[Cite as *State v. White*, 2017-Ohio-7169.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101576

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JERMEAL WHITE

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-14-581732-A
Application for Reopening
Motion No. 506649

RELEASE DATE: August 4, 2017

FOR APPELLANT

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FRANK D. CELEBREZZE, JR., P.J.:

{¶1} Jermeal White has filed an application for reopening pursuant to App.R. 26(B). White seeks to reopen the appellate judgment rendered in *State v. White*, 8th Dist. Cuyahoga No. 101576, 2015-Ohio-2387, which affirmed his convictions for aggravated murder, aggravated burglary, and felonious assault and his aggregate prison sentence of 28 years to life. The state opposes White's application to reopen on the grounds that it is untimely. For the reasons discussed below, we decline to reopen White's appeal.

A. Untimely Without a Showing of Good Cause

{¶2} App.R. 26(B)(2)(b) requires that White establish "a showing of good cause for untimely filing if the application is filed more than 90 days after journalization of the appellate judgment" that is subject to reopening. The Supreme Court of Ohio, with regard to the 90-day deadline provided by App.R. 26(B)(2)(b), has firmly established that

> [consistent] 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.* (1982), 455 U.S. 422, 437, 102 S.Ct. 1148, 71 L.Ed.2d 265, 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, 1996 Oho 52, 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, ¶ 7, 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, 653 N.E.2d 252 (1995); *State v. Reddick*, 72 Ohio St.3d 88, 647 N.E.2d 784 (1995).

{¶3} Here, White is attempting to reopen the appellate judgment that was journalized on June 18, 2015. The application for reopening, however, was not filed until April 27, 2017 — well beyond the 90-day deadline. White acknowledges that his application is untimely, but claims that he has good cause to justify the delay: he was unable to obtain a copy of the trial transcripts to support his application. White further asserts in a reply brief that his appellate counsel failed to communicate with him and failed to timely provide notice of this court's decision in his direct appeal as well as his right to file an application to reopen. Apart from this argument not being properly before this court, White's stated reasons for his untimely filing are insufficient to establish "good cause" under Ohio law.[1]

[1] App.R. 26(B) does not authorize reply briefs, and White never requested leave to file a reply brief.

{¶4} This court has consistently recognized that "reliance upon appellate counsel does not establish good cause for untimely filing an application for reopening." *State v. Huber*, 8th Dist. Cuyahoga No. 93923, 2011-Ohio-62, *reopening disallowed*, 2011-Ohio-3240, ¶ 6 (citing a string of cases recognizing same principle). Indeed, "the failure of appellate counsel to communicate with applicant and provide him with necessary records do not provide a basis for finding that an applicant has good cause for the untimely filing on an application for reopening." *State v. Morgan*, 8th Dist. Cuyahoga No. 55341, 1989 Ohio App. LEXIS 928 (Mar. 16, 1989), *reopening disallowed*, 2007-Ohio-5532, ¶ 7; *see also State v. Alt*, 8th Dist. Cuyahoga No. 92689, 2011-Ohio-5393, *reopening disallowed*, 2012-Ohio-2054 (appellate counsel's failure to give applicant copies of the notice of appeal and briefs in the direct appeal is not good cause).

{¶5} Further, lack of a transcript does not state good cause for an untimely filing. *State v. Henderson*, 8th Dist. Cuyahoga No. 95655, 2012-Ohio-1040, *reopening disallowed*, 2013-Ohio-2524, ¶ 2, citing *State v. Lawson*, 8th Dist. Cuyahoga No. 84402, 2005-Ohio-880, *reopening disallowed*, 2006-Ohio-3839. Notably, White's sole proposed assignment of error in support of his application to reopen relates to the denial of his own oral motion for new counsel before the start of trial, which does not require a transcript to be identified. *See State v. Houston*, 73 Ohio St.3d 346, 652 N.E.2d 1018 (1995) (rejecting appellant's claim that a lack of transcript provided good cause for the untimely application).

{¶6} Accordingly, because White has failed to establish a showing of good cause for the untimely filing of his application for reopening, the application must be denied.

B. Arguments Not Meritorious

{¶7} Aside from being untimely, White's application fails on the merits.

{¶8} "To succeed on an App.R. 26(B) application, a petitioner must establish that counsel's performance fell below an objective standard of reasonable representation and that he was prejudiced by the deficient performance." *State v. Adams*, 146 Ohio St.3d 232, 2016-Ohio-3043, 54 N.E.3d 1227, ¶ 52, 54, citing *State v. Dillon*, 74 Ohio St.3d 166, 171, 657 N.E.2d 273 (1995); *see also 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). Specifically, White "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." *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

{¶9} In *Strickland*, the United States Supreme Court held that a court's scrutiny of an attorney's work must be "highly deferential." *Id.* at 689. The court further stated that it is all too tempting for a defendant to second-guess counsel's assistance after conviction and that it would be too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Thus, "a court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the

presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.*

{¶10} White contends that his appellate counsel was ineffective in failing to raise "winning issues." Specifically, he argues that his appellate counsel should have raised an assignment of error challenging the trial court's denial in part of his oral motion for new counsel. White, however, is relying on the trial court's ruling in an earlier indicted case that had been dismissed. That ruling was not part of the record of his direct appeal and, therefore, his appellate counsel could not have raised the issue.

{¶11} As for the three transcript pages that White attached to his application in support of his claim, our reading of the complete transcript belies any claim that the trial court abused its discretion in denying a request for new counsel.

{¶12} On April 15, 2014, the trial court held a pretrial on the record to address a letter from White, raising concerns about his trial representation. Upon being questioned, White ultimately revealed that his frustration rested with the process and not his attorneys:

> THE DEFENDANT: I was basically saying like that I was feeling like, I don't know, man, I just feel like, I feel like I am not going over enough information and I don't really know — I don't know. I am cool. I am going to trial. Man, like I am ready to get out of here. I am just sitting in here for something I don't got nothing to do with. I am just ready to get up out of here and get to the bottom of this so I can get out of here and go home to my family.

THE COURT: So you are just more impatient about the process and why it is taking so long and that kind of stuff; is that it?

THE DEFENDANT: Basically.

THE COURT: You know we have our trial set for May 7. That's why we are having a pretrial, to make sure that everything is set so that it doesn't get interrupted or extended beyond that period of time. And everything does seem to be going — everything is going according to schedule at this time.

So I don't see any other problems.

So if you are cool, as you say, with your attorneys, they are getting ready to try this case and they will be ready on May 7.

{¶13} And while White later again made a general statement of dissatisfaction with his attorneys during a subsequent hearing where the plea agreement was placed on the record, he never made any objection or request for new trial counsel. Moreover, there is absolutely no evidence in the record that would support a claim for substitute counsel. Under such circumstances, we cannot say that his appellate counsel was ineffective in failing to raise a losing argument. *See Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (recognizing that it is well settled that appellate counsel is not required to raise and argue assignments of error that are meritless).

{¶14} White also generally argues that his appellate counsel should have raised an ineffective assistance of counsel claim related to his trial counsel. According to White,

his trial counsel failed to call key eyewitnesses and present White's alibi witnesses. White, however, offers no support for his broad assertions and merely speculates that these alleged witnesses would have benefitted his defense. This argument has no merit. Generally, an attorney's determination of which witnesses to call falls within the realm of trial strategy and will not be second-guessed on appeal. *State v. Treesh*, 90 Ohio St.3d 460, 490, 739 N.E.2d 749 (2001); *State v. Vargas*, 8th Dist. Cuyahoga No. 97376, 2012-Ohio-2767, ¶ 14. Thus, the mere failure to call witnesses does not render counsel's assistance ineffective absent a showing of prejudice. Here, there is no showing of prejudice, and therefore, no viable ineffective assistance of counsel claim.

{¶15} In conclusion, because White's application was filed untimely without good cause, and because White failed to demonstrate a genuine issue that he was deprived effective assistance of appellate counsel, his application for reopening under App.R. 26(B) fails on two separate grounds.

{¶16} The application for reopening is denied.

FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
ANITA LASTER MAYS, J., CONCUR