

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 10AP-848
	:	(C.P.C. No. 07CR-08-6217)
George Dingess,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 7, 2013

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

George Dingess, pro se.

ON APPLICATION FOR REOPENING

CONNOR, J.

{¶ 1} Defendant-appellant, George Dingess ("appellant"), filed an application, pursuant to App.R. 26(B), seeking to reopen his appeal resolved in this court's decision in *State v. Dingess*, 10th Dist. No. 10AP-848, 2011-Ohio-5659, claiming ineffective assistance of appellate counsel. The State of Ohio filed a memorandum in opposition to appellant's application. Because appellant's application was filed untimely without good cause, and because he failed to comply with App.R. 26(B)(2)(d) by attaching a sworn statement explaining the basis for the deficiency with his appellate counsel and the manner in which it prejudiced him, we deny his application to reopen.

{¶ 2} On August 27, 2007, appellant was indicted for three drug offenses: possession of crack cocaine as a felony of the first degree, possession of powder cocaine as

a felony of the fourth degree, and possession of marijuana as a felony of the third degree. Subsequently, appellant filed a motion to suppress evidence obtained from the issuance of a search warrant. Following a hearing on the motion, the trial court denied the motion to suppress. The case proceeded to jury trial on or about August 2, 2010. On August 5, 2010, the jury returned verdicts finding appellant guilty of all three drug offenses. A sentencing hearing was held that same day. The trial court imposed a total prison sentence of six years, which was ordered to run consecutively to a separate, unrelated federal prison term. A judgment entry journalizing appellant's convictions and sentence was filed on August 9, 2010.

{¶ 3} Appellant, through counsel, filed a timely direct appeal in which he asserted five assignments of error, claiming: (1) the trial court erred in denying his motion to suppress because the supporting affidavit attached to the search warrant was insufficient to establish probable cause; (2) he was denied a fair trial because the government stacked evidence on a table for the jury to see prior to opening statements; (3) his conviction was against the manifest weight of the evidence; (4) he was denied a fair trial because a forensic expert analyzed the evidence in a manner focused exclusively upon him as the accused; and (5) the trial court erred in denying his motion for acquittal. We rejected appellant's claims on direct appeal and affirmed his convictions. *See Dingess*. An entry journalizing the appellate judgment was filed on November 3, 2011.

{¶ 4} App.R. 26(B) allows applications to reopen an appeal from a judgment of conviction and sentence based upon a claim of ineffective assistance of appellate counsel. App.R. 26(B)(1) provides that an application for reopening shall be filed within 90 days from the journalization of the appellate judgment. Additionally, App.R. 26(B)(2)(b) requires a showing of good cause for an untimely filing where the application is filed more than 90 days after the journalization of the appellate judgment.

{¶ 5} Appellant's application to reopen was filed on November 14, 2012. However, the 90-day deadline, established under App.R. 26(B)(1), expired on or about February 1, 2012. Thus, appellant's application is untimely, in that the instant application was filed more than one year after the journalization of the appellate judgment in this action. In order to pursue his application, appellant must demonstrate good cause as to

why he was unable to make a timely filing. For the reasons that follow, we find appellant has failed to demonstrate good cause.

{¶ 6} In an effort to demonstrate good cause, appellant claims to assert good cause by arguing that his appellate counsel failed to comply with his request to keep him abreast of the status of his case and of any new developments and failed to provide information which would allow him to pursue proper avenues of appeal. Appellant submits that he diligently searched to learn the status of his case pending before the Supreme Court of Ohio and discovered that his appeal had been denied, and that he was limited to pursuing this matter under the 90-day timeframe set forth in App.R. 26. Appellant argues his appellate counsel's failure to monitor the appeal process in the Supreme Court and to advise him of the denial of his appeal prevented him from filing a timely application for reopening.

{¶ 7} Notably, however, the 90-day timeframe for filing an application for reopening begins to run from the date our appellate judgment is filed. In this case, that date was November 3, 2011. And, as noted above, this deadline expired on February 1, 2012. In other words, whether or not the Supreme Court declined to accept his appeal for review did not affect the calculation of the 90-day deadline for filing an application for reopening. Additionally, the fact that appellant was aware an appeal had been filed in the Supreme Court is evidence that he knew he had lost his appeal in this case, and therefore he cannot demonstrate good cause for failing to comply with the 90-day deadline.

{¶ 8} Furthermore, even if appellant were to claim purported ignorance of the 90-day deadline, such a claim does not prove good cause. "Lack of effort or imagination, and ignorance of the law * * * do not automatically establish good cause for failure to seek timely relief." *State v. Reddick*, 72 Ohio St.3d 88, 91 (1995) (affirming denial of application to reopen appeal). Appellant cannot rely upon his alleged lack of legal training to excuse his failure to comply with the 90-day deadline. *State v. Farrow*, 115 Ohio St.3d 205, 206, 2007-Ohio-4792, ¶ 6. The 90-day requirement is "applicable to all appellants." *Id.* at 6, quoting *State v. Winstead*, 74 Ohio St.3d 277, 278 (1996). "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." *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, ¶ 7.

{¶ 9} Appellant has failed to offer a sound reason as to why he (unlike other criminal defendants) could not comply with this fundamental element of the rule. Thus, denial of appellant's application to reopen is proper.

{¶ 10} In addition, an application for reopening must set forth "[o]ne 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[.]" App.R. 26(B)(2)(c). The application must also contain a sworn statement setting forth the basis of the claim alleging that appellate counsel's representation was deficient and the manner in which the deficiency prejudiced the outcome of the appeal. App.R. 26(B)(2)(d). The application "shall be granted if 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).

{¶ 11} Here, appellant's application fails to comply with App.R. 26(B)(2)(d). Pursuant to this provision, an application for reopening must contain "[a] sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised * * * and the manner in which the deficiency prejudicially affected the outcome of the appeal."

{¶ 12} In this case, appellant's application does not contain a sworn statement. Such a statement is mandatory, and the failure to comply with this requirement warrants denial of an application to reopen. *State v. Lechner*, 72 Ohio St.3d 374 (1995). *See also State v. Franklin*, 72 Ohio St.3d 372 (1995) (an affidavit swearing to the truth of the allegations in the application falls short of the requirements set forth in App.R. 26(B)(2)(d); application denied); *State v. Thompson*, 10th Dist. No. 97APA04-489 (Mar. 24, 1998) (appellant failed to include a sworn statement with his application; the sworn statement is mandatory, and therefore the application is without merit); *State v. Brown*, 8th Dist. No. 77572, 2012-Ohio-5703 (where no sworn statement was submitted, denial of the application for reopening solely on the basis of failing to comply with App.R. 26(B)(2)(d) was affirmed because inclusion of the statement was mandatory); and *State v.*

Davis, 7th Dist. No. 05 MA 3, 2007-Ohio-7213, ¶ 9 (failure to submit a sworn statement pursuant to App.R. 26(B)(2)(d) is sufficient to deny an application to reopen).

{¶ 13} In conclusion, because appellant's application was filed untimely without good cause, and because he failed to comply with the mandatory requirement set forth in App.R. 26(B)(2)(d), we find it is proper to deny appellant's application for reopening. Consequently, it is unnecessary for us to address the merits of appellant's application and we deny appellant's application for reopening.

Application for reopening denied.

TYACK and BROWN, JJ., concur.
