

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

STATE OF OHIO,	:	MEMORANDUM OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2015-L-013
JAMES D. ASKEW, III,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 12 CR 000539.

Judgment: Appeal dismissed.

Charles E. Coulson, Lake County Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

James D. Askew, III, pro se, PID: A642-217, Lake Erie Correctional Institution, P.O. Box 8000, 501 Thompson Road, Conneaut, OH 44030 (Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, James D. Askew, III, moves this court for leave to file a delayed appeal from the sentencing judgment in the underlying criminal case. In that judgment, the trial court first noted that it had previously accepted appellant's guilty plea to one count of felonious assault, and then sentenced him to a mandatory term of eight years.

{¶2} The sentencing judgment was issued on May 23, 2013; thus, the thirty-day period for bringing a timely appeal ended on June 24, 2013. Appellant did not file his

motion for delayed appeal until February 4, 2015, approximately nineteen months late.

{¶3} If a criminal defendant fails to institute a timely appeal from the trial court's sentencing judgment, he can only bring such an appeal at a later date if he is granted leave by the appellate court. App.R. 5(A)(1). As part of his motion for leave to pursue a delayed appeal, the defendant must delineate the reasons why he failed to comply with the thirty-day rule for bringing the appeal as of right. App.R. 5(A)(2).

{¶4} “In construing the foregoing requirement of the rule, this court has held that a proper motion for leave must address two specific issues. First, the defendant must give a legitimate explanation in regard to why he failed to file his notice of appeal in a timely manner under App.R. 4(A). Second, he must provide a legitimate explanation as to why he did not submit his motion for leave within a reasonable time after the end of the thirty-day period for bringing a timely appeal.” *State v. Floyd*, 11th Dist. Trumbull No. 2013-T-0097, 2014-Ohio-1676, ¶4, quoting *State v. Rini*, 11th Dist. Lake No. 2004-L-199, 2005-Ohio-936, ¶4.

{¶5} In regard to the reasonableness of the delay between the conclusion of the thirty-day period and the filing of the motion for leave, this court has stated:

{¶6} “(**) Even if a defendant is not informed of his right to appeal at the time of his conviction, he still has an obligation to take steps to protect his rights within a reasonable time period. Stated differently, if a defendant believes, in the months following his conviction, that an error occurred in the trial proceedings, he has the burden to either research the matter himself or obtain a new attorney to represent him. In the instant case, (the defendant) has not alleged that he took any steps in the months following his conviction to discover whether he could contest his conviction, (**).” *Rini*,

at ¶6, quoting *State v. Binion*, 11th Dist. Trumbull No. 2002-T-0093, p. 4 (Dec. 13, 2002).

{¶7} Appellant's motion for delayed appeal gives an explanation as to why he was unable to file a timely appeal. Specifically, he maintains that he was not advised of his right to appeal at the time of his conviction, and he did not receive a copy of the sentencing judgment in sufficient time to bring a timely appeal. However, as to the nineteen month delay in moving for a delayed appeal, appellant has failed to provide any reasonable explanation. If the failure to receive a copy of the sentencing judgment was a contributing factor in appellant's inability to file a timely appeal, he could have contacted his trial counsel and requested a copy for purposes of immediately pursuing a delayed appeal. Furthermore, if appellant was uncertain whether any prejudicial errors occurred during the trial proceedings, he had an obligation to determine through an attorney or otherwise whether a delayed appeal was the appropriate procedural means to protect his rights. There is nothing before this court indicating that appellant tried to take the necessary steps to protect his rights in a timely manner, but was stymied from doing so by circumstance.

{¶8} In the absence of a legitimate explanation, a nineteen month delay in the filing of a delayed appeal is unacceptable. Therefore, appellant's motion for leave to file a delayed appeal is denied. It is the order and judgment of this court that this appeal is hereby dismissed.

CYNTHIA WESTCOTT RICE, J., concurs,

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

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{¶9} I respectfully dissent with the majority's position denying appellant's motion for a delayed appeal based on my dissenting opinions in similar matters involving App.R. 5(A). *State v. Christopher*, 11th Dist. Portage Nos. 2013-P-0003, 2013-P-0004, 2013-P-0005, 2013-Ohio-1946, ¶¶14-22; *State v. Grant*, 11th Dist. Lake No. 2013-L-101, 2014-Ohio-5378, ¶¶16-25; *State v. Gibbs*, 11th Dist. Geauga No. 2014-G-3201, 2014-Ohio-5772, ¶¶16-25; *State v. Funk*, 11th Dist. Lake No. 2014-L-094, 2015-Ohio-813, ¶¶16-24.