

Order

Michigan Supreme Court
Lansing, Michigan

September 10, 2019

Bridget M. McCormack,
Chief Justice

158875

David F. Viviano,
Chief Justice Pro Tem

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 158875
COA: 344912
Wayne CC: 84-473556-FC

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

KIM MOSS,
Defendant-Appellant.

On order of the Court, the application for leave to appeal the December 7, 2018 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.



t0904

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 10, 2019

Clerk

Court of Appeals, State of Michigan

ORDER

People of MI v Kim Moss

Docket No. 344912

LC No. 84-473556-01-FC

Anica Letica
Presiding Judge

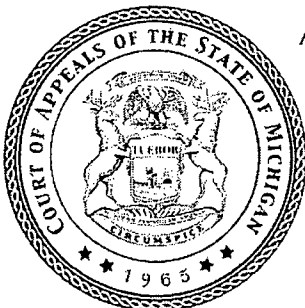
Kirsten Frank Kelly

Cynthia Diane Stephens
Judges

The Court orders that the motion to waive fees is GRANTED for this case only.

The delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

Anica Letica
Presiding Judge



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

DEC 07 2018

Date

Jerome W. Zimmer Jr.
Chief Clerk

**STATE OF MICHIGAN
THIRD CIRCUIT COURT
CRIMINAL DIVISION**

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff,

v

Hon. Margaret M. Van Houten

Case No: 84-473556-01

KIM MOSS,

Defendant.

_____ /

OPINION AND ORDER

At a session of Court held at the Frank Murphy Hall of
Justice in the City of Detroit, Wayne County, Michigan,

On: **FEB 15 2018**

Present: Hon. Margaret M. Van Houten
Circuit Court Judge

This matter is before the court on Defendant's Motion for Reissuance of Judgment. For the reasons stated below, the Court will deny this Motion.

On January 30, 1985, following a jury trial, Defendant was convicted of first degree murder (MCL 750.316) and felony firearm (MCL 750.227B-A). Defendant was sentenced to two years' imprisonment for felony firearm, to be served consecutive to and preceding life without parole for first degree murder. Defendant's Motion for New Trial was denied on August 28, 1985.

After granting Defendant's application for leave to appeal, the Court of Appeals affirmed Defendant's conviction and sentence. *People v Moss*, unpublished opinion per curiam of the

Court of Appeals, issued April 20, 1989 (Docket No. 87282), lv den, *People v Moss*, order of the Supreme Court, issued July 5, 1990 (Docket No. 86112).

On February 14, 1994, this Court denied Defendant's first Motion for Relief from Judgment. *People v Moss*, unpublished opinion of the Third Circuit Court, issued February 14, 1994 (Docket No. 84-473556-01), recon den, *People v Moss*, unpublished opinion of the Third Circuit Court, issued July 18, 1994 (Docket No. 84-473556-01), lv den, *People v Moss*, unpublished opinion per curiam of the Court of Appeals, issued August 31, 1995 (Docket No. 183250), lv den, *People v Moss*, 451 Mich 914, 550 NW2d 531 (1996), recon den, *People v Moss*, order of the Supreme Court, issued July 29, 1996 (Docket No. 104554).

On May 17, 2005, this Court denied Defendant's second Motion for Relief from Judgment, *People v Moss*, unpublished opinion of the Third Circuit Court, issued May 17, 2005 (Docket No. 84-473556-01), recon den, *People v Moss*, unpublished opinion of the Third Circuit Court, issued September 6, 2005 (Docket No. 84-473556-01), lv den, *People v Moss*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 2007 (Docket No. 272802), lv den, *People v Moss*, 480 Mich 856, 737 NW2d 710 (2007), cert den, *Moss v McGinnis*, 522 US 881, 118 SCt 207 (1997).

Defendant's petition for a writ of habeas corpus was denied following an evidentiary hearing in the US District Court for the Eastern District of Michigan. *Moss v Hofbauer*, (Docket No. 97-CV-72172-DT), aff'd, 286 F3d 851, 2002 Fed App 0127P (CA6, 2002), cert den, 537 US 1092, 123 SCt 702 (2002), recon den, 537 US 1245, 123 SCt 1383 (2003). Defendant's application for a certificate of appealability was denied. *Moss v Hofbauer*, 541 US 931, 124 SCt 1706 (2004).

On March 11, 2011, this Court denied Defendant's third Motion for Relief from Judgment, *People v Moss*, unpublished opinion of the Third Circuit Court, issued March 11, 2011 (Docket No. 84-473556-01), recon den, *People v Moss*, unpublished opinion of the Third Circuit Court, issued October 11, 2011 (Docket No. 84-473556-01), lv den, *People v Moss*, Order of the Court of Appeals, issued June 19, 2012 (Docket No. 307954), lv den, *People v Moss*, Order of the Court of Appeals, issued November 20, 2012 (Docket No. 145420), recon den, *People v Moss*, Order of the Court of Appeals, issued April 1, 2013 (Docket No. 145420).

On January 28, 2014, this Court denied Defendant's fourth Motion for Relief from Judgment, *People v Moss*, unpublished opinion of the Third Circuit Court, issued January 28, 2014 (Docket No. 84-473556-01), lv den, *People v Moss*, Order of the Court of Appeals, issued June 28, 2014 (Docket No. 320350), lv den, *People v Moss*, Order of the Court of Appeals, issued April 1, 2015 (Docket No. 149728), recon den, *People v Moss*, Order of the Court of Appeals, issued July 28, 2015 (Docket No. 149728).

¶ Defendant now files a Motion for Reissuance of Judgment pursuant to MCR 6.428; requesting that the Court restart the time in which Defendant may file an appeal of right. The rule that governs reissuance of judgment, MCR 6.428, provides that where a Defendant fails to timely file an appeal of right due to ineffective counsel, the trial court must issue an order resetting the time in which a defendant may file an appeal of right. The rule states in its entirety:

If the defendant did not appeal within the time allowed by MCR 7.204(A)(2) and demonstrates that the attorney or attorneys retained or appointed to represent the defendant on direct appeal from the judgment either disregarded the defendant's instruction to perfect a timely appeal of right, or otherwise failed to provide effective assistance, and, but for counsel's deficient performance, the defendant would have perfected a timely appeal of right, the trial court shall issue an order restarting the time in which to file an appeal of right. MCR 6.428.

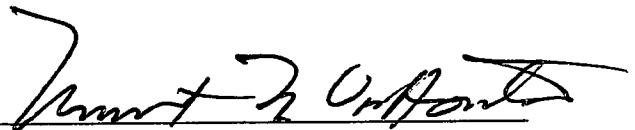
Defendant has cited no authority – and none could be found – supporting the contention that MCR 6.428 applies to cases such as this one, in which a defendant was granted leave to appeal and subsequently had their arguments considered on the merits by the Court of Appeals.

In this case, Defendant accurately states that an appeal of right was not timely filed on his behalf. However, the Court of Appeals granted Defendant's application for leave to appeal, and together with the issues presented in his codefendant's appeal of right, the Court of Appeals addressed the merits of Defendant's arguments on appeal. Because the Court of Appeals granted Defendant's application for leave to appeal, his appeal was considered on the merits in the same way it would have been if Defendant had filed a timely claim of appeal. Accordingly, Defendant has failed to establish that he is entitled to relief pursuant to MCR 6.428. Therefore, Defendant's Motion for Reissuance of Judgment is hereby **DENIED**.

IT IS SO ORDERED.

FEB 15 2018

Date



Hon. Margaret M. Van Houten
Circuit Court Judge

A P P E N D I X - B

TRIAL COURT ORDER DENYING RECONSIDERATION, DATED (7/11/18)

APPENDIX-B.

STATE OF MICHIGAN
THIRD CIRCUIT COURT
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff,

v

Hon. Margaret M. Van Houten
Case No: 84-473556-01

KIM MOSS,
Defendant.

OPINION AND ORDER

At a session of Court held at the Frank Murphy Hall of
Justice in the City of Detroit, Wayne County, Michigan,

On: JUL 11 2018

Present: Hon. Margaret M. Van Houten
Circuit Court Judge

This matter is before the Court on Defendant's Motion for Reconsideration. For the reasons stated below, the Court will deny this Motion.

On January 30, 1985, following a jury trial, Defendant was convicted of first degree murder (MCL 750.316) and felony firearm (MCL 750.227B-A). Defendant was sentenced to two years' imprisonment for felony firearm, to be served consecutive to and preceding life without parole for first degree murder. Defendant's Motion for New Trial was denied on August 28, 1985.

After granting Defendant's application for leave to appeal, the Court of Appeals affirmed Defendant's conviction and sentence. *People v Moss*, unpublished opinion per curiam of the

Court of Appeals, issued April 20, 1989 (Docket No. 87289), lv den, *People v Moss*, order of the Supreme Court, issued July 5, 1990 (Docket No. 86112).

On February 14, 1994, this Court denied Defendant's first Motion for Relief from Judgment. *People v Moss*, unpublished opinion of the Third Circuit Court, issued February 14, 1994 (Docket No. 84-473556-01), recon den, *People v Moss*, unpublished opinion of the Third Circuit Court, issued July 18, 1994 (Docket No. 84-473556-01), lv den, *People v Moss*, unpublished opinion per curiam of the Court of Appeals, issued August 31, 1995 (Docket No. 183250), lv den, *People v Moss*, 451 Mich 914, 550 NW2d 531 (1996), recon den, *People v Moss*, order of the Supreme Court, issued July 29, 1996 (Docket No. 104554).

On May 17, 2005, this Court denied Defendant's second Motion for Relief from Judgment, *People v Moss*, unpublished opinion of the Third Circuit Court, issued May 17, 2005 (Docket No. 84-473556-01), recon den, *People v Moss*, unpublished opinion of the Third Circuit Court, issued September 6, 2005 (Docket No. 84-473556-01), lv den, *People v Moss*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 2007 (Docket No. 272802), lv den, *People v Moss*, 480 Mich 856, 737 NW2d 710 (2007), cert den, *Moss v McGinnis*, 522 US 881, 118 SCt 207 (1997).

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On January 28, 2014, this Court denied Defendant's fourth Motion for Relief from Judgment, *People v Moss*, unpublished opinion of the Third Circuit Court, issued January 28, 2014 (Docket No. 84-473556-01), lv den, *People v Moss*, Order of the Court of Appeals, issued June 28, 2014 (Docket No. 320350), lv den, *People v Moss*, Order of the Court of Appeals, issued April 1, 2015 (Docket No. 149728), recon den, *People v Moss*, Order of the Court of Appeals, issued July 28, 2015 (Docket No. 149728).

✓ On February 15, 2018, this Court denied Defendant's Motion for Reissuance of Judgment. *People v Moss*, unpublished opinion of the Third Circuit Court, issued February 15, 2018 (Docket No. 84-473556-01). Defendant subsequently filed the present Motion for Reconsideration, arguing that the Court erred when it relied on the procedural history in this case to determine that Defendant failed to establish entitlement to reissuance of judgment pursuant to MCR 6.428.

MCR 7.215(I) provides in part that "[m]otions for reconsideration are subject to the restrictions contained in MCR 2.119(F)(3)." MCR 2.119(F)(3) provides in part:

[A] motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must

demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

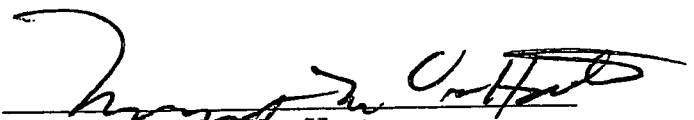
In the present Motion for Reconsideration, Defendant alleges that there were three palpable errors committed by this Court: (1) the Court failed to strictly apply MCR 6.428 by considering Defendant's prior procedural history as a factor in the denial of his requested relief, (2) the Court disregarded the authority cited in Defendant's Motion, and (3) the Court disregarded Defendant's absolute right to appeal when it reasoned that because Defendant's leave to appeal was granted and heard by the Court of Appeals on the merits, he is not entitled to relief pursuant to MCR 6.428.

It is clear from Defendant's Motion that he disagrees with the decision and reasoning set forth in this Court's Opinion denying Defendant's Motion for Reissuance of Judgment. While Defendant sets forth the reasons for his disagreement, and refers to those reasons as "palpable error," the present Motion presents the same issues ruled on by the court. Accordingly, Defendant has failed to overcome the burden proscribed by MCR 7.215(I) and MCR 2.119(F)(3). Therefore, Defendant's Motion for Reconsideration is hereby DENIED.

IT IS SO ORDERED.

JUL 11 2018

Date



Hon. Margaret M. Van Houten
Circuit Court Judge