

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

STATE OF OHIO,	:	MEMORANDUM OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2014-T-0043
RICKY R. SLABAUGH,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2012 CR 684.

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).

Michael A. Partlow, 112 South Water Street, Suite C, Kent, OH 44240 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This matter is before the court upon appellant Ricky R. Slabaugh’s motion to file a delayed appeal to contest the legality of his sentence. On December 17, 2012, Slabaugh pleaded guilty to two counts of operating a motor vehicle while under the influence of alcohol or drugs with a prior felony conviction, both third degree felonies, in violation of R.C. 4511.19(A)(1)(a) & (G)(1)(e) (OVI); one count of endangering children, a misdemeanor of the first degree, in violation of R.C. 2919.22(C)(1) & (E)(1) & (5)(a)

(OVI); and one count of operating a motor vehicle while under the influence of a listed controlled substance or a listed metabolite of a controlled substance with a prior conviction, a third degree felony, in violation of R.C. 4511.19(A)(1)(J)(viii)(II) & (G)(1)(e) (OVI). All of the OVI counts contained vehicle forfeiture and repeat OVI offender specifications. The trial court found that the OVI counts merged for sentencing purposes, and on January 4, 2013, sentenced Slabaugh to a mandatory two year prison sentence with a consecutive three year sentence for the associated OVI specification. Slabaugh did not timely appeal his conviction.

{¶2} On June 28, 2013, approximately four months after Slabaugh’s case became final, this court decided in *State v. Owen*, 11th Dist. Lake No. 2012-L-102, 2013-Ohio-2824 that H.B. 86 changed the maximum sentence of an OVI offense from five years to three years. On May 15, 2014, more than 10 months after *Owen*, Slabaugh now moves for permission to file a delayed appeal arguing that *Owen* requires him to be resentenced.

{¶3} Appellee, the state of Ohio, filed a motion in opposition arguing that Slabaugh’s appeal is without merit because (1) as a general matter, court decisions do not retroactively apply to final judgments and (2) Slabaugh’s sentence is still lawful under *Owen*.

{¶4} App.R. 3(A) provides that an appeal as of right “shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4.” App.R. 4(A) requires an appealing party to file within 30 days of the judgment or order appealed. Should an appealing party not comply with App.R. 4(A), App.R. 5(A) provides for an appeal by leave of the court. App.R. 5(A)(1) specifies that delayed

appeals are permitted in criminal cases and App.R. 5(A)(2) requires the movant to “set forth the reasons for the failure of the appellant to perfect an appeal as of right.” If a movant establishes sufficient reasons justifying the delay, the appellate court may, in its discretion, grant the motion. App.R. 5(A). A delayed appeal should be granted where it appears on the face of the record that denying leave would result in a miscarriage of justice. *State v. Bednarik*, 101 Ohio App. 339 (1954), paragraph 3 of the syllabus.

{¶5} Slabaugh does not provide a compelling case for being excused from the App.R. 3(A) and 4(A) time requirements. The delayed appeal process is meant to allow for defendants to bring appeals when they are unable to bring an appeal within the 30-day window. See *State v. Pankey*, 10th Dist. Franklin No. 11AP-378, 2011-Ohio-6461 (delayed appeal granted because clerk failed to timestamp notice of appeal); *In re A.S.*, 2d Dist. Montgomery Nos. 21782, 21911, 2007-Ohio-3434 (delayed appeal granted because juvenile was not notified of right to appeal). The Ohio Supreme Court has also held that good cause for App.R. 26(B)(1) is not automatically found based upon appellant’s “[l]ack of effort or imagination.” *State v. Reddick*, 72 Ohio St.3d 88, 91 (1995).

{¶6} Slabaugh’s motion lacks any similarity to *Pankey* or *In re A.S.* He asserts no reason why he was unable to make the same arguments Owen made in his appeal. Further, the Ohio Supreme Court has discouraged appellate courts from finding good cause on the basis that an appellant did not consider an argument within the 30-day window. *Id.*

{¶7} We are aware of other cases that have granted delayed appeals in similar situations. See *State v. Pinkney*, 8th Dist. Cuyahoga No. 88357, 2007-Ohio-1721; *State v. Nicol*, 11th Dist. Ashtabula No. 2006-A-0078, 2007-Ohio-4962; *State v. French*, 6th Dist. Sandusky No. S-06-033, 2007-Ohio-2826 (considering whether *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 should retroactively apply to final judgments). However, delayed appeals should not be granted if the sole reason for the delay is to now argue a case that was not announced before the appeal time expired.

{¶8} Moreover, allowing a delayed appeal for Slabaugh would circumvent the jurisdictional requirements for petitions for post-conviction relief. R.C. 2953.21(A) allows for collateral attacks on final criminal judgments for alleged *constitutional* errors in a defendant's trial. In cases where there is no timely direct appeal, R.C. 2953.21(A)(1)(c)(2) requires a petition for post conviction to be filed no later than 180 days after the time to file a direct appeal expired. R.C. 2953.23 provides exceptions to that rule. One exception is an actual innocence petition premised upon DNA testing. R.C. 2953.23(B). The other exception requires a petitioner to demonstrate (1) he or she was "unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief," or subsequent to the 180-day window, "the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right;" and (2) "[t]he petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted." R.C. 2953.23(A).

{¶9} R.C. 2953.21 and 2953.23 demonstrate that the General Assembly has carefully considered the extent to which the Ohio courts are permitted to consider overturning final judgments because of the alleged existence of retroactive rights. A delayed appeal cannot be used to defeat those statutes.

{¶10} The motion is overruled and the case is dismissed.

CYNTHIA WESTCOTT RICE, J., concurs,

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

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

{¶11} 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.