

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO

STATE OF OHIO	:	MEMORANDUM OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2014-G-3234
RICHARD W. GIBBS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Geauga County Common Pleas Court, Case No. 06 C 000077.

Judgment: Appeal dismissed.

James R. Flaiz, Geauga County Prosecutor, and *Nicholas A. Burling*, Assistant Prosecuting Attorney, Courthouse Annex, 231 Main Street, Suite 3A, Chardon, OH 44024 (For Plaintiff-Appellee).

Richard W. Gibbs, pro se, PID: A530-087, London Correctional Institution, P.O. Box 69, 1580 State Route 56, SW, London, OH 43140 (Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant has filed a notice of appeal from the judgment of the Geauga County Court of Common Pleas ordering the parties to the matter to respond to any extant motions, presumably to facilitate rulings. Because the judgment is not a final order, we dismiss the matter.

{¶2} On July 11, 2005, appellant was indicted on 10 counts of gross sexual imposition, in violation of R.C. 2907.05(A)(3), felonies of the third degree, for crimes he

allegedly committed between January 1, 1987 and December 31, 1989. Appellant pleaded not guilty to the charges. He eventually entered pleas of guilty on the first six of the 10 counts. The trial court accepted the plea and nolleed the remaining counts.

{¶3} Appellant was ultimately sentenced pursuant to the felony-sentencing scheme in effect at the time the crimes were committed. Appellant received indefinite terms of four to 10 years on counts one and two, to run concurrent to each other; four to 10 years on counts three and four, to run concurrent with each other, but consecutive to counts one and two; and four to 10 years on counts five and six, to run concurrent with each other, but consecutive to counts three and four. In total, appellant received an aggregate prison term of 12-30 years. He was also classified as a sexual predator. Appellant did not appeal his conviction.

{¶4} In February 2010, appellant filed a “motion to vacate a void sentence.” The trial court denied the motion and appellant appealed the judgment to this court. The appeal, however, was dismissed for failure to file a timely notice of appeal. See *State v. Gibbs*, 11th Dist. Geauga No. 2010-G-2967, 2010-Ohio-2675, ¶10 (“*Gibbs I*”).

{¶5} Appellant then filed a “motion to dismiss the indictment” in September, 2012. The court denied the motion and appellant did not appeal that judgment.

{¶6} In October 2012, appellant filed a “motion to withdraw his guilty plea.” The court denied the motion. Appellant appealed and, in *State v. Gibbs*, 11th Dist. Geauga No. 2012-G-3123, 2014-Ohio-1341 (“*Gibbs II*”), this court affirmed the trial court’s judgment.

{¶7} On April 22, 2014, appellant moved this court for leave to file a delayed appeal of his May 18, 2007 judgment of conviction. This court denied the motion and

dismissed the appeal. See *State v. Gibbs*, 11th Dist. Geauga No. 2014-G-3201, 2014-Ohio-5772 (“*Gibbs III*”).

{¶8} Also in April 2014, appellant filed a “motion for relief from judgment pursuant to Civ.R. 60(B)” in the trial court. The trial court construed the motion as a petition for post-conviction relief and denied the same. Appellant appealed and, in *State v. Gibbs*, 11th Dist. Geauga No. 2014-G-3213, 2014-Ohio-5773 (“*Gibbs IV*”), this court affirmed the trial court.

{¶9} On September 10, 2014, appellant filed a motion to “vacate void sentence.” One week later, the state filed a memorandum in opposition. Appellant filed a “reply in opposition” to the state’s memorandum. The state subsequently moved to strike appellant’s reply in opposition and revoke appellant’s in forma pauperis status in the trial court. On October 10, 2011, the court issued the following order:

{¶10} “Plaintiff has filed a Motion to Strike Reply in Opposition of the Defendant and a Motion to Revoke Defendant’s *In Forma Pauperis Status*. Opposing parties may respond to said motions in accordance with the Geauga County Local Rule 7. There shall be no reply without leave. Thereafter, the Court shall decide the motions without oral hearing.” (Emphasis sic.)

{¶11} Appellant filed a notice of appeal of this order and, the state moved to dismiss the appeal for lack of a final, appealable order. Appellant did not respond to the state’s motion.

{¶12} The order at issue is procedural, directing the parties to respond to outstanding pleadings. The order does not purport or function to dispose of any pending issue. The order simply affords each party the opportunity to respond to the motions identified in the judgment and, as such, does not operate to rule on any

particular motion. In effect, there is no final adjudication with which appellant might take issue on appeal. Because the underlying order does not fall within the ambit of R.C. 2505.02(B), it is not a final, appealable order.

{¶13} The underlying appeal is therefore dismissed.

TIMOTHY P. CANNON, P.J., concurs,

COLLEEN MARY O'TOOLE, J., concurs with a Concurring Opinion.

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{¶14} I concur with the majority's holding that this appeal was not premised upon a final appealable order. I write separately to note that appellant has never had his case reviewed on direct appeal. See *State v. Gibbs*, 11th Dist. Geauga No. 2014-G-3201, 2014-Ohio-5772 (O'Toole, J., dissenting). The majority has succinctly outlined all the various appeals that appellant has filed with this court. Appellant continues to file multiple motions with the trial court and appeals with this court all essentially seeking the same thing: appellate review of his conviction.

{¶15} The Staff Note to the 1994 Amendment to App.R. 5(A) warns of the subsequent litigation that can occur when appellants are denied review of their cases. The Staff Note provides in part:

{¶16} "Although there was also concern about the fairness of requiring usually indigent, and frequently unrepresented, criminal defendants to demonstrate (often without the benefit of a transcript) the probability of error, the primary reason for this amendment is judicial economy. Denial of leave to file a delayed appeal for failure to demonstrate the probability of error usually leads to subsequent litigation of the issue by

direct appeals to the Ohio and United States Supreme Courts, petitions to vacate sentence under R.C. 2953.21 et seq., and appeals thereon, and/or federal habeas corpus petitions and appeals. Review of the merits by the courts of appeals upon the initial (albeit delayed) appeal would thus avoid the presentation of the probability of error issue to as many as nine subsequent tribunals.”

{¶17} Denied review of the merits of his case, appellant continues to file motions with the trial court and subsequent appeals with this court, all at the taxpayer’s expense. As I have noted in my prior writings in “*Gibbs III*” and “*Gibbs IV*” it would have been far more cost effective for this court to have granted appellant’s motion for leave to file a delayed appeal; consider any such alleged errors he might raise and bring this matter to a quick and *final* close. This would avoid future filings by appellant in the trial court and further subsequent appeals (such as the present case) to this court. There are times when judicial economy dictates appellate review. This would also insure that the lengthy and expensive period of incarceration currently being served by appellant (again, at the taxpayer’s expense) is correct, and free of reversible error.