

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO  
2012**

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

MARTIN McMICHAEL,

Defendant-Appellant.

Case No. 2012-1595

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

Court of Appeals  
Case Nos. 11AP-1042, 11AP-  
1043, 11AP-1044

**MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING MOTION FOR  
DELAYED APPEAL**

RON O'BRIEN 0017245  
Franklin County Prosecuting Attorney  
373 South High Street-13<sup>th</sup> Fl.  
Columbus, Ohio 43215  
614/525-3555

And

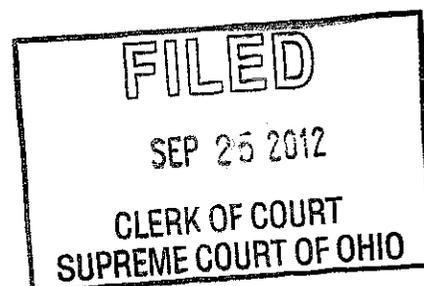
BARBARA A. FARNBACHER 0036862  
Assistant Prosecuting Attorney

Counsel for Plaintiff-Appellee  
(Counsel of Record)  
Assistant Prosecuting Attorney  
bafarnba@franklincountyohio.gov

COUNSEL FOR PLAINTIFF-APPELLEE

MARTIN McMICHAEL #645-878  
Ross Correctional Institution  
P.O. Box 7010  
Chillicothe, Ohio 45601

DEFENDANT-APPELLANT, PRO SE



**IN THE SUPREME COURT OF OHIO  
2012**

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

MARTIN McMICHAEL,

Defendant-Appellant.

Case No. 2012-1595

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

Court of Appeals  
Case Nos. 11AP-1042, 11AP-  
1043, 11AP-1044

**MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING  
MOTION FOR DELAYED APPEAL**

On September 19, 2012, the defendant filed a motion requesting leave to file a delayed appeal from the court of appeals' decision affirming the trial court's denial of defendant's post-sentence motion to withdraw guilty plea. The defendant claims that he failed to file a timely appeal in this case because of his pro se status and limited access to the prison law library. This motion, filed pursuant to S. Ct. Prac. R. 2.2(A)(4)(a) more than three weeks after the defendant's appeal was due for filing in this Court, lacks merit. The State of Ohio opposes the defendant's motion, because the defendant has not set forth adequate reasons for the delayed filing. The State therefore respectfully requests that this Court deny defendant's motion.

An analysis of the well-settled standards for deciding a motion for delayed appeal in the Ohio appellate courts is helpful to this Court's resolution of defendant's motion. 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, *State v. Wilbur*, 10th Dist. Nos. 05AP-960, 05AP-961, 2005-Ohio-6213, ¶2, and the defendant bears the burden to demonstrate a reasonable explanation of the basis for his failure to perfect a timely appeal. *State v. Morris*, 10th Dist. No. 05AP-1139, 2005-Ohio-6479, ¶3. While a motion for leave to appeal need not set out any claim that error

took place in the trial court, the moving party must demonstrate a reasonable explanation for the failure to appeal as of right. *State v. Poole*, 10th Dist. No. 05AP-1266, 2006-Ohio-210, ¶7.

As this Court recently recognized, “If a movant establishes sufficient reasons justifying the delay, the appellate court may, in its discretion, grant the motion, and the case proceeds as it would have if timely filed.” *State v. Silsby*, 119 Ohio St.3d 370, 2008-Ohio-3834, ¶12, 894 N.E.2d 667.

An assessment of reasonableness includes an assessment of the defendant’s delay in filing the motion for delayed appeal. In *State v. Poindexter*, 10th Dist. No. 01AP-1311 (Jan. 24, 2002), the defendant had 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 court of appeals 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.”

In *State v. Hayes*, 10th Dist. No. 11AP-636 (Sept. 27, 2011), the court of appeals found that the defendant’s one-month delay in filing a notice of appeal from a guilty plea was not supported by a reasonable explanation. The court stated that the defendant’s assertion that his failure was due, in part, to his limited access to the prison law library did not warrant granting his motion. *Id.* at ¶6, citing *State v. Davis*, 10th Dist. No. 10AP-123 (Mar. 4, 2010), and *State v. Smith*, 10th Dist. No. 07AP-1050 (Feb. 7, 2008).

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, ¶4. A pro se defendant is obligated to take affirmative steps to protect available appellate rights. *State v.*

*Conley*, 10th Dist. No. 10AP-440, ¶5 (June 10, 2010). 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*, 72 Ohio St.3d 88, 91, 647 N.E.2d 784 (1995) (affirming denial of application to reopen pursuant to App.R. 26). “Although decided under App.R. 26, this guiding principle applies to motions for delayed appeal under App.R. 5(A) as well.” *Poole*, 2006-Ohio-210, ¶11, citing *Wilbur*, 2005-Ohio-6213.

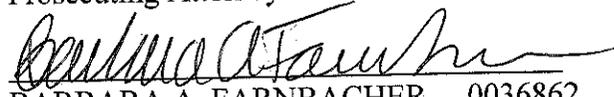
Under these standards, defendant’s motion for delayed appeal should be denied. The defendant’s pro se status and limited access to the prison law library do not establish good cause for his failure to file a timely appeal from the appellate court’s decision affirming the denial of his post-sentence motion to withdraw guilty plea. This is particularly true because the defendant does not claim a lack of timely notice of the appellate court’s decision.

Additionally, it is noteworthy that the defendant was represented by counsel both when he entered his guilty pleas in these three separate cases, and six weeks later, when the trial court imposed sentence, *see State v. McMichael*, 10th Dist. Nos. 11AP-1042, 11AP-1043, 11AP-1044, 2012-Ohio-3166, ¶¶5, 28, but he did not seek to withdraw his plea until nearly five months after the sentencing proceeding. He then successfully filed timely appeals from the trial court’s decision denying his requests in his three cases. Now he asks that this Court allow him to file an untimely appeal from the appellate court’s decision affirming the denial of his post-sentence motion to withdraw guilty plea. Under these circumstances, the defendant’s pro se status and limited access to the prison law library do not provide a reasonable explanation for his failure to prosecute this appeal timely.

For these reasons, the defendant’s motion lacks merit, and the State therefore respectfully requests that it be denied.

Respectfully submitted,

RON O'BRIEN 0017245  
Prosecuting Attorney



BARBARA A. FARNBACHER 0036862

Assistant Prosecuting Attorney  
373 South High Street-13<sup>th</sup> Fl.  
Columbus, Ohio 43215  
614/525-3555  
bafarnba@franklincountyohio.gov

Counsel for Plaintiff-Appellee

### CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, September 25<sup>th</sup>, 2012, to Martin McMichael, #645-878, Ross Correctional Institution, P.O. Box 7010, Chillicothe, Ohio 45601.



BARBARA A. FARNBACHER 0036862  
Assistant Prosecuting Attorney