

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

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|---------------------------|---|-----------------------------|
| STATE OF OHIO, | : | MEMORANDUM OPINION |
| Plaintiff-Appellee, | : | |
| - vs - | : | CASE NO. 2016-T-0070 |
| NATHANIEL JAMES SANTIAGO, | : | |
| Defendant-Appellant. | : | |

Criminal Appeal from the Trumbull County Court of Common Pleas.
Case No. 2010 CR 00842.

Judgment: Appeal dismissed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Nathaniel James Santiago, pro se, PID: A671-876, Belmont Correctional Institution, P.O. Box 540, 68518 Bannock Road, St. Clairsville, OH 43950 (Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant filed a motion for leave to file a delayed appeal, pursuant to App.R. 5(A), with this court on July 14, 2016. Attached to the motion were two trial court entries: 1) the court's order of July 25, 2011, sentencing appellant to community control sanctions after he pleaded guilty to robbery, and 2) the court's order of June 18, 2015, sentencing appellant to serve a prison term of 6 years after it found that he had violated the court's previous community control order. No notice of appeal was filed.

{¶2} Appellee, the state of Ohio, filed its response in opposition to the motion for delayed appeal on July 25, 2016.

{¶3} App.R. 5(A) provides:

{¶4} “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.*” Emphasis added.

{¶9} As reasons for failing to file a timely appeal, appellant asserts that he was never notified of his right to appeal by trial court or his trial counsel. He further indicates that his appellate rights were not listed in his court paperwork.

{¶10} Appellee disagrees and indicates in its response to the motion that appellant’s original signed plea agreement of May 5, 2011, clearly shows on pages three and four that appellant waived certain constitutional and statutory rights, including his right to appeal. Also, page four paragraph three of the plea indicates “[m]y attorney has advised me that I may only be able to appeal the imposition of a maximum sentence or other procedural issues regarding this plea. I also understand my other

limited appellate rights that have been explained to me by the Court, and that I must file an appeal within thirty (30) days of my sentence. I also understand that under certain circumstances, the State may appeal my sentence.”

{¶11} In reviewing the signed plea agreement, appellant was clearly advised of his limited appellate rights by his trial counsel and the court. Therefore, appellant has not asserted a valid reason for the delay in perfecting his appeal as of right, and therefore he has not satisfied the threshold in App.R. 5(A). Further, appellant has not complied with App.R. 5(A) because he failed to file a notice of appeal in the trial court concurrently with the filing of his motion for leave to appeal. See *State v. Fisher*, 46 Ohio App.2d 279 (1975); *State v. Pavisich*, 11th Dist. Portage No. 2014-P-0028, 2014-Ohio-5313. Therefore, appellant's present motion is procedurally defective.

{¶12} For the foregoing reasons, appellant's motion for leave to file a delayed appeal is hereby overruled.

{¶13} Appeal dismissed.

THOMAS R. WRIGHT, J., concurs,

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

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

{¶14} 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). See *State v. Christopher*, 11th Dist. Portage Nos. 2013-P-0003,

2013-P-0004, and 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.