

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio

Court of Appeals No. OT-08-038

Appellee

Trial Court No. 07-CR-156

v.

Dale E. Notestine

DECISION AND JUDGMENT

Appellant

Decided: May 26, 2011

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Andrew M. Bigler, Assistant Prosecuting Attorney, for appellee.

Kenneth J. Rexford, for appellant.

* * * * *

PER CURIAM.

{¶ 1} On April 8, 2011, Dale E. Notestine filed a motion for leave to file a delayed reopening in this court pursuant to App.R. 26(B) from a decision issued by this court on June 30, 2009. The state of Ohio filed a response in opposition on April 15, 2011.

{¶ 2} In support of his request for delayed reopening, Notestine essentially argues that he was denied effective assistance of appellate counsel because counsel did not

effectively present the following arguments on appeal: (1) the indictment was unconstitutionally vague; (2) the trial court's verdict was not supported by sufficient evidence and was against the manifest weight of the evidence presented at trial; and (3) the prosecution violated his constitutional rights by making negative comments at trial about Notestine's decision not to testify in his own defense. For the reasons that follow, this court denies the motion.

{¶ 3} Pursuant to App.R. 26(B)(1) and (2)(b), applications for reopening which raise claims of ineffective assistance of appellate counsel must be filed within 90 days from the journalization of the appellate court's decision, unless the applicant establishes good cause for filing at a later time. App.R. 26(B)(2) further states that, in addition to a showing of good cause for untimely filing, an application for delayed reopening must contain the following:

{¶ 4} "(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

{¶ 5} "(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments or error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and reference to the record; * * *."

{¶ 6} Notestine's motion for delayed reopening was filed 22 months after our decision was journalized. Thus, the motion is untimely on its face, and Notestine must establish good cause for its untimely filing.

{¶ 7} In an effort to establish good cause, Notestine admits that he "should have initiated a motion to reopen the appeal by the end of September in 2009 * * *."

However, he argues that the delay was caused by his "errant" attempt to argue that the trial court's judgment entry did not comply with the requirements set forth in *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330 and Crim.R. 32(C). That challenge included an unsuccessful appeal to this court on the *Baker* issue.¹ Notestine also argues that this court should grant his request for a delayed reopening, in spite of its untimeliness, because "[a] pro se litigant who actually relied upon existing case law in Ohio should be somewhat excused in the delays if the 'delay' was not inaction but incorrect action." We disagree, for the following reasons.

{¶ 8} First, a "lack of knowledge or ignorance of the law does not provide sufficient cause for untimely filing." *State v. Caldwell*, 8th Dist. No. 44360, 2002-Ohio-2751, ¶ 6, citing *State v. Klein* (Apr. 8, 1991), 8th Dist. No. 58389, reopening disallowed (Mar. 15, 1994), Motion No. 49260, affirmed (1994), 69 Ohio St.3d 1481. (Other citations omitted.) Similarly, the Ohio Supreme Court has held that good cause has not been established pursuant to App.R. 26(B) based on ineffective assistance of appellate

¹See *State v. Notestine*, 6th Dist. No. OT-10-015, 2010-Ohio-4167. Notestine filed a timely notice of appeal in the Ohio Supreme Court from our decision; however, the appeal was not allowed. See *State v. Notestine*, 127 Ohio St.3d 1505, 2011-Ohio-19.

counsel where the record contained no explanation as to why the defendant did not either seek the assistance of new counsel, or attempt to reopen the appeal on his own, until several years after his conviction was affirmed on appeal. *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, ¶ 9.

{¶ 9} As set forth above, similar to the facts presented in *Gumm*, there was a 22-month gap between our decision and the filing of this motion, during which Notestine, acting pro se, mounted a collateral attack on his conviction. The record and the motion now before this court fail to demonstrate why Notestine did not either: (1) concurrently attempt to reopen this appeal on his own within 90 days of our original decision in case No. OT-08-038; or (2) seek the assistance of counsel to reopen the appeal at an earlier time. On that basis, Notestine has not set forth facts sufficient to establish good cause for the untimeliness of his delayed appeal. However, the facts of this case present an additional basis for denying Notestine's motion.

{¶ 10} It is well-settled under Ohio law that "[t]he principles of res judicata may be applied to bar the further litigation in a criminal case of issues which were raised previously or could have been raised previously in an appeal. * * *" *State v. Bibbs*, 8th Dist. No. 83955, 2006-Ohio-3018, ¶ 10, quoting *State v. Williams* (Mar. 4, 1991), 8th Dist. No. 57988, reopening disallowed (Aug. 5, 1994), Motion No. 52164. Accordingly, the Ohio Supreme Court has held that "[c]laims of ineffective assistance of appellate counsel in an application for reopening may be barred by res judicata unless circumstances render the application of the doctrine unjust." *State v. Murnahan* (1992),

63 Ohio St.3d 60, 66. In cases where the Ohio Supreme Court has denied a motion for delayed appeal and dismissed the appeal, the doctrine of res judicata "bars any further review of the claim of ineffective assistance of counsel." *State v. Bibbs*, supra, at ¶ 11, quoting *State v. Coleman*, (Feb. 15, 2001), 8th Dist. No. 77844, reopening disallowed (Mar. 15, 2002), Motion No. 33547, at 5.

{¶ 11} The record in this case shows that Notestine, again acting pro se, filed a motion for delayed appeal to the Ohio Supreme Court from our June 30, 2009 decision and judgment on January 4, 2010, almost six months after it was journalized. In an attempt to establish good cause for his untimely filing in that instance, Notestine stated that he did not receive a copy of our decision and judgment from his appointed appellate counsel in time to meet the 45-day filing deadline. Notestine also submitted six proposed assignments of error in support of the merits of his delayed appeal to the Ohio Supreme Court, some of which are essentially the same as arguments he makes in support of a delayed reopening in this court. Although Notestine's request for a delayed appeal was granted on March 3, 2010,² it was ultimately dismissed by the Ohio Supreme Court on June 23, 2010.³ Since Notestine has had the opportunity to present arguments in support of his appeal to the Ohio Supreme Court, we find that the application of res judicata in this case is not unjust. His claim of ineffective assistance of appellate counsel is therefore barred. *State v. Bibbs*, supra.

²*State v. Notestine*, 124 Ohio St.3d 1490, 2010-Ohio-670.

³See *State v. Notestine*, 125 Ohio St.3d 1462, 2010-Ohio-2753.

{¶ 12} For the foregoing reasons, Notestine has not established good cause to support the delayed reopening of his appeal pursuant to App.R. 26(B). Accordingly, his application is denied.

{¶ 13} It is so ordered.

APPLICATION DENIED.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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