

[Cite as *State v. Davis*, 2008-Ohio-4515.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NO. 05 MA 3
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION AND
)	JOURNAL ENTRY
JACK DAVIS)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Appellant's Motion to Reopen Appeal Pursuant to App.R. 26

JUDGMENT: Motion Overruled.

APPEARANCES:

For Plaintiff-Appellee: Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Rhys B. Cartwright-Jones
Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant: Atty. Jeffrey A. Kurz
219 West Boardman Street
Youngstown, Ohio 44503

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: September 5, 2008

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PER CURIAM.

{¶1} Appellant Jack Davis has filed a second application to reopen his appeal, citing as his authority App.R. 26(B). For the following reasons, the application is denied.

{¶2} According to App.R. 26(B)(1), a criminal defendant is entitled to file an application to reopen an appeal based on a claim of ineffective assistance of counsel.

{¶3} Appellant was convicted of two counts of gross sexual imposition and one count of rape in 2004 in the Mahoning County Court of Common Pleas. The court imposed a thirteen-year prison sentence. We upheld the conviction and sentence on March 23, 2007. *State v. Davis*, 7th Dist. No. 05 MA 3, 2007-Ohio-1397. Approximately seven months later, Appellant filed an application to reopen his appeal pursuant to App.R. 26(B). We issued our Opinion and Journal Entry in that matter on December 27, 2007. *State v. Davis*, 7th Dist. No. 05 MA 3, 2007-Ohio-7213. In our Opinion, we determined that Appellant's application for reopening was not timely filed within 90 days as required by App.R. 26(B)(1). *Id.* at ¶5. We also held that the application must fail because it did not contain a sworn statement as required by App.R. 26(B)(2)(d). *Id.* at ¶9. Finally, we held that the application was barred because Appellant had an earlier opportunity to raise the issue of ineffective assistance of appellate counsel by filing an appeal with the Ohio Supreme Court, but had not done so. *Id.* at ¶10.

{¶4} This second application attempts to remedy one of the three reasons we denied his first application, in that it contains a sworn statement. Obviously, the

remaining two reasons for denying the application continue to exist. This application was not filed within 90 days of our Opinion upholding Appellant's conviction and sentence. In addition, there is no indication that Appellant has filed an appeal with the Ohio Supreme Court.

{¶15} Even more fundamentally, a criminal defendant is not permitted to file a second application for reopening. *State v. Twyford*, 106 Ohio St.3d 176, 2005-Ohio-4380., 883 N.E.2d 289. “[T]here is no right to file successive applications for reopening” under App.R. 26(B). *State v. Williams*, 99 Ohio St.3d 179, 2003-Ohio-3079, 790 N.E.2d 299, ¶12. See also *State v. Cooley*, 99 Ohio St.3d 345, 2003-Ohio-3914, 792 N.E.2d 720; *State v. Richardson* (1996), 74 Ohio St.3d 235, 658 N.E.2d 273. “[A] prisoner has no right to file successive applications for reopening. Once ineffective assistance of counsel has been raised and adjudicated, res judicata bars its relitigation.” *State v. Cheren* (1995), 73 Ohio St.3d 137, 138, 652 N.E.2d 707. See also *State v. Perry* (1967), 10 Ohio St.2d 175, 39 O.O.2d 189, 226 N.E.2d 104.

{¶16} Application for reopening is hereby denied.

Waite, J., concurs.

Donofrio, J., concurs.

DeGenaro, P.J., concurs.