[Cite as *State v. Townsend*, 2021-Ohio-696.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 107186
v.	:	
ALBERT TOWNSEND,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: March 5, 2021

Cuyahoga County Court of Common Pleas
Case No. CR-17-614508-A
Application for Reopening
Motion No. 532629

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Daniel T. Van, Assistant Prosecuting Attorney, *for appellee*.

Albert Townsend, *pro se*.

LARRY A. JONES, SR., J.:

{¶ 1} Albert Townsend has filed a timely App.R. 26(B) application for reopening. Townsend is attempting to reopen the appellate judgment, rendered in *State v. Townsend*, 8th Dist. Cuyahoga No. 107186, 2019-Ohio-1134, that affirmed

his convictions for the offenses of rape, kidnapping, complicity to commit rape, attempted rape, and gross sexual imposition, but reversed and vacated his convictions on the sexually violent predator specifications associated with Counts 1, 2, 3, 7, 9, 10, 11, and 12, and remanded for resentencing.[1] We decline to reopen Townsend's appeal for the following reasons.

I. Standard of Review Applicable to App.R. 26(B) Application for Reopening

{¶ 2} To establish a claim of ineffective assistance of appellate counsel, Townsend is required to establish that the performance of his appellate counsel was deficient, and the deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 767 (1990).

{¶ 3} In *Strickland*, the United States Supreme Court held that a court's scrutiny of an attorney's work must be highly deferential. The court further stated that it is all too tempting for a defendant to second-guess his attorney after conviction and that it would be too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Thus, a court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must

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[1] The opinion rendered by this court, which vacated Townsend's convictions on the sexually violent predator specifications associated with Counts 1, 2, 3, 7, 9, 10, 11, and 12, and remanded for resentencing, was affirmed by the Ohio Supreme Court. *See State v. Townsend*, Slip Opinion No. 2020-Ohio-5586.

overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*.

{¶ 4} Moreover, even if Townsend establishes that an error by his appellate counsel was professionally unreasonable, he must further establish that he was prejudiced; but for the unreasonable error there exists a reasonable probability that the results of his appeal would have been different. Reasonable probability, with regard to an application for reopening, is defined as a probability sufficient to undermine confidence in the outcome of the appeal. *State v. May*, 8th Dist. Cuyahoga No. 97354, 2012-Ohio-5504.

II. First Proposed Assignment of Error

{¶ 5} Townsend's first proposed assignment of error is that the

> [t]rial court erred by denying and refusing appellant's oral and written motion for speedy trial pursuant to R.C. 2941.401 filed on March 10, 2017 — notice to deny consent to any continuances at the request of defendant-appellant filed on June 27, 2017 and speedy trial invocation.

{¶ 6} Townsend, through his first proposed assignment of error, argues that appellate counsel failed to argue on appeal the claim of a lack of speedy trial. Specifically, Townsend argues that he was not brought to trial within 270 days as required by the triple count provision found in R.C. 2945.71(E).

{¶ 7} The Supreme Court of Ohio, regarding speedy trial and the application of the triple count provision, has established that:

> Speedy-trial provisions are mandatory, and, pursuant to R.C. 2945.73(B), a person not brought to trial within the relevant time constraints "shall be discharged," and further criminal proceedings based on the same conduct are barred. R.C. 2945.72(D). A person

> charged with a felony shall be brought to trial within 270 days of the date of arrest. R.C. 2945.71(C)(2). If that person is held in jail in lieu of bail, then each day of custody is to be counted as three days. R.C. 2945.71(E). This "triple count" provision applies only when the defendant is being held in jail solely on the pending charge. *State v. MacDonald* (1976), 48 Ohio St.2d 66, 2 O.O.3d 219, 357 N.E.2d 40, paragraph one of the syllabus (construing former R.C. 2945.71(D), now (E)). Thus, the triple-count provision does not apply when a defendant is being held in custody pursuant to other charges. *Id*.

State v. Sanchez, 110 Ohio St.3d 274, 2006-Ohio-4478, 853 N.E.2d 283, ¶ 7.

{¶ 8} Herein, Townsend was previously convicted in an unrelated criminal case, on December 21, 2009, of the offenses of aggravated robbery, robbery, and having weapons while under disability and sentenced to incarceration for a period of 12 years. *See State v. Townsend*, Cuyahoga C.P. No. CR-09-531966-A. Thus, the triple-count provision of R.C. 2945.71(E) was not applicable to the criminal charges brought in CR-17-614508-A. *State v. Brown*, 64 Ohio St.3d 476, 597 N.E.2d 97 (1992).

{¶ 9} In addition, a review of the docket in CR-17-614508-A clearly demonstrates that Townsend was brought to trial within 270 days after being delivered into custody for trial. The record reflects numerous continuances for discovery, withdrawal of counsel, pretrials, motions to dismiss, and motions for change of venue, and motions to dismiss the presiding judge that tolled the running of the 270 day requirement for trial. *State v. Logan*, 8th Dist. Cuyahoga No. 99471, 2014-Ohio-816. Townsend has failed to establish that he was prejudiced through his first proposed assignment of error.

III. Second Proposed Assignment of Error

{¶ 10} Townsend's second proposed assignment of error is that

> [t]he trial court erred by denying appellant's right to confrontation where the state failed to produce alleged victim B.G. at trial and the court allowed the examining nurse to give inadmissible hearsay testimony in regards to B.G.'s unsworn statements made to the nurse.

{¶ 11} Townsend, through his second proposed assignment of error, argues that testimony from a nurse, regarding medical records relating to a victim, violated the Sixth Amendment's Confrontation Clause. However, statements made to medical personnel and contained in medical records are nontestimonial and admissible under Evid.R. 803(4). Testimony regarding statements made to medical personnel does not violate the Confrontation Clause. *State v. Ford*, 8th Dist. Cuyahoga No. 105865, 2018-Ohio-3563; *State v. Steele*, 8th Dist. Cuyahoga Nos. 101139 and 101140, 2014-Ohio-5431; *State v. Bowleg*, 8th Dist. Cuyahoga Nos. 100263 and 100264, 2014-Ohio-1433. Townsend has failed to establish prejudice through his second proposed assignment of error.

IV. Third Proposed Assignment of Error

{¶ 12} Townsend's third proposed assignment of error is that

> [t]he trial court erred by not granting appellant's Crim.R. 29 motion for judgment of acquittal where the evidence presented was insufficient to sustain the convictions for all charges thus violating appellant's state and federal rights to due process.

{¶ 13} Townsend, through his third proposed assignment of error, essentially argues that his convictions for the offenses of rape, kidnapping,

complicity to commit rape, attempted rape, and gross sexual imposition were not supported by sufficient evidence.

{¶ 14} Although sufficiency and manifest weight are different legal concepts, "manifest weight may subsume sufficiency in conducting the analysis; that is, a finding that a conviction is supported by the manifest weight of the evidence necessarily includes a finding of sufficiency." *State v. McCrary*, 10th Dist. Franklin No. 10AP-881, 2011-Ohio-3161, citing *State v. Braxton*, 10th Dist. Franklin No. 04AP-725, 2005-Ohio-2198. Accordingly, a determination that a conviction is supported by the weight of the evidence will subsume the issue of sufficiency. *State v. Mock*, 2018-Ohio-268, 106 N.E.3d 154 (8th Dist.); *Braxton*.

{¶ 15} Herein, this court has previously determined that Townsend's convictions were not against the manifest weight of the evidence. *See State v. Townsend*, 8th Dist. Cuyahoga No. 107186, 2019-Ohio-1134, ¶ 42. In addition, the doctrine of res judicata prevents further review of the issue of insufficient evidence because the issue has already been addressed by this court on direct appeal, through the claim that Townsend's convictions were against the manifest weight of the evidence, and found to be without merit. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967). Claims of ineffective assistance of appellate counsel in an application for reopening may be barred from further review by the doctrine of res judicata unless circumstances render the application of the doctrine unjust. *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992); *State v. Logan*, 8th Dist. Cuyahoga No. 88472, 2008-Ohio-1934; *State v. Tate*, 8th Dist. Cuyahoga No.

81682, 2004-Ohio-973. We further find that circumstances do not render the application of the doctrine of res judicata unjust. Townsend has failed to establish any prejudice through his third proposed assignment of error.

V. Fourth Proposed Assignment of Error

{¶ 16} Townsend's fourth proposed assignment of error is that

> [t]he court erred in denying appellant's motion to sever charges in violation of appellant's state and federal rights to due process.

{¶ 17} Townsend, through his fourth proposed assignment of error, argues an issue of joinder. Specifically, Townsend argues that he was entitled to separate trials with regard to the charged offenses of the rape of three separate victims.

{¶ 18} The joinder of offenses in a single trial is permissible under Crim.R. 8(A) to avoid a waste of the trial court's limited resources, inconvenience, and repetition. *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990); *State v. Clipps*, 8th Dist. Cuyahoga No. 107747, 2019-Ohio-3569; *State v. Ferrell*, 8th Dist. Cuyahoga No. 100659, 2014-Ohio-4377. Although the rape offenses involving the three victims were similar crimes, they were entirely distinct in proof. The evidence used to establish the elements of each offense was simple and direct. Townsend has failed to establish any prejudicial error through his fourth proposed assignment of error.

VI. Fifth Proposed Assignment of Error

{¶ 19} Townsend's fifth proposed assignment of error is that

> [t]he trial court erred in not granting motion for *Brady* material pursuant to *Brady v. Maryland* requesting all withheld *Brady* material filed January 18, 2018, by the clerk of courts and motion requesting all

withheld exculpatory discovery pursuant to Crim.R. 16 filed on November 21, 2017, and amended motion requesting funds to obtain an independent DNA analysis review filed on January 2018. *See Amador v. Dretke*, 2005 U.S. Dist. LEXIS 6072. *See also* docket sheet in case no. CR-614508-A dated January 30, 2018. Filed 1/30/2018.

{¶ 20} Townsend, through his fifth proposed assignment of error, argues that the trial court erred by not granting a "*Brady*" motion. Specifically, Townsend argues that he was not provided with all discovery, that included exculpatory evidence, held by the prosecutor. In addition, Townsend argues that he was prejudiced by the trial court's failure to allow for an independent DNA analysis.

{¶ 21} A review of the transcript clearly demonstrates that Townsend was provided with all discovery and exculpatory evidence:

> THE COURT: This is the State of Ohio versus, 614508, and that is Mr. Albert Townsend. We're here today, [assistant prosecutors] are representing the prosecutor's office, and we're here today to discuss the discovery issues that were raised yesterday by the defendant, who is representing himself.
>
> So [assistant prosecutor], would you care to make a record as to what's going to be provided to the defendant?
>
> ASSISTANT PROSECUTOR: Yes, Your Honor. I do have all of the discovery that is available to be printed out, printed out. I am right now handing the defendant his initial response to discovery. That includes the bill of particulars, the evidence list, as well as an initial witness list.
>
> Further, the previous prosecutor who handled this case, [assistant prosecutor], also filed supplements to his initial discovery, and I am handing the defendant supplements from March 13th of 2017; supplemental discovery responses from April 5th of 2017, April 26th of 2017, May 24th of 2017, September 1st of 2017, September 5th of 2017. So those are all the actual discovery responses via initial discovery, as well as the supplemental discovery.
>
> Yesterday I did have an opportunity to speak to the sheriff's deputy and it was indicated to me that I could not provide any discovery

to him that involved staples or paper clips, so everything I'm handing him has not been stapled or paper-clipped.

With regards to the actual evidence against this defendant, Your Honor, I have printed out the evidence. I am handing him the detective files, as well as police reports. All four of them in discovery are labeled "1st police report." One of them is further labeled "1st police report, Maple Heights." I have redacted out Social Security numbers as well as addresses, Your Honor.

I also have for the defendant the BCI lab work and submission sheets; BCI report dated January 5th of 2017, December 16th of 2015, February 2nd of 2015. All of those include the CVs of the BCI DNA analysts who tested that particular evidence.

I have an evidence submission sheet from August 5th of 2014; a BCI report from December 23rd of 2015; I have submission sheets from December 8th of 2006; submission sheet to BCI from May 29th of 2014; a lab report from December 23rd of 2015; a lab report from BCI from December 22nd, 2006; a lab report from BCI from August 17th of 2017.

I also have the letter that BCI sends to the Cleveland Police Department to notify them of a CODIS hit, that letter being dated April 6th of 2015.

I have a CODIS match memorandum sent by BCI to the Maple Heights Police Department dated December 18, 2015; a CODIS match memorandum from BCI to the Cleveland Police Department dated December 18th, 2015; I have a summary of the statement made by Kris Williams to the police department; a Cleveland Police report RMS 2003-32948; Cleveland RMS 2005-104080.

I have Cuyahoga County prosecutor's office investigator report created by Dshaun Thompson, that was created on November 28th, 2016. I have another report from Dshaun Thompson created on November 9th of 2016. We have several copies of that report created November 9th of 2016.

I have certified medical records from MetroHealth concerning patient [victim]; certified medical records from University Hospitals concerning [victim]; and certified medical records from Marymount hospital concerning [victim].

I have photocopies of jail mail from Mr. Townsend to Keisha Fletcher.

THE COURT: And that's relevant how?

ASSISTANT PROSECUTOR: Your Honor, some of the information that we have gathered as a result of this case, while he is the creator of these documents, just so that he has a copy of whatever the State has in his possession. I also –

THE COURT: She is not a victim?

ASSISTANT PROSECUTOR: No.

THE COURT: Thank you.

ASSISTANT PROSECUTOR: Sorry, Your Honor. I have a letter from Mr. Townsend addressed to Sister Souljah; a letter from Mr. Townsend addressed to Robert Foster; a letter from Mr. Townsend addressed to Tiara Townsend; a letter from Kris Williams addressed to Natasha Gant, also not a victim in this case; a letter from Mr. Williams addressed to Ms. Gant; a letter from Mr. Williams addressed to — I'm going to spell this out — T-w-a-n-e-l-a-i-a Walker.

I have a copy of a Cleveland Police Department photo array; I have a photo array shown to [victim] by Dshaun Thompson and Investigator Sahir Hassan; I have a photo array shown to [victim] by Dshaun Thompson and Investigator Hassan.

I have a waiver of rights that was signed by Kris Williams. I have a photo of Mr. Townsend and a photo of [victim] shown to Mr. Williams during his interview with the police. And finally, Your Honor, I have crime scene photos that were taken of 17308 McCracken.

Your Honor, in this case there is also several recorded statements taken from witnesses and victims. In speaking to the sheriff's deputy, I was informed that I cannot provide a copy of those to the defendant on a CD, because they're not allowed to have them in jail; further, they have no way of listening to them. I would be able to make a copy of those recordings and have a jury room laptop available, if the court wants to bring the defendant up to listen to those in the holding cell.

THE COURT: What are they exactly? What has been recorded?

ASSISTANT PROSECUTOR: They are interviews with the victims in this case and the co-defendant, Your Honor. So when Investigator Dshaun —

THE COURT: What's the status of the co-defendant's case?

ASSISTANT PROSECUTOR: He is also set for trial. I think at this time we were intending to start [victim's] trial with both co-defendants on November 13th.

THE COURT: So both defendants are set for trial on November 13th?

ASSISTANT PROSECUTOR: Correct.

THE COURT: As regards victim —

ASSISTANT PROSECUTOR: [Victim].

THE COURT: Is it the State's position to try the other two cases against this defendant separately?

ASSISTANT PROSECUTOR: Yes, Your Honor, together, but separate from the [victim] trial.

THE COURT: I understand. So what's at issue is her oral interview?

ASSISTANT PROSECUTOR: Correct, and the interview of the co-defendant.

THE COURT: And it's your decision to make this information available, it's only a question of what format is utilized?

ASSISTANT PROSECUTOR: Correct, Your Honor.

THE COURT: You're telling me that the defendant is not permitted to have a CD in the county jail?

ASSISTANT PROSECUTOR: Correct, Your Honor. That is information that was given to me by the deputy yesterday in speaking to how discovery could be provided to this defendant.

THE COURT: How do you propose we provide this to him?

ASSISTANT PROSECUTOR: It's my understanding that he can't bring it down to the jail. I propose having a copy of that interview up here on the 19th floor along with a jury laptop, a —

THE COURT: We may be able to have his standby counsel assist in this where you would provide a laptop with a disk and they move into the holding cell, as opposed to the jury room.

ASSISTANT PROSECUTOR: The holding cell is what I was suggesting, Your Honor. I'm sorry.

THE COURT: That's acceptable to me, we'll set a date for that.

ASSISTANT PROSECUTOR: Okay. The only other thing with regards to discovery, the defendant did file a discovery motion that was filed with the clerk of court on October 6th of 2017. In that request I have provided him with a copy of his bill of particulars, his evidence notice. He also makes a demand for summaries of all cellular phone calls made to or from the officers involved in the stop, arrest, or incident involving the defendant. I'm not a hundred percent sure what he's asking me for, and I don't have any copies of any cell phone calls or summaries of those cell phone calls.

THE COURT: All right, thank you. Thank you very much, [assistant prosecutor], I appreciate your comments on behalf of the State of Ohio.

Tr. 68 - 76.

{¶ 22} In addition, the transcript demonstrates that Townsend withdrew his request for an independent DNA analysis:

THE COURT: I want to stick to the DNA analysis, because the problem with this is, in the past your attorneys have not requested an independent analysis. It was my understanding that that motion was revoked, I believe by [defense counsel], because he doesn't wish the information to incriminate you. I think there was a concern. Now you are, as far as I am concerned, reversing that trial strategy.

THE DEFENDANT: You can cancel the DNA.

THE COURT: Pardon me?

THE DEFENDANT: It can be canceled. Can I speak, please?

THE COURT: I want to resolve the DNA issue, because if you want the DNA analysis, it's going to require a lengthy continuance of this case.

THE DEFENDANT: Okay. We don't need it; cancel it.

THE COURT: You don't want it?

THE DEFENDANT: I don't want it; don't need it

.

THE COURT: Then the request for the DNA analysis independent review is canceled.

Tr. 105 - 106.

{¶ 23} Townsend has failed to establish any prejudicial error through his fifth proposed assignment of error.

VII. Sixth and Seventh Proposed Assignments of Error

{¶ 24} Having a common basis in law and fact, we shall simultaneously consider Townsend's sixth and seventh proposed assignments of error.

{¶ 25} Townsend's sixth proposed assignment of error is that

> [t]he trial court erred by not granting amended motion to suppress evidence Crim.R. 12(B)(E) pursuant to Evid.R. 104(C) pages 1 - 10 and page 11 — sworn notarized affidavit filed on March 12, 2018.

{¶ 26} Townsend's seventh proposed assignment of error is that

> [t]he trial court erred and violated appellant's state and federal rights to due process when the court denied appellant's amended motion to suppress all illegally obtained evidence.

{¶ 27} Townsend, through his sixth and seventh proposed assignments of error, argues that the trial court erred by denying his amended motion to suppress

evidence. Townsend, however, has failed to present any cognizable argument with regard to his sixth and seventh proposed assignments of error. Thus, Townsend has failed to demonstrate how appellate counsel's performance was deficient and that he was prejudiced by appellate counsel's claimed deficiencies.

{¶ 28} In *State v. Kelly*, 8th Dist. Cuyahoga No. 74912, 2000 Ohio App. LEXIS 2907 (June 21, 2000), this court established that the mere recitation of assignments of error is not sufficient to meet the burden to prove that the applicant's appellate counsel was deficient for failing to raise the issues he now presents, or that there was a reasonable probability that the applicant would have been successful if the presented issues had been considered in the original appeal. *See also State v. Jones*, 8th Dist. Cuyahoga No. 99703, 2014-Ohio-4467; *State v. Hawkins*, 8th Dist. Cuyahoga No. 90704, 2009-Ohio-2246. The failure of Townsend to present any cognizable argument, with regard to his sixth and seventh proposed assignments of error, results in the failure to demonstrate that his appellate counsel was deficient and that he was prejudiced by the alleged deficiency. *State v. Freeman*, 8th Dist. Cuyahoga No. 95511, 2011-Ohio-5151.

VIII. Eighth Proposed Assignment of Error

{¶ 29} Townsend's eighth proposed assignment of error is that

> [t]he trial court [erred] by refusing to allow pro se defendant to submit any supporting evidence favorable to his defense to the jury violating his due process and equal protection rights under the state and federal constitution.

{¶ 30} Townsend, through his eighth proposed assignment of error, argues that the trial court erred by refusing to allow the addition to the record of "a B.C.I.

chain of custody forensic laboratory report which would have proved that defendant Townsend's DNA did not match that of the aborted fetus."

{¶ 31} It is well-settled, that matters outside of the record do not provide a basis for reopening under App.R. 26(B). *State v. Hicks*, 8th Dist. Cuyahoga No. 83981, 2005-Ohio-1842. More properly, any allegations of ineffectiveness of counsel based upon facts not appearing in the trial court record must be reviewed through postconviction remedies. *State v. Coleman*, 85 Ohio St.3d 129, 707 N.E.2d 476 (1999); *State v. Carmon*, 8th Dist. Cuyahoga No. 75377, 2005-Ohio-5463.

{¶ 32} Herein, the alleged document that Townsend attempted to add to the record, which proved Townsend's DNA did not match the DNA of an aborted fetus, was not made a part of the record. Any allegations of ineffectiveness based on facts and evidence not appearing in the record must be reviewed through the postconviction remedies of R.C. 2953.21. *State v. Cooperrider*, 4 Ohio St.3d 226, 448 N.E.2d 452 (1983). In addition, a review of the transcript shows that testimony adduced at trial established that Townsend could not be excluded as the biological father of the aborted fetus. *See* tr. 987. Townsend has failed to establish any prejudicial error through his eighth proposed assignment of error.

IX. Ninth Proposed Assignment of Error

{¶ 33} Townsend's ninth proposed assignment of error is that

> [t]he trial court erred in denying Appellant's Rights to Compulsory Process.

{¶ 34} Townsend, through his ninth proposed assignment of error, argues that he was denied the right to compulsory process. However, Townsend has failed

to specifically identify any witness that was not subjected to compulsory process. In addition, to establish a violation of the right to compulsory process, a defendant must make some plausible showing of how the witness's testimony would have been both material and favorable to his defense. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982); *State v. Brown*, 8th Dist. Cuyahoga No. 86544, 2006-Ohio-2573, ¶ 104. Townsend has failed to demonstrate how the testimony of any excluded witness would have resulted in a different outcome at trial. *State v. Jackson*, 8th Dist. Cuyahoga No. 108241, 2019-Ohio-4893; *State v. Jackson*, 8th Dist. Cuyahoga No. 105919, 2018-Ohio-1633. Townsend has failed to establish any prejudicial error through his ninth proposed assignment of error.

X. Tenth Proposed Assignment of Error

{¶ 35} Townsend's tenth proposed assignment of error is that

> [t]he trial court erred by denying hearing, amended motion to dismiss or excluded filed on March 12, 2018.

{¶ 36} Townsend, through his tenth proposed assignment of error, argues that "[a]ppellant's counsel on appeal failed to submit a complete record of the transcripts." Townsend, however, fails to delineate what part of the transcript is missing from the record and how he was prejudiced. The failure of Townsend to present any cognizable argument, with regard to his tenth proposed assignment of error, results in the failure to demonstrate that his appellate counsel was deficient and that he was prejudiced by the alleged deficiency. *State v. Freeman*, *supra*.

XI. Eleventh Proposed Assignment of Error

{¶ 37} Townsend's eleventh proposed assignment of error is that

> [t]he trial court erred in denying appellant's post-conviction DNA testing pursuant to R.C. 2953.71-R.C. 2953.81 in violation of appellant's state and federal rights to due process.

{¶ 38} Townsend's eleventh proposed assignment of error deals with the trial court's denial of a postconviction motion. App.R. 26(B) applies only to the direct appeal of a criminal conviction; it does not apply to subsequent post-conviction proceedings or postconviction motions. Townsend's eleventh proposed assignment of error cannot be considered through his application for reopening. *State v. Loomer*, 76 Ohio St.3d 398, 667 N.E.2d 1209 (1996); *State v. Bolton*, 8th Dist. Cuyahoga No. 103628, 2017-Ohio-7062; *State v. Gaston*, 8th Dist. Cuyahoga No. 92242, 2009-Ohio-3080.

{¶ 39} Accordingly, the App.R. 26(B) application for reopening is denied.

LARRY A. JONES, SR., JUDGE

SEAN C. GALLAGHER, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR