

ORIGINAL

NO. 09-1619

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR SUMMIT COUNTY, OHIO
NO. 21906

STATE OF OHIO
Plaintiff-Appellant

-vs-

DENNY ROSS
Defendant-Appellee

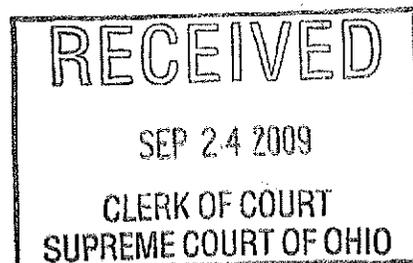
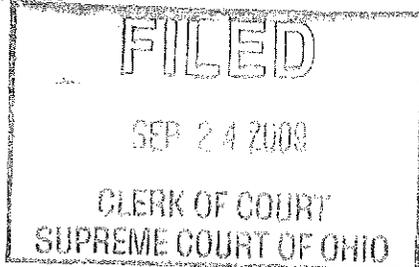
MOTION TO DISMISS APPEAL AND/OR MOTION CONTRA MOTION FOR LEAVE TO
FILE A DELAYED APPEAL.

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO	*	CASE NO. 09-1619
Plaintiff-Appellant	*	
-vs-	*	On Appeal from the Court of Appeals for Summit County, Ohio
DENNY ROSS	*	Case No. 21906
Defendant-Appellee	*	<u>MOTION TO DISMISS APPEAL AND/ OR MOTION CONTRA MOTION FOR LEAVE TO FILE A DELAYED APPEAL</u>
	* * *	

Now comes Denny Ross, by and through counsel, and hereby submits the following motion to dismiss appeal and/or motion contra motion for leave to file a delayed appeal. The reasons are set forth in the Memorandum below.

MEMORANDUM

PROCEDURAL HISTORY

The underlying appeal in this case was heard by the Ninth District Court of Appeals in Summit County. A copy of said decision is appended to Appellant's motion. The Court of Appeals affirmed the trial court's decision on July 22, 2009. On August 3, 2009, the Appellant filed a motion for reconsideration. The Court of Appeals denied Appellant's request on August 3, 2009. On September 10, 2009, Appellant filed a motion for leave to file delayed appeal and a notice of appeal.

ARGUMENT

S.Ct.Prac.R. II § 2(A)(1)(a) states:

To perfect an appeal from a Court of Appeals to the Supreme Court, other than a certified conflict case (which is addressed in S.Ct. Prac.R. IV, the appellant shall file a notice of appeal in the Supreme Court within 45 days from the entry of the entry of the judgment being appealed. The date the Court of Appeals filed its judgment entry for journalization with its clerk, in accordance with

App.R.22(E), shall be considered the date of entry of the judgment being appealed. If the appeal is a claimed appeal of right or a discretionary appeal, the appellant shall also file a Memorandum in Support of Jurisdiction, in accordance with S.Ct.Prac.R. III, at the time the notice of appeal is filed.

The state did not file a notice of appeal within 45 days as provided for in S.Ct.Prac.R. II. In *State v. Davie*, this Court held that the defendant's failure to file a notice of appeal within 45 days from entry of judgment being appealed divested the Supreme Court of jurisdiction to hear appeal. *State v. Davie*, 74 Ohio St.3d 232, 232/234 (1996). This Court went on further to say that S.Ct.Prac.R. II (2)(A)(2),(3) and (4) create no exception to the jurisdictional appeal period. (supra at 234). Therefore, since the state did not file its appeal within the proscribed time limitation, the Defendant-Appellee would ask this Court to dismiss the state's notice of appeal.

The state has subsequently filed a motion for leave to file delayed appeal according to S.Ct.Prac.R. II § 2(4)(a). S.Ct.Prac.R. II § 2(4)(a) states:

In a felony case, when the time has expired for filing a notice of appeal in the Supreme Court, the appellant may seek to file a delayed appeal by filing a motion for delayed appeal and a notice of appeal. The motion shall state the date of entry of the judgment being appealed and adequate reasons for the delay. Facts supporting the motion shall be set forth in an affidavit. A copy of the court of appeals opinion and the judgment entry being appealed shall be attached to the motion.

Attached to the motion is an affidavit of Assistant Prosecutor Matthew E. Meyer setting forth the reasons for the delayed appeal. The reasons stated by Appellant for not filing the appeal on time are that counsel for the state assigned to this case has experienced an overwhelming case load, pointing to two pending cases, and that he miscalculated the filing deadline (See Affidavit of Assistant Prosecutor Matthew E. Meyer). The Defendant-Appellee would argue that those reasons are not adequate reasons as set forth in S.Ct.Prac.R. II § 2(4)(a).

Again, this Court in *Davie*, supra, held that S.Ct.Prac. R. II, does not create an exception to the jurisdiction appeal period.

Therefore, the Defendant-Appellee would ask this Court to deny the state's motion for leave to file delayed appeal and dismiss the state's appeal.

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that a copy of the foregoing has been mailed by regular U.S. Mail this 23 day of September, 2009, to William D. Mason, Cuyahoga County Prosecutor and Matthew E. Meyer, Assistant Prosecutor, The Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113.



LAWRENCE J. WHITNEY
Attorney for Defendant-Appellee