[Cite as *State v. Burroughs*, 2022-Ohio-4823.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

STEPHEN BURROUGHS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 93 CA 0013

Motion to Reopen

BEFORE:
Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Denied.

Atty. Paul J. Gains, Mahoning County Prosecutor, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee

Atty. Rhys Brendan Cartwright-Jones, 42 N. Phelps Street, Youngstown, Ohio 44503-1130, for Defendant-Appellant.

Dated: December 30, 2022

PER CURIAM.

{¶1} Appellant Stephen Burroughs has filed a motion to reopen his appeal. While Appellant failed to provide a specific assignment of error, it appears that he seeks to reopen his appeal to challenge whether his convictions for aggravated murder and aggravated robbery should have merged for purposes of sentencing. As Appellant's motion is untimely and he has failed to establish good cause for his tardiness, his motion is denied.

Factual and Procedural History

{¶2} On November 2, 1991, Appellant and a codefendant were involved in the robbery of a store in Youngstown, Ohio. As a result, Appellant was charged with one count of aggravated murder with a firearm and death specification, and one count of aggravated robbery with a firearm specification. Following a jury trial, Appellant was convicted on all counts except the death specification. The trial court sentenced Appellant to life imprisonment with the possibility of parole after thirty years for the aggravated murder conviction, three years of incarceration on the firearm specification associated with the aggravated murder conviction to be served prior to and consecutive to the aggravated murder sentence, ten to twenty-five years on the aggravated robbery conviction, and three years on the aggravated robbery firearm specification to be served prior to and consecutive to the aggravated robbery conviction. Each of these sentences were ordered to run consecutively.

{¶3} Appellant filed a direct appeal and was appointed two appellate attorneys to assist in his appeal. On appeal, he filed two assignments of error challenging the cross-examination of a witness and contesting his conviction on manifest weight of the evidence

grounds. We affirmed his convictions and sentence in *State v. Burroughs*, 7th Dist. Mahoning No. 93-CA-13, 1999 WL 1243136.

Reopening

{¶4} Pursuant to App.R. 26(B)(1), a criminal defendant "may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel." An applicant must demonstrate that "there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). If the application is granted, the appellate court must appoint counsel to represent the applicant if the applicant is indigent and unrepresented. App.R. 26(B)(6)(a).

{¶5} In order to show ineffective assistance of appellate counsel, the applicant must meet the two-prong test outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Pursuant to *Strickland*, the applicant must first demonstrate deficient performance of counsel and then must demonstrate resulting prejudice. *Id*. at 687. See also App.R. 26(B)(9).

{¶6} "Under this test, a criminal defendant seeking to reopen an appeal must demonstrate that appellate counsel was deficient for failing to raise the issue presented in the application for reopening and that there was a reasonable probability of success had that issue been raised on appeal." *State v. Hackett*, 7th Dist. Mahoning No. 17 MA 0106, 2019-Ohio-3726, ¶ 6, citing *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

{¶7} However, pursuant to App.R. 26(B)(1), "[a]n application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from

journalization of the appellate judgment unless the applicant shows good cause for filing at a later time."

{¶8} The appellate judgment in this matter was journalized on December 22, 1999. Because more than twenty-two years have passed since the journalization of judgment, Appellant is required to demonstrate good cause for his untimeliness. In an affidavit, Appellants explains his tardiness by stating "I never received my case material until the early 2000s, and it was not until shortly before this writing that the concept of allied offenses dawned on me, having never discussed the matter with any of my prior attorneys." Appellant concedes that he has been in possession of his case materials for over twenty years. The fact that the concept of allied offenses did not "dawn" on him until recently does not establish the good cause necessary to allow him to overcome the time restraints of App.R. 26(B)(1). For this reason, Appellant's motion to reopen his appeal is denied.

JUDGE CHERYL L. WAITE

JUDGE GENE DONOFRIO

JUDGE CAROL ANN ROBB

NOTICE TO COUNSEL

This document constitutes a final judgment entry.