[Cite as *State v. McClain*, 2016-Ohio-4954.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103089

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TAVARRE MCCLAIN

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-14-586972-A
Application for Reopening
Motion No. 496798

RELEASE DATE: July 13, 2016

FOR APPELLANT

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ATTORNEYS FOR APPELLEE

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PATRICIA ANN BLACKMON, J.:

{¶1} On May 27, 2016, the applicant, Tavarre McClain, pursuant to App.R. 26(B) and *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992), commenced this application to reopen this court's judgment in *State v. McClain*, 8th Dist. Cuyahoga No. 103089, 2016-Ohio-705, in which this court affirmed McClain's convictions and sentences for involuntary manslaughter with a firearm specification, felonious assault, discharge of a firearm near a prohibited premises, and having a weapon while under disability. McClain submits that his appellate counsel should have argued (1) that his trial counsel was ineffective for failing to advise him that he faced a mandatory sentence pursuant to R.C. 2929.13(F), and (2) that his sentence was contrary to law. The state filed its brief in opposition on June 6, 2016. For the following reasons, this court denies the application.

{¶2} As shown by the plea hearing transcript, on June 25, 2014, on a public street in view of the residents, McClain and the victim got into an argument. When McClain felt disrespected by the victim's actions, he pulled out his handgun and tried to shoot the victim. Initially, the gun jammed. McClain then unjammed the firearm and fired six shots, one of which killed the victim.

{¶3} The grand jury indicted McClain for aggravated murder, murder, two counts of felonious assault, discharge of a firearm on or near a prohibited premises, and having a weapon while under disability, all with one- and three-year firearm specifications. The state presented two plea offers to McClain. Under the first, he would plead guilty to

murder with a firearm specification and to having a weapon under disability. This option would carry a sentence of 18 years to life. Under the second, McClain would plead guilty to involuntary manslaughter with a firearm specification (amended from murder in Count 2), one count of felonious assault, discharge of a firearm near a prohibited premises, and having a weapon while under disability. Under the second offer, none of the offenses would merge. McClain would then face a sentence of 17 to 23 years.

{¶4} McClain pled guilty pursuant to the second option. In doing so, he explicitly acknowledged that he committed the subject crimes and that he would receive a prison sentence between 17 and 23 years.

{¶5} He then moved to withdraw his guilty plea at the sentencing hearing. The judge reviewed the charges, their penalties, and the plea offer with McClain and endeavored to discern what McClain knew when he pleaded guilty. This included the allegations that McClain had contacted witnesses from jail and discussed the case with them. The judge denied the motion to withdraw the guilty plea and sentenced him to 23 years in prison.

{¶6} McClain's appellate counsel made the following arguments: (1) the trial court erred in accepting a plea that was not knowingly, willingly or intelligently made; (2) the trial court erred by not allowing McClain to withdraw his guilty plea; and (3) the trial court erred in imposing a sentence not authorized by law. This court rejected those arguments and affirmed. McClain now argues that his appellate counsel was ineffective

for not arguing that his trial counsel did not advise him that his sentence would be mandatory and that the sentence was contrary to law.

{¶7} 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. This court issued its decision on February 25, 2016, and McClain filed his application two days late on Friday, May 27, 2016. Four (remaining days in February 2016) plus 31 (March) plus 30 (April) plus 27 (May) equals 92. Thus, this application is untimely. McClain did not proffer any explanation to show good cause.

{¶8} 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 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 counsel continued to represent them, and their appellate counsel 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, imagination, and ignorance of the law do not establish good cause for complying with this fundamental aspect of the rule. As a corollary, miscalculation of the time needed for

mailing would also not state good cause. *State v. Agosto*, 8th Dist. Cuyahoga No. 87283, 2006-Ohio-5011, *reopening disallowed*, 2007-Ohio-848; *State v. Ellis*, 8th Dist. Cuyahoga No. 91116, 2009-Ohio-852, *reopening disallowed*, 2009-Ohio-2875; and *State v. Peyton*, 8th Dist. Cuyahoga No. 86797, 2006-Ohio-3951, *reopening disallowed*, 2007-Ohio-263. The App.R. 26(B) application to reopen is denied as untimely because it was filed two days late.

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

PATRICIA ANN BLACKMON, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
EILEEN T. GALLAGHER, J., CONCUR