

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

STATE OF OHIO,	:	MEMORANDUM OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-P-0048
JAMES S. OBER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. 09 TRC 3321.

Judgment: Appeal dismissed.

Victor V. Vigluicci, Portage County Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

James S. Ober, pro se, 6150 Allyn Road, Hiram, OH 44234 (Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} On August 17, 2009, appellant, James S. Ober, pro se, filed a Notice of Appeal and a “Motion or Request for Extension to File an Appeal.” Appellant’s motion will be construed by this court as a motion for leave to file a delayed appeal pursuant to App.R. 5(A). Appellant appeals from a judgment of conviction and sentence issued by the trial court on June 16, 2009. Thus, his appeal is untimely by approximately one month.

{¶2} No brief or memorandum in opposition to appellant's pro se motion has been filed.

{¶3} App.R. 4(A) states:

{¶4} "A party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed ***."

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

{¶6} "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:

{¶7} "(a) Criminal proceedings;

{¶8} "(b) Delinquency proceedings; and

{¶9} "(c) Serious youthful offender proceedings.

{¶10} "(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.* ***." (Emphasis added.)

{¶11} In reviewing appellant's motion, rather than advancing reasons for failing to file a timely appeal, appellant makes several assertions regarding his trial counsel's misrepresentation during his plea agreement and how counsel ill advised him when he made his plea. While appellant's assertions may be ones to set forth on the merits of an appeal, they do not explain what caused his one-month delay in perfecting his appeal as of right. Setting forth one's reasons for filing a late appeal in the motion for leave is a fundamental requirement under App.R. 5(A). When the motion does not comply with the basic requirements of the rule by furnishing reasons for the delay, we

cannot determine whether the delay was justified and ultimately decide whether leave should be granted based on those reasons.

{¶12} Since appellant's present motion is procedurally flawed, he has failed to invoke this court's jurisdiction. Thus, appellant's motion for leave to file a delayed appeal is hereby overruled, and the appeal is missed as untimely pursuant to App.R. 4(A).

{¶13} Appeal dismissed.

MARY JANE TRAPP, P.J., concurs,

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

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

{¶14} I respectfully dissent from the majority.

{¶15} Appellant, a pro se litigant, 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, a 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 that we should accept the delayed appeal, and review the record before this court to make sure the trial court did not err. There is no specific time limit for appellant to assert his constitutional right to 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.

{¶16} In this case, appellant has filed a request for a delayed appeal, but the majority does not feel inclined to accept it because he did not give a specific reason for missing the underlying deadline for filing his appeal. The majority, in emphasizing form over function, is placing an unnecessary barrier in front of appellant by its technical reading of the rule. The denial of the constitutional right to appeal is, in itself, sufficient to sustain the request in this instance.

{¶17} As appellate judges, we are bound by our oaths to uphold the constitution and laws of this state. However, mechanical enforcement of a single appellate rule should not take precedence over enforcement of the law as a whole. The Rules of Appellate Procedure are meant to provide a framework for the orderly disposition of appeals. *In re Beck*, 7th Dist. No. 00 BA 52, 2002-Ohio-3460, at ¶29. However, “[o]nly a flagrant, substantial disregard for the court rules can justify a dismissal on procedural grounds.” *Id.* at ¶28, quoting *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189, 193. The Supreme Court of Ohio has, again and again, instructed the lower courts of this state that cases are to be decided on the merits, and that the various rules of court are to be applied so as to achieve *substantial* justice. Cf. *State ex rel. Lapp Roofing & Sheet Metal Co., Inc. v. Indus. Comm.*, 117 Ohio St.3d 179, 2008-Ohio-850, at ¶12; *DeHart* at 192. Consequently, strict adherence to the appellate rules must yield when a procedural error is inadvertent, and a party or counsel acted in good faith. Cf. *Beck* at ¶29.

{¶18} The Staff Note to the 1994 Amendment to App.R. 5(A) also indicates that the rule is to be given a flexible, liberal interpretation, and not used to dismiss appeals willy-nilly. Prior to the amendment, defendants were required to set forth the errors claimed and evidence relating to the claimed errors. *Id.* The amendment merely retained the requirement that the would-be appellant set forth his or her reasons for the delay. *Id.* In explanation, the Staff Note provides:

{¶19} “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.”

{¶20} In denying this delayed appeal, the majority also ignores the intent of our General Assembly. The framework for sentencing in criminal matters – despite the changes wrought by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 – is still provided by Senate Bill 2. A principal purpose of the General Assembly in reforming Ohio’s sentencing structure in Senate Bill 2, including procedure relating to appeals, was cost containment. *State v. Grider*, 8th Dist. No. 82072, 2003-Ohio-3378, at ¶29, citing Griffin and Katz, Sentencing Consistency: Basic Principles Instead of Numerical Grids: The

Ohio Plan (2002), 53 Case W.R.L.Rev. 1. R.C. 2929.11(A) mandates that “[t]he overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender.” R.C. 2929.12(A) grants trial courts broad discretion in fashioning sentences that fulfill these overriding purposes of felony sentencing, and mandates that our trial courts consider the listed seriousness and recidivism factors when doing so. As appellant pleaded guilty to the crimes for which he was sentenced, the errors he might raise on appeal are limited. Surely it would be most cost effective for this court to consider any such alleged error, and so bring this matter to a quick, *final* close.

{¶21} In sum, the majority, hypnotized by App.R. 5(A), ignores the mandate of the Supreme Court of Ohio that court rules be construed so cases are decided on the merits. It ignores the intent of the General Assembly that the courts deal with criminal cases in the most cost effective manner complying with justice. I humbly suggest this is not a proper application of the appellate rules.

{¶22} 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.

{¶23} This writer further notes that nothing precludes appellant from refiling his delayed appeal pursuant to App.R. 5(A) and clearing the ministerial obstacle put in place by the majority.

{¶24} Thus, I respectfully dissent from the majority.