

[Cite as *State v. Howard*, 2016-Ohio-8298.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 97695

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANDRE HOWARD, JR.

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-554036
Application for Reopening
Motion No. 501719

RELEASE DATE: December 20, 2016

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SEAN C. GALLAGHER, J.:

{¶1} On November 10, 2016, the applicant, Andre Howard, pursuant to App.R. 26(B), applied to reopen this court’s judgment in *State v. Howard*, 8th Dist. Cuyahoga No. 97695, 2012-Ohio-3459, in which this court affirmed Howard’s convictions for four counts of felonious assault, and two counts of improperly discharging a weapon into a habitation, all with one-, three-, and five-year firearm specifications, along with one count of having weapons while under disability.¹ Howard now argues that his appellate counsel did not properly argue ineffective assistance of trial counsel: (1) appellate counsel failed to support assigned error for ineffective assistance of trial counsel with evidence of the availability of alibi witnesses; (2) appellate counsel and trial counsel conceded that Howard’s initial alibi statement was false; and (3) trial counsel failed to cross-examine the witnesses on their initial misidentification of the two other men. For the following reasons, this court denies the application to reopen.

¹On June 12, 2011, Howard had a confrontation with his ex-girlfriend. She subsequently went to her father’s house. The people there witnessed Howard drive past the father’s house several times.

Shortly after midnight on June 13, Howard drove past the house again. The person in the back of the car, as well as two men riding bicycles behind the car, fired shots toward the people in front of the father’s house. One person was shot in the head, 11 shell casings were recovered, and several bullet holes were noted in the neighbors’ houses.

The father and two other witnesses identified Howard as the driver of the car. The ex-girlfriend did not testify. In their initial reports to the police, the father, the ex-girlfriend, and the shot victim identified two other men as shooters. The grand jury indicted them, too. However, when the other men’s alibis were verified, the state dismissed the charges against them without prejudice. Howard testified at trial and denied that he was involved in a shooting; rather he was at his aunt’s house watching a basketball game. The trial court found him guilty on all charges and sentenced him to a total of 12 years.

{¶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 November 2016 application was filed more than four years after this court’s decision. Thus, it is untimely on its face. Moreover, 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 *Gumm*, the Supreme Court of Ohio ruled that in promulgating the 90-day deadline, Ohio “erected a reasonable procedural requirement for triggering the right to an adjudication.” *Id.* at ¶ 8, quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). Furthermore, consistent enforcement of the rule protects the state’s legitimate interest in finality and ensures the prompt resolution of any claims of ineffective assistance of appellate counsel. 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 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).

{¶3} In an effort to establish good cause, Howard argues that case law makes it almost impossible to state good cause. He also relies on several pre-*Gumm* and *Lamar* cases that held that it would be unjust to deny an application to reopen an appeal due to a

procedural defect when a genuine issue regarding the effectiveness of appellate counsel is shown. These arguments are unpersuasive.

{¶4} Those early cases are no longer reliable in light of *Gumm* and *Lamar*. The Supreme Court of Ohio made it very clear that an applicant must show extraordinary reasons for not filing timely. All the ordinary excuses are insufficient.

{¶5} Moreover, Howard's arguments are not such "dead-bang winners" that they would support a plea to transcending justice. Appellate review is strictly limited to the record. *The Warder, Bushnell & Glessner Co. v. Jacobs*, 58 Ohio St. 77, 50 N.E. 97 (1898). Thus, "a reviewing court cannot add matter to the record that was not part of the trial court's proceedings and then decide the appeal on the basis of the new matter." *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus. "Nor can the effectiveness of appellate counsel be judged by adding new matter to the record and then arguing that counsel should have raised these new issues revealed by the newly added material." *State v. Moore*, 93 Ohio St.3d 649, 650, 2001-Ohio-1892, 758 N.E.2d 1130. Therefore, appellate counsel could not support the ineffective assistance of trial counsel argument with a 2015 affidavit that Howard had alibi witnesses ready, willing, and able to testify.²

{¶6} Howard also argues that his trial counsel was ineffective for not cross-examining the father and the gunshot victim for misidentifying the co-defendants.

²The court notes that Howard's new counsel submitted a complete copy of Howard's transcript with the application to reopen, but did not refer to the transcript as to the existence of alibi witnesses. Instead, he relies on recent affidavits.

A review of the transcript shows the witness statements containing those identifications were before the court and that trial counsel did cross-examine the father on this point. (Tr. 132, 135-136.) Moreover, trial counsel in closing argument maintained that the erroneous accusations against those other individuals meant that the accusation against Howard was also erroneous.³

{¶7} Finally, appellate counsel in the brief did not insinuate that Howard's alibi was compromised. Moreover, this court had all of Howard's testimony before it, so that it could draw its own conclusions.

{¶8} In summary, this court will not deviate from the Supreme Court of Ohio's admonition to strictly enforce App.R. 26(B)'s 90-day deadline.

{¶9} Accordingly, this court denies the application as untimely.

SEAN C. GALLAGHER, JUDGE

MARY J. BOYLE, P.J., and
EILEEN A. GALLAGHER, J., CONCUR

³It is easy to speculate that trial counsel sought a bench trial so he could invoke the judge's knowledge that Howard's codefendants were dismissed.