

ORIGINAL

**IN THE SUPREME COURT OF OHIO
2011**

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

MICHAEL MCDOWALL,

Defendant-Appellant.

Case No. 2011-055

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

Court of Appeals
Case No. 09AP-443, 09AP-444

**MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING MOTION FOR
LEAVE TO FILE DELAYED APPEAL**

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And

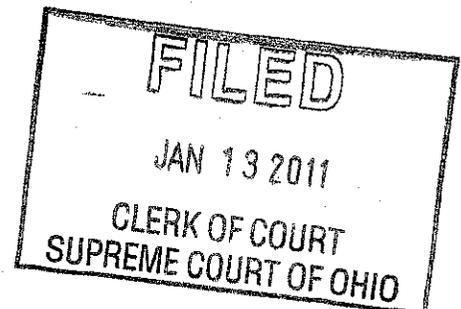
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DEFENDANT-APPELLANT, PRO SE



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On January 10, 2011, the defendant-appellant filed a motion requesting leave to file an untimely appeal from the Tenth District Court of Appeals' decision in case number 09AP-444, but that case was dismissed for failing to prosecute it. *State v. McDowall*, 10th Dist. Nos. 09AP-443, 09AP-444, 2009-Ohio-6902, ¶¶1, 31. At the same time, in case number 09AP-443, the Tenth District Court of Appeals affirmed the defendant's convictions for multiple counts of aggravated arson. *State v. McDowall*, 10th Dist. Nos. 09AP-443, 09AP-444, 2009-Ohio-6902. Now, over a year after his aggravated arson convictions were affirmed and his appeal from his guilty plea was dismissed for failure to prosecute, the defendant is seeking leave to file an untimely appeal to this Court, pursuant to S. Ct. Prac. R. 2.2(A)(4)(a). The State of Ohio opposes the motion, and asserts that defendant has not set forth adequate reasons for the delayed filing. The State respectfully requests that this Court deny defendant's motion.

Defendant's notice of appeal was due for filing in this Court on February 12, 2010. The defendant claims he was not notified of the court of appeals' decision until April 30, 2010, but that does not explain the subsequent eight-month delay after he purportedly learned of the court of appeals' decision before filing the instant motion.

Moreover, this Court has affirmed that “lack of effort or imagination, and ignorance of the law *** do not automatically establish good cause for failure to seek timely relief.” *State v. Reddick* (1995), 75 Ohio St.3d 88,91 (affirming denial of application to reopen pursuant to App.R. 26). In addition, an analysis of the well-settled standards for granting a motion for delayed appeal in the Ohio appellate courts is helpful. “The decision to grant or deny a motion for leave to appeal pursuant to App.R. 5(A) is solely within the discretion of the court of appeals.” *State v. Padgitt* (Nov. 2, 1999), 10th Dist. No. 99AP-1085. Delayed appeal is justified only for mistake, inadvertence, or excusable neglect. *State v. Malkowski* (Mar. 14, 2002), 10th Dist. No. 01AP-1469. “Although App.R. 5(A) has been amended to delete requirements that the appellant set forth reasons that would support his appeal, this court has recognized that the rule does not operate to permit unlimited access to appellate courts. The rule does not relieve the moving party from demonstrating a reasonable explanation for failure to perfect a timely appeal.” *State v. Lumpkin* (2000), 10th Dist. No. 00AP-513, citing *State v. Cromlish* (Sept. 1, 1994), 10th Dist. No. 94AP-855.

An assessment of reasonableness includes an assessment of the defendant's delay in filing the motion for delayed appeal. In *State v. Poindexter* (2002), 10th Dist. No. 01AP-1311, the defendant filed the motion for delayed appeal within six months after his judgment of conviction, which was based on a guilty plea. He claimed that his trial counsel had not informed him of his appellate rights, but the appellate court denied the motion, emphasizing the six-month delay. “We find this substantial lag in filing his motion for leave to file a delayed appeal, without justifiable explanation, unreasonable.” See, also, *Malkowski, supra* (denying leave when defendant provided no reasonable explanation for eight-month delay).

This conclusion is consistent with case law addressing the “good cause” criterion under App.R. 26(B). Under that rule, “[g]ood cause can excuse the lack of a filing only while it exists, not for an indefinite period.” *State v. Davis* (1999), 86 Ohio St.3d 212, 214, quoting *State v. Fox* (1998), 83 Ohio St.3d 514. Even if a defendant has “good cause” early on, such good cause will evaporate if he does not act in a timely manner thereafter.

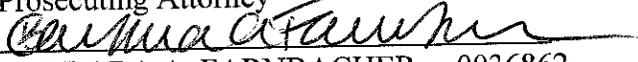
Additionally, *pro se* status will not provide a reasonable explanation in most cases. “A defendant’s claim of limited legal knowledge is insufficient to justify the failure of a timely notice of appeal.” *State v. Robinson*, 10th Dist. No. 04AP-713, 2004-Ohio-4654. And ignorance of the law does not automatically establish good cause for failure to seek timely appeal under App.R. 5(A). *State v. Clayton* (July 10, 2007), 10th Dist. No. 07AP-454, ¶3. “[A d]efendant is obligated to take affirmative steps to protect his appellate rights.” *State v. Trott* (Aug. 28, 2007), 10th Dist. No. 07AP-560.

Defendant has failed to set forth adequate reasons justifying his delay in seeking to appeal from either the dismissal of his appeal for failure to prosecute or the affirmance of his convictions in the Tenth District Court of Appeals. Accordingly, the State respectfully requests that the defendant’s motion for leave to file a delayed appeal be denied.

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, January 13, 2011, to Michael McDowall, #605477, Mansfield Correctional Institution, P.O. Box 788, Mansfield, Ohio, 44901.



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