

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

STATE OF OHIO,	:	MEMORANDUM OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2016-T-0106
KELVIN DEON FITZPATRICK,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2015 CR 00630.

Judgment: Appeal dismissed.

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

Kelvin Deon Fitzpatrick, pro se, PID# A690173, Lake Erie Correctional Institution, P.O. Box 8000, 501 Thompson Road, Conneaut, OH 44030 (Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This matter is before this court on the pro se motion for leave to file a delayed appeal. Along with his motion, appellant, Kelvin Deon Fitzpatrick, filed his notice of appeal on November 7, 2016.

{¶2} Appellant appeals from the trial court's August 18, 2016 judgment entry sentencing him to two years in prison after entering a guilty plea to felonious assault and domestic violence.

{¶3} Appellant had 30 days to perfect an appeal of right. App.R.3. His appeal is untimely by approximately one and one-half months.

{¶4} No brief or response in opposition to the motion for delayed appeal has been filed.

{¶5} App.R. 4(A)(1) states in relevant part:

{¶6} “* * * [A] party who wishes to appeal from an order that is final upon its entry shall file the notice of appeal required by App.R. 3 within 30 days of that entry.”

{¶7} App.R. 5(A) provides:

{¶8} “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:

{¶9} “(a) Criminal proceedings;

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

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

{¶12} “(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.”

{¶13} As his primary reason for failing to file a timely appeal, appellant asserts that the trial court and his trial counsel failed to advise him that he had a right to appeal and for appointment of appellate counsel.

{¶14} However, page five, paragraph three, of appellant’s August 1, 2016 signed plea states: “My attorney has advised me that I may only be able to appeal the

imposition of a maximum sentence or procedural issues regarding this plea. I also understand my other limited appellate rights that have been explained to me by the Court, and I must file an appeal within thirty (30) days of my sentence.”

{¶15} The signed plea clearly advised appellant of his limited appellate rights and time constraints. Therefore, his reason of not being informed of his rights until October 26, 2016 “by an inmate law clerk” is baseless.

{¶16} Appellant’s motion for leave to file a delayed appeal is hereby overruled.

{¶17} Appeal dismissed.

TIMOTHY P. CANNON, J., concurs,

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

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

{¶18} 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, 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.