

IN THE SUPREME COURT OF OHIO

06-2283

STATE OF OHIO

Plaintiff-Appellee

vs.

JOHNNIE PAIGE

Defendant-Appellant

On Appeal from the  
Cuyahoga County Court of Appeals,  
Eighth Judicial District

Court of Appeals  
Case No. 88752

**BRIEF IN SUPPORT OF MOTION FOR  
DELAYED APPEAL**

**(ORAL HEARING REQUESTED)**

Defendant-Appellant Johnnie Paige ("Appellant") files this brief in support of the motion for delayed appeal pursuant to Ohio Supreme Court Rule II, § 2(A)(4)(a) and (b). Appellant requests the court consider his appeal of felony convictions in the Cuyahoga County Court of Common Pleas for two counts of rape in violation of Ohio Revised Code Section 2907.02 A(2). The Eighth District Court of Appeals dismissed his appeal on October 13, 2006. This appeal is delayed because counsel for Appellant did not learn that the appeal had been dismissed until two weeks after it had been dismissed. This Appeal is filed within forty-five (45) days of when counsel learned that the appeal had been dismissed.

**FILED**  
**DEC 12 2006**  
**MARCIA J. MENGEL, CLERK**  
**SUPREME COURT OF OHIO**

STATE OF OHIO

COUNTY OF CUYAHOGA

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SS: AFFIDAVIT IN SUPPORT OF FACTS

GORDON S. FRIEDMAN, being first duly sworn according to law, deposes and states as follows:

1. On May 12, 2006, Mr. Paige entered a plea of guilty and was sentenced to seven years in prison on Case No. 473330 and ten years on Case No. 469928 in the Court of Common Pleas for Cuyahoga County. The sentences were ordered to run consecutively. On September 14, 2006, Mr. Paige filed a motion for leave to file a delayed appeal, a motion for preparation of transcript at State's expense and an affidavit of indigency, among other documents. He also filed an affidavit stating the reasons for the delayed appeal. The motion for delayed appeal and the affidavit indicate that he was never advised of any right to appeal and was never appointed counsel for his appeal. The trial court appointed the undersigned counsel on September 21, 2006 to represent Mr. Paige and ordered that the transcript be prepared at the State's expense. On October 13, 2006, this Court dismissed the appeal sua sponte. In its Journal Entry, attached hereto, the Court stated that pursuant to Ohio v. Edward J. Hyde, Jr., 2001 Ohio App. LEXIS 81, (Jan.22, 2001), Cuyahoga App. No. 77592, unreported, there is no appeal from an agreed sentence.

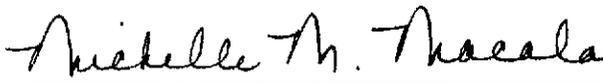
2, Knowing that the appeal had already been filed, the undersigned counsel awaited notice from the Court that the record had been completed and filed so that he may begin to draft a brief on Mr. Paige's behalf. Although counsel had been assigned by the trial court, he received no copies of anything filed in this Court after his appointment. On October 27, 2006, an associate in counsel's office checked the docket to see if notice of receipt of the record had been sent. It indicated that it had been sent just three days prior. However, the docket also indicated that the appeal had been dismissed. This was the first

time that counsel was aware that dismissal had occurred. Counsel then filed a motion for reconsideration which was denied on November 20, 2006.

**FURTHER AFFIANT SAYETH NAUGHT.**

  
GORDON S. FRIEDMAN

SWORN TO BEFORE ME and subscribed in my presence, this 11<sup>th</sup> day of December, 2006.

  
NOTARY PUBLIC

MICHELLE M. MACALA  
Notary Public - State of Ohio  
My Commission Expires 9-29-07

## LAW AND ARGUMENT

Mr. Paige was never allowed to brief his issues for appeal. As noted by Mr. Paige in his pro se filings, there was cause for his delayed appeal as he was never informed of his appellate rights and was not appointed counsel until September 21, 2006, over three and a half months after receiving his sentence. In State v. Stivison, 1994 Ohio App. LEXIS 223, \*3 (10<sup>th</sup> App. Dist.), the court noted that even in a guilty plea the defendant should have been informed of his right to appeal because he does not waive all appeal rights by pleading guilty. (relying on State v. Wilson (1979), 58 Ohio St.2d 52).

This is not a situation where Mr. Paige waited an inexcusable amount of time before filing for a delayed direct appeal to the Court of Appeals. According to the trial court docket, Mr. Paige was transported to Lorain Correctional Facility on May 18, 2006. He filed his notice of appeal after he learned of his appeal rights at Lorain. This was less than four months after his sentencing. See State v. Riley, 1997 Ohio App. LEXIS 5642 (6<sup>th</sup> App. Dist.) (allowing a delayed appeal after four months). Additionally, the trial court appointed counsel so that these issues may be adequately addressed before this Court.

Moreover, there are legitimate issues for appeal. Counsel has never received a copy of the sentencing transcript in order to fully assess the possible appeal issues. Without the transcript, it is unclear what all of the issues may be. However, it is clear that it will most likely include whether or not the constitutional requirements of Ohio Rules of Criminal Procedure, No. 11 were met. Appellant Paige clearly indicated in his pro se filings that he has suffered from mental illness in the past and the trial court referred Mr. Paige to the psychiatric clinic. Without the transcript or the report of the psychiatric clinic, counsel is unable to assess whether or not his plea was a knowing and voluntary one and if he fully understood the nature of the agreed sentence. If it is clear from the transcript and other documents in the record that the plea was not knowing and voluntary, this is an issue for direct appeal and must be addressed with this Court.

Moreover, the Court of Appeals' Journal Entry dismissing the appeal stated that it was being dismissed because there was no appeal from an agreed sentence pursuant to Hyde. In Hyde, the Court fully addressed the Appellant's assignment of error regarding the constitutionality of the plea that was entered into with an agreed sentence. Hyde, 2001 Ohio App. LEXIS 81, \*3-6. In fact, Hyde does not provide that there is no review of an agreed sentence. Instead, it addresses the Appellant's assignments of error on the merits and finds that under the circumstances in that case, he was not entitled to relief. It does not preclude an appeal in the instant matter that addresses many of the same issues.

Ohio courts have, and continue to, address the merits of an appeal to a guilty plea and agreed sentence. In State v. Jackson, 2006 Ohio 3165 (8<sup>th</sup> App. Dist.), the same Court of Appeals filed an extensive opinion dealing with the merits to an appeal of a guilty plea and agreed sentence. As here, the issues included whether or not the plea was voluntary and knowing. See also State v. Abney, 2006 Ohio 273 (8<sup>th</sup> App. Dist.) (addressing an appeal from a guilty plea and agreed sentence on the merits).

Additionally, the transcript may evince issues regarding Mr. Paige's trial counsel's performance. Again, if that is clear from the transcript, it is an issue for direct appeal and must be addressed at this time. The same Court of Appeals also addressed this issue on the merits in Hyde. There, the Court acknowledged that even though the Appellant entered a plea of guilty, he was entitled to relief on this issue if he could demonstrate that his trial counsel's performance prevented "him from entering a knowing, voluntary and intelligent plea." *Id.* at \*12.

Mr. Paige submitted an affidavit providing a justification for his delayed appeal to the Court of Appeals. Moreover, the trial court found that an appeal was warranted as it appointed the undersigned counsel to represent Mr. Paige on appeal.

## CONCLUSION

Because there are legitimate issues for appeal from a guilty plea and an agreed sentence and there was justification for a delayed appeal to the Court of Appeals, Appellant Johnnie Paige respectfully requests that this Court reverse the Court of Appeals' sua sponte Judgment Entry dismissing the appeal and allow the parties to file Briefs on the merits of the appeal. It would be unjust to not hear Appellant's delayed appeal. Appellant respectfully requests this Honorable Court accept this petition for delayed appeal.

Respectfully submitted,



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Counsel for Appellant, Johnnie Paige

**CERTIFICATE OF SERVICE**

A copy of this Brief in Support of Motion for Delayed Appeal has been sent by regular U.S. Mail, postage prepaid, this 17<sup>th</sup> day of December, 2006, to Counsel for Appellee, William D. Mason, Esq., Cuyahoga County Prosecuting Attorney, at his office, Cuyahoga County Court of Common Pleas, 1200 Ontario Street, Cleveland, Ohio 44113.

A handwritten signature in cursive script, reading "Gordon S. Friedman", written over a horizontal line.

GORDON S. FRIEDMAN  
Counsel for Appellant, Johnnie Paige

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.  
88752

LOWER COURT NO.  
CP CR-469928  
CP CR-473330

COMMON PLEAS COURT

-vs-

JOHNNIE PAIGE

Appellant

MOTION NO. 388439

Date 10/13/06

Journal Entry

MOTION BY APPELLANT, PRO SE, FOR LEAVE TO FILE DELAYED APPEAL IS DENIED. THERE IS NO APPEAL FROM AN AGREED SENTENCE. STATE OF OHIO V. EDWARD J. HYDE, JR., (JAN. 22, 2001), CUYAHOGA APP.NO. 77592, UNREPORTED.

RECEIVED FOR FILING

OCT 13 2006

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY [Signature] DEP.

Judge ANTHONY O. CALABRESE, JR., Concur

[Signature]  
Administrative Judge ANN DYKE

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NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES: GOBTS TAXED

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.  
88752

LOWER COURT NO.  
CP CR-469928  
CP CR-473330

COMMON PLEAS COURT

-vs-

JOHNNIE PAIGE

Appellant

MOTION NO. 388754

Date 10/13/06

Journal Entry

MOTION BY APPELLANT, PRO SE, IN CONTRA IS DENIED.

RECEIVED FOR FILING

OCT 13 2006

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY *[Signature]* DEP.

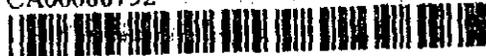
NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES-COSTS TAXED

Judge ANTHONY O. CALABRESE, JR., Concur

*[Signature]*  
Administrative Judge ANN DYKE

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