

[Cite as *State v. Harris*, 2018-Ohio-839.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104329

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BYRON HARRIS

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-14-589543-A
Application for Reopening
Motion No. 509522

RELEASE DATE: March 7, 2018

FOR APPELLANT

Byron Harris, pro se
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ATTORNEYS FOR APPELLEE

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By: Mary M. Frey
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KATHLEEN ANN KEOUGH, P.J.:

{¶1} On August 14, 2017, the applicant, Byron Harris, pursuant to App.R. 26(B) and *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992), applied to reopen this court's judgment in *State v. Harris*, 8th Dist. Cuyahoga No. 104329, 2017-Ohio-2751, in which this court affirmed Harris's convictions for aggravated murder, felonious assault, and having weapons while under disability.¹ Harris now argues that his appellate counsel was ineffective

¹ Tyler suspected Harris and his friends of planning to rob him. Harris gathered some friends and relatives for protection. Subsequently, Tyler's group met up with Harris and some other men. Tyler's group began chasing Harris's group. Harris produced a gun and shot at Tyler's group. Harris approached one of the group, repeatedly shot at him, and finally killed him by shooting him in the chest at short range.

Harris was convicted of aggravated murder, murder, two counts of felonious assault, discharge of a firearm on or near prohibited premises, and one count of having a weapon while under disability. The murder counts, one felonious assault count, and the discharge of a firearm count merged. The trial court sentenced Harris to a total of 29 years to life.

for not arguing that Harris was denied his right to counsel of his choice.² The state of Ohio filed its brief in opposition on September 12, 2017, and Harris filed a reply brief on November 2, 2017. For the following reasons, this court denies the application.

{¶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. This court journalized its decision on May 11, 2017, and Harris filed his application on August 14, 2017, five days late. (20 days in May + 30 days in June + 31 days in July + 14 days in August = 95 days.)

{¶3} Harris claims that he placed the application in the prison mailbox on August 3, 2017, eleven days before filing and six days before the time for filing lapsed on August 9, 2017. Thus, he claims good cause for late filing because he exercised due diligence in filing the application, and its lateness is due to other parties and not his own fault. In support of this argument, he attached what appears to be the original “Personal A/C Withdrawal Check Out-Slip” showing that he paid 97 cents for U.S. Mail postage for mail to Clerk of Courts Naila [sic] Byrd on August 3, 2017. A notation at the bottom of the slip shows the date processed as of August 5, 2017.

{¶4} However, the Supreme Court of Ohio explicitly rejected the failure of a mail carrier to deliver timely as good cause in *State v. Winstead*, 74 Ohio St.3d 277, 1996-Ohio-52, 658

² Harris retained his counsel. Several times during the pretrial proceedings Harris filed motions to dismiss his attorney, and each time Harris withdrew his motion. The last such motion was filed on December 4, 2015. On December 9, 2015, counsel also asked to withdraw as attorney. There was never a hearing on that motion. However, on December 30, 2015, Harris withdrew his motion to dismiss, apologizing for his error and asking the court to void the motion to dismiss counsel.

At the beginning of trial in February 2016, Harris’s counsel affirmed that they were ready to proceed. Harris participated in this pretrial and never voiced dissatisfaction with his attorney or asked for a hearing concerning counsel. It is understandable how appellate counsel could conclude in the exercise of professional judgment that such a record would not support an argument for denial of counsel.

N.E.2d 722. In that case, the application to reopen was due no later than December 27, 1994. The applicant hired an overnight courier to deliver the application. Nevertheless, the application was filed one day late on December 28, 1994. The court ruled “that a courier’s delay in delivery is not ‘good cause’ for accepting an App.R. 26(B) application for reopening that is untimely filed.” *Winstead*, 74 Ohio St.3d at 278.

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

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR