[Cite as *State v. Hubbard*, 2016-Ohio-918.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 83384

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CORDELL HUBBARD

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-03-435700-C
Application for Reopening
Motion No. 490969

RELEASE DATE: March 9, 2016

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Cordell Hubbard has filed an application for reopening pursuant to App.R. 26(B). Hubbard is attempting to reopen the appellate judgment rendered in *State v. Hubbard*, 8th Dist. Cuyahoga No. 83384, 2004-Ohio-4627, which affirmed his conviction and sentence.

{¶2} The appellate judgment was released on September 2, 2004. The application for reopening was not filed until November 16, 2015. App.R. 26(B)(1) requires applications to be filed within 90 days after journalization of the appellate judgment. The only exception that would permit us to review an untimely application is if applicant establishes good cause for filing at a later time. *Id.*_

{¶3} The Supreme Court of Ohio, with regard to the 90-day deadline provided by App.R. 26(B)(2)(b), has firmly established that

> [c]onsistent enforcement of the rule's deadline by the appellate courts in Ohio protects on the one hand the state's legitimate interest in the finality of its judgments and ensures on the other hand that any claims of ineffective assistance of appellate counsel are promptly examined and resolved.
>
> Ohio and other states "may erect reasonable procedural requirements for triggering the right to an adjudication," *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437, 102 S.Ct 1148, 71 L.Ed.2d 265 (1982), and that is what Ohio has done by creating a 90-day deadline for the filing of applications to reopen. [The applicant] could have retained new attorneys after the court of appeals issued its decision in 1994, or he could have filed the application on his own. What he could not do was ignore the rule's filing deadline.
> * * * The 90-day requirement in the rule is "applicable to all appellants," *State v. Winstead* (1996), 74 Ohio St.3d 277, 278, 658 N.E.2d 722, and [the applicant] offers no sound reason why he — unlike so many other Ohio criminal defendants — could not comply with that fundamental aspect of the rule.

State v. Gumm, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, ¶ 8, 10. *See also State v. LaMar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970; *State v. Cooey*, 73 Ohio St.3d 411, 1995-Ohio-328, 653 N.E.2d 252; *State v. Reddick*, 72 Ohio St.3d 88, 1995-Ohio-249, 647 N.E.2d 784.

{¶4} Applicant acknowledges that he did not file the application in a timely manner. He claims his appellate attorney did not inform him that he could have another attorney review that attorney's work or that he had 90 days to file an application to reopen the direct appeal. He claims he would have filed the application if he had known he had the ability to do so. Applicant indicates that the same counsel represented him throughout the remainder of the state appeal process as well as the federal appellate process and that prior counsel could not raise his own ineffectiveness.

{¶5} Applicant provides no law that would support a finding that any of his proffered reasons create the good cause required to allow consideration of an untimely filed application. The courts have actually consistently rejected these arguments and found they do not provide good cause for a delayed application. *See State v. Keith*, 119 Ohio St.3d 161, 2008-Ohio-3866, 892 N.E.2d 912, ¶ 6-7, citing *Gumm*, *supra* and *LaMar*, *supra*. The Ohio Supreme Court has consistently held that an attorney's continued representation in ongoing or collateral litigation does not establish good cause for filing an application to reopen outside the rule's 90-day deadline. The applicant could have attempted to obtain new counsel or could have filed an application himself. Applicant has offered no factual basis upon which appellate counsel would have had reason to

advise him of an option to retain other counsel to review his work or challenge his effectiveness. It is self evident that a client always has the option and right to seek and retain the advice of different counsel. Further, there was an extensive time period between the conclusion of the state appellate proceedings and the filing of this application.

{¶6} The Ohio Supreme Court declined jurisdiction and dismissed Hubbard's appeal in 2005. Hubbard then waited over ten years before filing this application. Neither applicant's alleged reliance on his prior counsel nor his ignorance of the law provide good cause to allow consideration of a delayed filing. *State v. Gray*, 8th Dist. Cuyahoga No. 92646, 2012-Ohio-3565, ¶ 3, citing *State v. Alt*, 8th Dist. Cuyahoga No. 96289, 2012-Ohio-2054; *State v. Moncrief*, 8th Dist. Cuyahoga No. 85479, 2006-Ohio-5571, ¶ 5 (misplaced reliance on appellate counsel and ignorance of the law do not state good cause).

{¶7} It is proper to deny applications for reopening solely on the basis that they are untimely filed and without good cause for the delay. *Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, and *LaMar*, 2014-Ohio-3976. Applicant's failure to demonstrate good cause is a sufficient basis for denying his application for reopening. *See, e.g., State v. Almashni*, 8th Dist. Cuyahoga No. 92237, 2010-Ohio-898, *reopening disallowed*, 2012-Ohio-349._

{¶8} Applicant has not established good cause for filing an untimely application for reopening. Accordingly, the application for reopening is denied.

FRANK D. CELEBREZZE, JR., JUDGE

TIM McCORMACK, J., CONCURS;
MARY EILEEN KILBANE, P.J., DISSENTS
(SEE ATTACHED DISSENTING OPINION)

MARY EILEEN KILBANE, P.J., DISSENTING:

{¶9} I respectfully dissent. Even though Hubbard's application is untimely, I would find that he demonstrated good cause for the delay.

{¶10} In *State v. Reed*, 74 Ohio St.3d 534, 535, 1996-Ohio-21, 660 N.E.2d 456, the Ohio Supreme Court held that the two-prong analysis found in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is the appropriate standard to assess a defense request for reopening under App.R. 26(B)(5), which provides that "an application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." The applicant must prove that his counsel was deficient for failing to raise the issues he now presents, as well as showing that had he presented those claims on appeal, there was a "reasonable probability" that he would have been successful. *Reed* at 535-536. Thus, the applicant bears the burden of establishing that there was a "genuine issue" as to whether he has a "colorable claim" of ineffective assistance of counsel on appeal. *Id.*

{¶11} Here, Hubbard and his codefendants were charged with several counts of murder, kidnapping, and felonious assault. These charges also carried firearm

specifications. The indictment included the wording of the complicity statute as set forth in R.C. 2923.03, but cited the conspiracy statute as set forth in R.C. 2923.01.

{¶12} The matter proceeded to a jury trial on May 21, 2003. At the conclusion of trial on June 5, 2003, the jury found Hubbard guilty of complicity in commission of aggravated murder, murder, complicity in commission of murder, two counts of kidnapping, two counts of complicity to commit kidnapping, two counts of felonious assault, and two counts of complicity to commit felonious assault. The jury also found Hubbard guilty of the one-year firearm specification accompanying each count. On July 23, 2003, nearly two months after the jury rendered its verdict, the state moved to amend the indictment. The state intended to include the complicity statute and mistakenly used the conspiracy statute. The trial court held a hearing and issued a judgment granting the state's motion on July 28, 2003. The court found that "each count of complicity shall read [R.C] 2923.03 instead of [R.C.] 2923.01." Hubbard then directly appealed his convictions and sentence, which were affirmed by this court in September 2004. *Hubbard*, 2004-Ohio-4627.

{¶13} Hubbard now argues appellate counsel was ineffective for failing to raise the issue that the state amended his indictment to include the complicity statute (R.C. 2923.03) instead of the conspiracy statute (R.C. 2923.01), almost two months after the jury had rendered its verdict.

{¶14} Under the conspiracy statute (R.C. 2923.01), the state was required to prove that Hubbard, with another person, planned or aided in the planning of the victim's

murder. Under the complicity statute (R.C. 2923.03), the state was required to prove that one aided and abetted another in committing an offense. The requirements for aiding and abetting are much less demanding than a finding that Hubbard specifically planned the offense with another.

{¶15} Hubbard was indicted under the conspiracy statute, but the state tried the case under a complicity theory. Crim.R. 7(D) provides that the

> court may at any time before, during, or after a trial amend the indictment * * *, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impaneled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury.

{¶16} By amending the indictment after the jury rendered its verdict, Hubbard was impermissibly convicted of an element and theory not found by the grand jury. Under these facts, Hubbard was prejudiced by the trial court's order allowing the indictment to be amended nearly two months after the jury rendered this verdict.

{¶17} Therefore, I would find that this raises a genuine issue as to whether Hubbard was deprived of the effective assistance of counsel.

{¶18} Notably, "this court has previously overlooked App.R. 26(B) procedural deficiencies to reach the merits of an application for reopening." *State v. Hui Hing Chu*,

8th Dist. Cuyahoga Nos. 75583 and 75689, 2002-Ohio-4422, ¶ 64 (here this court granted defendant's untimely application for reopening when the trial court committed a sentencing error). *See also State v. Manos*, 8th Dist. Cuyahoga No. 64616, 1998 Ohio App. LEXIS 128 (Jan. 15, 1998), and *State v. Smiley*, 8th Dist. Cuyahoga No. 72026, 1998 Ohio App. LEXIS 1886 (Apr. 28, 1998) (where we found that an application that presents a genuine issue as to the effectiveness of counsel on appeal should supersede any procedural deficiency of the application).

{¶19} Based on the foregoing, I would grant the application for reopening.