[Cite as *State v. Taylor*, 2018-Ohio-264.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104892

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRYANT D. TAYLOR

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-14-586331-B
Application for Reopening
Motion No. 511772

RELEASE DATE: January 24, 2018

FOR APPELLANT

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MELODY J. STEWART, J.:

{¶1} Bryant Taylor has filed an application for reopening pursuant to App.R. 26(B). Taylor seeks to reopen the appellate judgment rendered in *State v. Taylor*, 8th Dist. Cuyahoga No. 104892, 2017-Ohio-5580, that affirmed his convictions on counts of drug trafficking and possession of criminal tools and remanded for a limited resentencing hearing to determine whether consecutive sentences should be imposed. For the following reasons, we decline to reopen Taylor's appeal.

{¶2} App.R. 26(B)(2)(b) requires that Taylor 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 established that

> [w]e now reject [the applicant's] claims that those excuses gave good cause to miss the 90-day deadline in App.R. 26(B). * * * 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 (1982), and that is what Ohio has done by creating a 90-day deadline for the filing of applications to reopen. * * *
>
> The 90-day requirement in the rule is "applicable to all appellants," *State v. Winstead* (1996), 74 Ohio St.3d 277, 278, 1996 Ohio 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. *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, Taylor is attempting to reopen the appellate judgment that was journalized on June 29, 2017. The application for reopening, however, was not filed until November 2, 2017, more than 90 days after journalization of the appellate judgment. In an attempt to establish good cause, Taylor argues that his "prior counsel failed to timely inform him of his rights."

{¶4} Taylor has failed to establish a showing of good cause for the untimely filing of his application for reopening, which requires that this court deny the application. *State v. Lipscomb*, 8th Dist. Cuyahoga No. 92189, 2010-Ohio-4104, *reopening disallowed*, 2010-Ohio-6469, ¶ 5. It is well settled 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. Indeed, appellate counsel's failure to inform the defendant as to the availability of App.R. 26(B) or the 90-day deadline does not establish good cause for filing an untimely application. *State v. Matthews*, 8th Dist. Cuyahoga No. 101275, 2015-Ohio-176, *reopening disallowed*, 2016-Ohio-5617, ¶ 4.

{¶5} Aside from being untimely, Taylor's application also fails on the merits and procedural grounds.

{¶6} "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, 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), *cert. denied sub nom.*, *Bradley v. Ohio*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768 (1990). Taylor "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).

{¶7} Taylor argues that his "plea was not willful nor knowing" because his plea was premised on a benefit he did not receive: a concurrent sentence of his underlying case with the sentence imposed in his federal case. But Taylor's appellate counsel already challenged Taylor's guilty plea on the grounds that he did not voluntarily enter his guilty plea without being advised that his underlying sentences could be ordered consecutive to the sentence in his federal case. This court rejected the argument. *See State v. Taylor*, 8th Dist. Cuyahoga No. 104892, 2017-Ohio-5580, ¶ 3 – 4. Res judicata therefore bars any further review. *State v. McGee*, 8th Dist. Cuyahoga No. 91638, 2009-Ohio-3374, *reopening disallowed*, 2009-Ohio-6637, ¶ 13, citing *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph one of the syllabus (recognizing errors of law that were previously raised on appeal are barred from further review by the doctrine of res judicata). To the extent that Taylor implies that appellate counsel should have additionally challenged his guilty plea on the basis that a concurrent sentence was promised, the record expressly belies this claim. Upon the trial court asking Taylor if

any promises were made to induce his plea, he expressly answered "no." Taylor's sole argument lacks merit.

{¶8} Finally, Taylor's application separately fails on procedural grounds. Taylor failed to attach a sworn statement as required under App.R. 26(B)(2)(d). The sworn statement is mandatory, and the failure to include one warrants denial of the application. *State v. Lechner*, 72 Ohio St.3d 374, 650 N.E.2d 449 (1995); *see also State v. Bates*, 8th Dist. Cuyahoga Nos. 97631, 97632, 97633, and 97634, 2012-Ohio-3949, *reopening disallowed*, 2015-Ohio-4176 (applying *Lechner* and recognizing that the sworn statement is mandatory).

{¶9} Accordingly, we deny Taylor's application for reopening.

MELODY J. STEWART, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
TIM McCORMACK, J., CONCUR