

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

STATE OF OHIO,	:	MEMORANDUM OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2015-G-0036
CURTISS J. BIRCH,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 08 C 000130.

Judgment: Appeal dismissed.

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

Curtiss J. Birch, pro se, PID: A562-798, Chillicothe Correctional Institution, P.O. Box 5500, 15802 St. Rte. 104, North, Chillicothe, OH 45601 (Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} This matter is before this court on the pro se motion for leave of appellant, Curtiss J. Birch, to file a delayed appeal, pursuant to App.R. 5(A). Along with his motion, appellant filed his notice of appeal on August 24, 2015. Appellant appeals from his conviction and sentence of February 26, 2009. That entry indicates that appellant pleaded guilty to the offenses of rape and disseminating matter harmful to juveniles, and

the Geauga County Court of Common Pleas sentenced him to serve ten years to life in prison.

{¶2} A timely notice of appeal from the February 26, 2009 judgment entry was due no later than March 24, 2009, which was not a weekend or a holiday. Appellant's notice of appeal was not filed until August 24, 2015, almost six and one-half years beyond the due date for filing an appeal.

{¶3} Appellee, the state of Ohio, filed its response in opposition to appellant's motion on August 26, 2015.

{¶4} App.R. 4(A)(1) states, in part:

{¶5} "[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 thirty days of that entry."

{¶6} App.R. 5(A) provides:

{¶7} "(1) 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:

{¶8} "(a) Criminal proceedings;

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

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

{¶11} "(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."

{¶12} In his motion, appellant asserts that he believed that his trial counsel would take care of filing his appeal. Appellant indicates that he only learned recently, on April 13, 2015, when the trial court denied his motion to withdraw his guilty plea, that no appeal was filed by his attorney after his sentencing.

{¶13} Appellee maintains that appellant has not provided a valid reason for such an extensive delay in filing his notice of appeal and motion for leave. Further, the state asserts that even if appellant just discovered on April 13, 2015, that no appeal was filed on his behalf, it still took him 134 days to file his motion for leave and notice of appeal on August 24, 2015.

{¶14} Given the length of time that has passed from the time of appellant's conviction and sentence until the filing of his notice of appeal and motion for delayed appeal, it is evident that appellant was not diligent in taking the proper steps to protect his own rights.

{¶15} Accordingly, it is ordered that appellant's pro se motion for leave to file a delayed appeal is hereby overruled.

{¶16} Appeal dismissed.

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

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

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{¶17} 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.