

IN THE SUPREME COURT OF OHIO
2006

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

TYJUAN VANMOORE,

Defendant-Appellant.

Case No. 06-2200

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 06AP-892, 06AP-893,
06AP-694

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

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DEFENDANT-APPELLANT, PRO SE

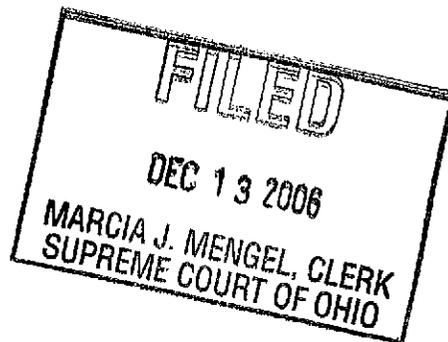


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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

The instant case does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be declined.

The only issue in this case is whether the Tenth District Court of Appeals abused its discretion by denying defendant's motion for delayed appeal. The law in this area is well settled. Under App. R.5(A), a defendant must set forth a reasonable explanation for failing to file a timely notice of appeal. As defendant failed to provide any explanation for his nine month delay in filing, his motion was properly denied.

The Tenth District did not abuse its discretion by finding defendant failed to set forth a reasonable explanation. Defendant did not even acknowledge that there was a delay in his motion other than in the title of the motion.

The Court of Appeals properly found that defendant did not meet his burden of setting forth a reasonable explanation for his delay. It is respectfully submitted that jurisdiction should be declined.

STATEMENT OF THE CASE AND FACTS

On December 13, 2005, Defendant entered guilty pleas in three separate cases. In case number 05CR-3844 defendant pleaded guilty to one count of second degree possession of cocaine and was sentenced to a mandatory prison term of four years. In case number 05CR-5073 defendant pleaded guilty to one count of third degree felony possession of cocaine and was sentenced to a mandatory prison term of three years to run concurrent with 05CR-3844. Defendant was also sentenced on case number 05CR-4596 on one count of possession of cocaine, a fourth degree felony, one count of carrying a

concealed weapon, one count of tampering with evidence and one count of having a weapon while under a disability. Defendant was sentenced to three years as to both the tampering with evidence and having a weapon under a disability counts and sixteen months as to the other two counts, all to be served concurrently with each other and with the sentences in the other two cases. Defendant was represented by counsel during the plea and sentencing hearing. The judgment entries were journalized on December 14, 2005.

On September 5, 2006, Defendant, *pro se*, filed a motion for leave to file a delayed appeal pursuant to App.R. 5(A). Defendant failed to provide any explanation for the nine month delay in filing and the Tenth District Court of Appeals denied defendant's motion in a memorandum decision filed October 12, 2006.

Response to Proposition of Law: A court of appeals acts within its discretion in denying a motion for delayed appeal filed without any explanation for the delay.

Under App. R.4(A), a defendant choosing to appeal his conviction must file the notice of appeal "within thirty days of the judgment." After the expiration of this thirty-day period, an appeal may only be taken by leave of court. App. R.5(A)(1). "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." App. R.5(A)(2). The party seeking an appeal by leave of the court has the burden of "demonstrating a reasonable explanation of the basis for failure to perfect a timely appeal." *State v. Walden*, Franklin App. Nos. 05AP-532 to 536, 2005-Ohio-3993, citing *State v. Padgitt* (Nov. 2, 1994), Franklin App. No. 94AP-855 (Memorandum Decision), quoting *State v. Cromlish* (1994), 10th Dist. Nos. 94AP-855, 94AP-857.

“The decision to grant or deny a motion for leave to appeal pursuant to App. R.5(A) rests within the sound discretion of the court of appeals.” *Id.* citing *State v. Fisher* (1988) 35 Ohio St.3d 22, 26. “The term ‘abuse of discretion’ connotes more than an error of law or of judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable * * *.” *State v. Adams* (1980), 62 Ohio St.2d 151, 157 (citations omitted). Defendant has not argued that the Tenth District’s decision was “unreasonable, arbitrary or unconscionable.”

Defendant’s motion for leave to file a delayed appeal made no reference at all to the nine month delay and provided no explanation whatsoever for the lapsed time. Other than the title of the motion, defendant failed to acknowledge that there was any delay in his filing. Having provided no discussion whatsoever about the delay, defendant failed to meet his burden of providing a reasonable explanation as is required by App.R. 5 and the Tenth District properly denied defendant’s motion.

The state respectfully submits that because defendant set forth no reasons for his delay, he failed to establish good cause or a “reasonable explanation” for his failure to perfect a timely appeal from his convictions. This proposition of law merits no further review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be declined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, December 13, 2006, to Tyjuan Vanmoore, Inmate #509-285, Noble Correctional Institution, 15708 McConnelville Rd., Caldwell, Ohio 43724; Defendant-Appellant, pro se.


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