

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	MEMORANDUM OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2008-L-153
JAMES H. SMITH, SR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 07 CR 000158.

Judgment: Appeal dismissed.

Charles E. Coulson, Lake County Prosecutor, *Karen A. Sheppert*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

James H. Smith, Sr., pro se, PID: 531-269, Belmont Correctional Institution, P.O. Box 540, St. Clairsville, OH 43950 (Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} This matter is before this court on the pro se motion of appellant, James H. Smith, Sr., to file a delayed appeal. Along with his motion, appellant filed his notice of appeal on October 20, 2008. Appellant is appealing the trial court's June 19, 2007 judgment convicting him of the offense of rape and sentencing him to serve four years in prison. Thus, appellant's appeal was filed some sixteen months after his June 19, 2007 conviction and sentence.

{¶2} Appellee, the state of Ohio, filed a response in opposition to appellant's motion on October 27, 2008. Appellant filed a pro se reply to the response on November 6, 2008.

{¶3} App.R. 5(A) provides, in relevant part:

{¶4} “(1) After the expiration of the thirty day period provided by App.R. 4(A) for the filing of a notice of appeal as of right, an appeal may be taken by a defendant with leave of the court to which the appeal is taken in the following classes of cases:

{¶5} “(a) Criminal proceedings;

{¶6} “(b) Delinquency proceedings; and

{¶7} “(c) Serious youthful offender proceedings.

{¶8} “(2) A motion for leave to appeal shall be filed with the court of appeals and shall set forth the reasons for the failure of the appellant to perfect an appeal as of right. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by App.R. 3 and shall file a copy of the notice of the appeal in the court of appeals.”

{¶9} In his motion, appellant asserts the following as his reasons for failing to perfect a timely appeal: 1) he had no understanding and his right to appeal was not explained to him; 2) he was indigent and without funds to hire an attorney; 3) he did not become aware of the fact that he could file a delayed appeal until he started researching the Ohio Revised Code and understanding the judicial process.

{¶10} Given the length of time, sixteen months, that has passed from the time of appellant's conviction and sentence until the filing of his motion for delayed appeal, it is evident that appellant was not diligent in taking the proper steps to protect his own

rights. Further, the reason submitted by appellant as the cause for the delay does not adequately justify waiting that length of time to initiate a direct appeal. Therefore, we find that appellant has not satisfied the requirements of App.R. 5(A).

{¶11} Accordingly, it is ordered that appellant's motion for leave to file a delayed appeal is hereby overruled.

{¶12} Appeal dismissed.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

{¶13} I respectfully dissent from the majority.

{¶14} Appellant has a constitutional right to appeal his conviction. *State v. Clark* (May 24, 1991), 11th Dist. No. 90-P-2211, 1991 Ohio App. LEXIS 2371, at 9-10. In cases wherein someone is found guilty and sentenced in a criminal matter and there is no prejudice to the state in the delay, the motion for delayed appeal should be granted. The state of Ohio and its taxpayers will be spending their hard earned tax dollars to feed, clothe, house, as well as provide medical care for appellant. I humbly suggest to the majority that we accept the delayed appeal, and review the record before this court to make sure the trial court did not err. There specifically is no time limit for appellant to assert his constitutional right to an appeal. In fact, the rule provides specifically for a

delayed appeal if the thirty-day deadline to file its original appeal is missed and it specifically does not set a deadline for this delayed appeal to be filed.

{¶15} This court has an affirmative constitutional and statutory duty to review the trial court for error. We are the constitutional quality control, and backstop for the citizens of the state of Ohio. By skirting this appeal, as well as others, I humbly submit we are not performing our duties to the best of our statutory and constitutional obligation. Thus, I dissent from the majority.