

ORIGINAL

IN THE SUPREME COURT OF OHIO

Antonio Martin,

Appellant,

v.

State of Ohio,

Appellee.

: Supreme Ct. No.

12-0912

: On Appeal from the Hamilton
County Court of Appeals,
First Appellate District

: Court of Appeals
Case No. C-1100204
: (Trial No. B 0803273)

APPELLANT'S MOTION FOR DELAYED APPEAL

Appellant Antonio Martin, pro se, now moves this Court to grant leave to file a delayed appeal of the March 9, 2012 Judgment in the above captioned appeal case number, pursuant to S.Ct. Prac. R. 2.2(A)(4)(a), for the reasons set forth in the supporting memorandum and affidavit, hereto attached.

Respectfully submitted by,



Antonio Martin 647-784
Chillicothe Correctional Inst.
15802 S.R. 104 North
P.O. Box 5500
Chillicothe, Ohio 45601

APPELLANT, PRO SE

FILED
MAY 25 2012
CLERK OF COURT
SUPREME COURT OF OHIO

MEMORANDUM IN SUPPORT

S.Ct. Prac. R. 2.2(A)(4)(a) provides: "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 delay appeal by filing a motion for delayed appeal and a notice of appeal."

On March 9, 2012, the Court of Appeals, First Appellate District, Hamilton County, Ohio entered a Judgment in Appeal Case No. C-1100204 overruling Appellant's three (3) assignments of error and affirming the trial court's Judgment of March 21, 2011.

Appellant sought discretionary review by the Ohio Supreme Court of the appellate court's decision, presenting propositions of law that continued the argument of Appellant's actual innocence of the felony offenses underlying the conviction and sentence being appealed.

Due to external causes outside of Appellant's control, the Notice of Appeal and Memorandum In Support of Jurisdiction arrived late, two (2) days beyond the 45-day time period pursuant to S.Ct. Prac. R. 2.2(A)(1)(a) established for perfecting an appeal. Appellant received notification of the untimely receipt from the Office of the Clerk of the Ohio Supreme Court on May 7, 2012.

"The fundamental requisite of due process of law is the opportunity to be heard." **Goldberg v. Kelly**, 397 U.S. 254, 267, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287.

One of the numerous obstacles contributing to the untimeliness responsible for Appellant's motion for delayed appeal is his indigent and layman statuses, requiring the dependence upon inmate assistance to properly prepare and present the arguments for correcting the manifest miscarriage of justice resulting from the criminal trial proceedings and direct appeal review.

A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance, cf. *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S.Ct. 55, 63-64, 77 L.Ed. 158(1932); consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case.

Being incarcerated presents additional obstacles from the various policies that govern the pro se prison litigant's post-conviction remedies pursuits. It has been "held that some procedural rules must give way because of the unique circumstances of incarceration." *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245(1988).

In this case, Appellant deposited the appeal notice and supporting memorandum to the prison legal mail system on the afternoon of April 19, 2012, following an Institution Fog Procedure that requires the entire prison to remain locked-down until the fog clears. The Chillicothe Correctional Institution's mail pick-up is commonly at 8:30 AM. See Case Manager's confirmation letter hereto attached.

The notice and memorandum were due to the Clerk of the Ohio Supreme Court on April 23, 2012.

After depositing legal mail to the mailroom, and pick-up occurs, the legal mail is then submitted to the Institution Cashier for processing. On April 20, 2012, Appellant's cash-slip for postage cost was processed by the cashier and presumed delivered to the U.S. Postal Service for first-class mail delivery. See copy of the Appellant's cash-slip hereto attached.

April 20th was a Friday, and first-class mail commonly arrives in Columbus from Chillicothe in twenty-four (24) to forty-eight (48) hours. In this instance, it can be assumed that the cashier failed to forward Appellant's notice and supporting memorandum on the morning of April 20, 2012, but held

it until Monday morning April 23, 2012. From which, the legal mail not arriving to the Clerk's office until April 25, 2012.

Wherefore, Appellant has demonstrated, and provided supporting documentation, that the untimely arrival of the Notice of Appeal and Memorandum In Support of Jurisdiction was completely external to his control.

Therefore, in the interest of fairness and to correct the manifest miscarriage of justice in this felony case, Appellant requests this Court grant him leave to file a delayed discretionary appeal that raises substantial constitutional questions and is one of public and great general interests.

Respectfully submitted by,



Antonio Martin 647-784
Chillicothe Correctional Inst.
15802 S.R. 104 North
P.O. Box 5500
Chillicothe, Ohio 45601

APPELLANT, PRO SE

Certificate of Service

I certify that a copy of the foregoing Motion For Delayed Appeal was sent by ordinary U.S. Mail Service to Rachel Lipman Curran (0078850P), Assistant Prosecuting Attorney, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202 on this 21 day of May 2012.



Antonio Martin 647-784

APPELLANT, PRO SE



Ohio Department of Rehabilitation and Correction

Chillicothe Correctional Institution
15802 State Route 104 North
Chillicothe, OH 45601

John R. Kasich, Governor

www.drc.ohio.gov

Gary C. Mohr, Director

5/11/12

To: Ohio Supreme Court
Clerk Office

From: C. Harold
Case Manager Unit F-2
P.O. 5500 Chillicothe, OH 45601

Re: Martin A647-784

To whom it may concern,

Please be advised that due to Institutional fog count policy, Inmate Martin was unable to get his legal mail to the mailroom in time for the daily mail pick-up. This caused his appeal to the Ohio Supreme Court to be delayed. Please accept this letter as proof that Inmate Martin's correspondence was delayed due to matters out of his control.

Thank you,

C. Harold- Case Manager

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

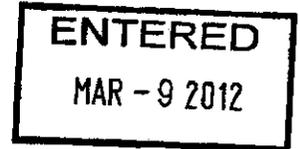
STATE OF OHIO,
Plaintiff-Appellee,

vs.

ANTONIO MARTIN,
Defendant-Appellant.

APPEAL NO. C-110204
TRIAL NO. B-0803273

JUDGMENT ENTRY.



We consider this appeal on the accelerated calendar; and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 3(A); App.R. 11.1(E); Loc.R. 11.1.1.

Antonio Martin appeals his conviction for aggravated arson. We conclude that his assignments of error do not have merit, and we therefore affirm the judgment of the trial court.

Martin was indicted for two counts of aggravated arson and one count of arson. The case was tried to a jury. At the conclusion of the trial, the jury found Martin guilty of both counts of aggravated arson. The jury was unable to reach a verdict on the arson count. The trial court merged the aggravated-arson counts and sentenced Martin to five years' incarceration. The arson count was dismissed by the state.

In his first assignment of error, Martin asserts that his conviction was against the manifest weight of the evidence. Having reviewed the record, we cannot say that the trial court lost its way and created such a manifest miscarriage of justice that we must reverse his conviction and order a new trial. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E2d 541. The first assignment of error is overruled.

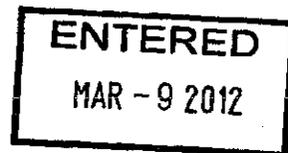
Martin's second assignment of error is that the trial court erred when it denied his motion to dismiss the charges against him. Martin moved to dismiss the charges because the house to which he had allegedly set fire was demolished without notice to him or his counsel. Martin had not moved to preserve the evidence, so the burden lay with him to show that the evidence was materially exculpatory. *State v. Benson*, 152 Ohio App.3d 495, 2003-Ohio-1944, 788 N.E.2d 693, ¶ 10-11 (1st Dist.). We conclude that he did not do so. Nor did he show that the state acted in bad faith. *Id.* The second assignment of error is overruled.

In his third assignment of error, Martin asserts that he was deprived of the effective assistance of counsel. Martin contends that his counsel did not adequately challenge testimony about a police canine's alerts to the presence of ignitable liquid in the house. To prevail on this assignment of error, Martin must demonstrate that his counsel's performance was deficient and that, absent his counsel's errors, the result of the proceedings would have been different. See *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, 538 N.E.2d 373; *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. We conclude that Martin has demonstrated neither that his counsel was ineffective nor that the result of the trial would have been different had the testimony about the canine been challenged more by defense counsel. The third assignment is overruled.

Therefore, we affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., SUNDERMANN and HENDON, JJ.



To the clerk:

Enter upon the court's journal on March 9, 2012 by order of the court


Presiding Judge

AFFIDAVIT OF MERIT
(Pursuant to S.Ct. Prac. R. 2.2(A)(4)(a))

STATE OF OHIO)
) SS:
ROSS COUNTY)

I, Antonio Martin and Affiant herein, being first duly cautioned to the penalty for perjury and sworn or affirmed on my oath as required by law, do hereby depose and aver:

1. Affiant is dependent upon inmate assistance to prepare legal documents due to his indigent status;
2. The Chillicothe Correctional Institution's Law Library policies strictly limit access and availability for obtaining inmate assistance in a timely manner;
3. The Institution's Law Library recently changed-over to Lexis Nexis from Westlaw without providing operating instructions to the inmate population;
4. Server access to Lexis Nexis was inoperable for approximately 20 days during the 45-day time period set forth in S.Ct. Prac. R. 2.2(A)(1)(a), restricting Affiant's ability to conduct necessary research for presenting arguments in proposition of law(s);
5. On April 19, 2012, there was an institution lock-down for the entire morning due to an Institution Fog Procedure, restricting Affiant's ability to deposit the Notice of Appeal and Memorandum In Support of Jurisdiction with the prison mailroom before the scheduled 8:30 AM pick-up, where movement was not permitted until after 11:15 AM (see confirmation letter hereto attached);
6. The Chillicothe Correctional Institution has not implemented a policy that would accomodate mailing legal documents on the same day as an unpredictable fog delay for timely filing;
7. The Institution Cashier received Affiant's legal documents, and completed cash-slip for paying postage costs, on the morning of April 20, 2012, processing the withdrawal of the corresponding amount of funds from Affiant's Inmate Account for such costs (see copy of cash-slip hereto attached);
8. That commonly, mail deposited and forwarded takes only one (1) day to arrive in Columbus from Chillicothe;
9. Affiant received notification from the Clerk of the Ohio Supreme Court to the untimely receipt of the notice and memorandum on May 7, 2012;

10. Affiant had to obtain inmate assistance for preparing these pleadings required pursuant to S.Ct. Prac. R. 2.2(A)(4)(a);
11. Affiant is actually innocent of the felony offenses convicted of, and raises substantial constitutional questions that are of public and great general interests; and
12. I am the Affiant and possess personal knowledge of all the facts herein, and I am capable and competent to testify to the facts herein stated as true as they are believed by me.

AFFIANT FURTHER SAITH NAUGHT



Affiant

SWORN TO, OR AFFIRMED, AND SUBSCRIBED in my presence, a Notary Public for the State of Ohio, County of Ross, this 21 day of May 2012.

SEAL


NOTARY PUBLIC
Commission 8-11-2013

Personal A/C Withdrawal Check Out-Slip

Dollars: 1 Cents: 70

Institution: C.C.I.		Date: 4/19/12	
Name: Clerk, Ohio Supreme Court			
Address: 65 S. Front St.			
City: Columbus	State: Ohio	Zip Code: 43215	

Postage Copies ID Misc. _____ Check-out CK # _____

The inmate's signature on this withdrawal request verifies that the information listed above has been read to or by the inmate and is correct. In the event of an error in the address which results in the return of this package, the inmate shall assume financial responsibility.

Inmate's Signature: <i>CDW</i>	Number: 647-784	Block & Cell Number: 72-254 B
Approved By:	Witnessed: Eric K. Rickolla	

Ship VIA:	Date Processed: APR 20 2012
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Personal A/C Withdrawal Check Out-Slip

Dollars: 1 Cents: 70

Institution: C.C.I.		Date: 4/19/12	
Name: Rachel Lipman Curran - Asst. Prosecuting Attorney			
Address: 230 E. 9th St.			
City: Cincinnati	State: Ohio	Zip Code: 45202	

Postage Copies ID Misc. _____ Check-out CK # _____

The inmate's signature on this withdrawal request verifies that the information listed above has been read to or by the inmate and is correct. In the event of an error in the address which results in the return of this package, the inmate shall assume financial responsibility.

Inmate's Signature: <i>CDW</i>	Number: 647-784	Block & Cell Number: 72-254 B
Approved By:	Witnessed: Eric K. Rickolla	

Ship VIA:	Date Processed: APR 20 2012
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