

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	MEMORANDUM OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-P-0025
TYRONE LEE NOLING,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 95 CR 0220.

Judgment: Appeal dismissed.

Victor V. Viglucci, Portage County Prosecutor and Pamela J. Holder, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

David M. Laing, and *Mark Godsey*, Ohio Innocence Project, University of Cincinnati, P.O. Box 210040, Cincinnati, OH 45221-0040 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.,

{¶1} This matter is before this court upon appellee’s motion to dismiss for lack of jurisdiction filed June 12, 2009. No brief or memorandum in opposition to the motion has been filed.

{¶2} In 1995, appellant was indicted on two counts of aggravated murder. Death specifications in each count charged murder in the course of “Aggravated Robbery and/or Aggravated Burglary (spec. 1),” R.C. 2929.04(A)(7), and murder to escape “detection or apprehension or trial or punishment” for another offense (spec. 2),

R.C. 2929.04(A)(3). Counts Three and Four both charged aggravated robbery, and Count Five charged aggravated burglary. All five counts included gun specifications. In February of 1996, the trial jury found appellant guilty as charged.

{¶3} After the penalty hearing, the trial court accepted the jury's recommendation and sentenced appellant to death on Counts One and Two. Appellant was further sentenced to consecutive prison terms for Counts Three, Four, and Five and for the firearms specifications. The convictions and sentences were affirmed on appeal. See *State v. Noling* (June 30, 1999), 11th Dist. No. 96-P-126, 1999 Ohio App. LEXIS 3095 and *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044.

{¶4} Appellant subsequently filed two petitions for post conviction relief, each of which was denied by the trial court and affirmed on appeal. See *State v. Noling*, 11th Dist. No. 98-P-0049, 2003-Ohio-5008 and *State v. Noling*, 11th Dist. No. 2007-P-0034, 2008-Ohio-2394, respectively.

{¶5} Appellant has recently filed an application for DNA testing pursuant to R.C. 2953.71 through R.C. 2953.81 in the Portage County Court of Common Pleas. On March 11, 2009, the trial court overruled appellant's application. On April 10, 2009, appellant sought leave to appeal the trial court's decision. Pursuant to governing statute, this court is without jurisdiction to consider appellant's appeal.

{¶6} R.C. 2953.73(E)(1) provides:

{¶7} "(E) A judgment and order of a court entered under division (D) of this section is appealable only as provided in this division. If an eligible inmate submits an application for DNA testing under section 2953.73 of the Revised Code and the court of

common pleas rejects the application under division (D) of this section, one of the following applies:

{¶8} “(1) If the inmate was sentenced to death for the offense for which the inmate claims to be an eligible inmate and is requesting DNA testing, the inmate may seek leave of the supreme court to appeal the rejection to the supreme court. Courts of appeals do not have jurisdiction to review any rejection if the inmate was sentenced to death for the offense for which the inmate claims to be an eligible inmate and is requesting DNA testing.”

{¶9} Appellant was sentenced to death for the offenses for which he asserts eligibility for DNA testing. As a result, this court does not possess jurisdiction to review the trial court’s judgment overruling his application. Appellant evidently recognized this statutory directive subsequent to filing his original notice with this court as, on April 27, 2009, he filed his notice of appeal and memorandum in support of jurisdiction with the Supreme Court of Ohio.

{¶10} Therefore, because this court is without jurisdiction to entertain appellant’s appeal, appellee’s motion to dismiss is granted, and the appeal is hereby dismissed.

MARY JANE TRAPP, P.J.,
DIANE V. GRENDALL, J.,
concur.