

[Cite as *State v. Gullatte*, 2018-Ohio-874.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

STATE OF OHIO

Plaintiff-Appellee

v.

DAVID J. GULLATTE

Defendant-Appellant

Appellate Case No. 2017 CA 0060

Trial Court Case No. 2015 CR 287

[Criminal Appeal from
Common Pleas Court]

DECISION AND FINAL JUDGMENT ENTRY

February 12, 2018

PER CURIAM:

{¶ 1} This matter is before the court on appellant's motion for leave to file a delayed appeal from his criminal conviction and sentence. If allowed, it would be the second appeal filed from the final judgment in appellant's criminal case: the May 26, 2016 Judgment Entry recounting his guilty plea and conviction and sentencing him thereon. Appellant's first appeal from the May 26, 2016 Judgment Entry was dismissed for lack of prosecution, after his counsel failed to file a brief or respond to a show cause order. *State v. Gullatte*, 2d Dist. Greene No. 2016-CA-20 (Nov. 3, 2016).

{¶ 2} Appellant acknowledges that he hired counsel who filed a notice of appeal on his behalf on June 6, 2016, and that his appeal was dismissed because no brief was filed. He asks for leave to now pursue a direct appeal of his conviction and sentence by way of a delayed appeal under App.R. 5(A).

{¶ 3} The motion for leave to file a delayed appeal is OVERRULED. Several Ohio courts, including this one, “have held that an App.R. 5(A) delayed appeal cannot be utilized as a means of maintaining successive appeals from the same judgment.” See, e.g., *State v. Melton*, 11th Dist. Lake No. 2016-L-073, 2016-Ohio-7444, ¶ 9 (marshalling cases where a second delayed appeal was not allowed); *Rocky River v. Garneck*, 8th Dist. Cuyahoga No. 99072, 2013-Ohio-1565, ¶ 14 (same); *State v. Howard*, 2d Dist. Montgomery No. 27748, 2017-Ohio-9395, ¶ 3 (denying leave to file a second, delayed direct appeal). These courts reason that an appellant who *has* perfected an appeal as of right cannot show “the reasons for the *failure* of the appellant to perfect an appeal as of right,” as required by App.R. 5(A)(2). (Emphasis added.) See, e.g., *Garneck* at ¶ 15, citing *State v. Malinchak*, 10th Dist. Franklin No. 79AP-30, 1979 WL 208983, *1 (Mar. 27, 1979).

{¶ 4} “An appeal is perfected when a written notice of appeal is filed, in the case of an appeal of a final order, judgment, or decree of a court, in accordance with the Rules of Appellate Procedure * * *.” R.C. 2505.04. Here, appellant previously perfected an appeal from the May 26, 2016 Judgment Entry by filing a notice of appeal in the underlying criminal case on June 6, 2016. He therefore cannot show the reasons for his failure to perfect an appeal as of right. App.R. 5(A). His motion must be denied as a matter of law.

{¶ 5} To the extent that appellant claims his previous appellate counsel was ineffective, he may have a claim to raise by way of an application for reopening of his

previous appeal. Greene App. No. 2016-CA-20. Any such application must be filed in the previous case number and conform to the requirements set out in App.R. 26(B).

{¶ 6} In this case, however, appellant's motion for leave to file a delayed appeal is OVERRULED. This appeal, Greene Appellate Case No. 2017 CA 0060, is DISMISSED.

{¶ 7} Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Greene County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.

SO ORDERED.

MARY E. DONOVAN, Judge

MICHAEL T. HALL, Judge

MICHAEL L. TUCKER, Judge

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