attempted felonious assault charge, the trial court imposed a twelve-month sentence concurrent to the three-year sentence in the instant case.