[Cite as *State v. Tenney*, 2009-Ohio-4104.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**MEMORANDUM OPINION**
Plaintiff-Appellee,	:	**CASE NO. 2009-A-0015**
- vs -	:	
DONALD D. TENNEY, SR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 235.

Judgment: Appeal dismissed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Donald D. Tenney, Sr., pro se, PID: 561-344, Madison Correctional Institution, P.O. Box 740, London, OH 43140 (Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} On March 10, 2009, appellant, Donald D. Tenney, Sr., pro se, filed a notice of appeal along with a "Notice of Delayed Appeal," and "Motion for Leave to Appeal," pursuant to App.R. 5(A). He appeals from his judgment of conviction and sentence issued by the trial court on December 31, 2008.

{¶2} Appellee, the state of Ohio, filed a response in opposition to appellant's pro se motion on March 19, 2009.

{¶3} App.R. 5(A) provides, in relevant part:

{¶4} "After the expiration of the thirty day period provided by App.R. 4(A) for the filing of a notice of appeal as of right, an appeal may be taken by a defendant with leave of the court to which the appeal is taken in the following classes of cases:

{¶5} "(a) Criminal proceedings;

{¶6} "(b) Delinquency proceedings; and

{¶7} "(c) Serious youthful offender proceedings.

{¶8} "(2) A motion for leave to appeal shall be filed with the court of appeals and *shall set forth the reasons for the failure of the appellant to perfect an appeal as of right.* ***." (Emphasis added.)

{¶9} Appellant's motion does not advance any reasons for a delay in perfecting his appeal other than to state: "I did not knowingly and intelligently waive my right to direct appeal." This statement may be one to advance on the merits of appellant's appeal if his motion for delayed appeal was granted, but it does not explain what caused the delay in perfecting his appeal as of right beyond the thirty-day requirement in App.R. 4(A). Setting forth one's reasons for filing a late appeal is one of the primary requirements under App.R. 5(A).

{¶10} Since appellant's motion is procedurally flawed, he has failed to invoke this court's jurisdiction. Accordingly, it is ordered that appellant's motion for leave to file a delayed appeal is hereby overruled.

{¶11} Appeal dismissed.

{¶12} As an aside, we would note that the dissent suggests that somehow we have placed "form over function." It suggests we have an affirmative constitutional and

statutory duty to review the trial court for error. We are governed by a rule which requires an applicant for a delayed appeal to set forth the reasons why the appellant failed to perfect his appeal timely. In this case, appellant did not give a bad reason, he gave no reason at all. We do not consider this to be a "hyper technical" basis for denying the motion for delayed appeal.

{¶13} Once again, the dissent is proposing that we operate, when it is convenient to do so, under our own set of rules. The proclamation we consider a social agenda, by factoring into our decision the cost to taxpayers of housing prisoners, makes for fine reading but has nothing to do with following the law in this case.

DIANE V. GRENDELL, J., concurs.

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

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{¶14} I would grant the delayed appeal.

{¶15} Appellant, a pro se litigant, has a constitutional right to appeal his conviction. *State v. Clark* (May 24, 1991), 11th Dist. No. 90-P-2211, 1991 Ohio App. LEXIS 2371, at 9-10. In cases wherein someone is found guilty and sentenced in a criminal matter and there is no prejudice to the state in the delay, a motion for delayed appeal should be granted. The state of Ohio and its taxpayers will be spending their hard earned tax dollars to feed, clothe, house, as well as provide medical care for appellant. I humbly suggest that we should accept the delayed appeal, and review the

record before this court to make sure the trial court did not err. There is no specific time limit for appellant to assert his constitutional right to appeal. In fact, the rule provides specifically for a delayed appeal if the thirty-day deadline to file its original appeal is missed and it specifically does not set a deadline for this delayed appeal to be filed.

{¶16} In this case, appellant has filed a request for a delayed appeal, but the majority does not feel inclined to accept it because he did not give a specific reason for missing the underlying deadline for filing his appeal. The majority, in emphasizing form over function, is placing an unnecessary barrier in front of appellant by its technical reading of the rule. The denial of the constitutional right to appeal is, in itself, sufficient to sustain the request in this instance.

{¶17} I thoroughly agree with the majority's observation that we are bound by the appellate rules. I disagree that mechanical enforcement of a single appellate rule takes precedence over enforcement of the law as a whole. The Rules of Appellate Procedure are meant to provide a framework for the orderly disposition of appeals. *In re Beck*, 7th Dist. No. 00 BA 52, 2002-Ohio-3460, at ¶29. However, "'[o]nly a flagrant, substantial disregard for the court rules can justify a dismissal on procedural grounds.'" Id. at ¶28, quoting *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189, 193. The Supreme Court of Ohio has, again and again, instructed the lower courts of this state that cases are to be decided on the merits, and that the various rules of court are to be applied so as to achieve *substantial* justice. Cf. *State ex rel. Lapp Roofing & Sheet Metal Co., Inc. v. Indus. Comm.*, 117 Ohio St.3d 179, 2008-Ohio-850, at ¶12; *DeHart* at 192. Consequently, strict adherence to the appellate rules must yield when a

procedural error is inadvertent, and a party or counsel acted in good faith. Cf. *Beck* at ¶29.

{¶18} The Staff Note to the 1994 Amendment to App.R. 5(A) also indicates that the rule is to be given a flexible, liberal interpretation, and not used to dismiss appeals willy-nilly. Prior to the amendment, defendants were required to set forth the errors claimed and evidence relating to the claimed errors. Id. The amendment merely retained the requirement that the would-be appellant set forth his or her reasons for the delay. Id. In explanation, the Staff Note provides:

{¶19} "Although there was also concern about the fairness of requiring usually indigent, and frequently unrepresented, criminal defendants to demonstrate (often without the benefit of a transcript) the probability of error, the primary reason for this amendment is judicial economy. Denial of leave to file a delayed appeal for failure to demonstrate the probability of error usually leads to subsequent litigation of the issue by direct appeals to the Ohio and United States Supreme Courts, petitions to vacate sentence under R.C. 2953.21 et seq., and appeals thereon, and/or federal habeas corpus petitions and appeals. Review of the merits by the courts of appeals upon the initial direct (albeit delayed) appeal would thus avoid the presentation of the probability of error issue to as many as nine subsequent tribunals."

{¶20} In denying this appeal, the majority also ignores the intent of our General Assembly. The framework for sentencing in criminal matters – despite the changes wrought by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 – is still provided by Senate Bill 2. A principal purpose of the General Assembly in reforming Ohio's sentencing structure in Senate Bill 2, including procedure relating to appeals, was cost

containment. *State v. Grider*, 8th Dist. No. 82072, 2003-Ohio-3378, at ¶29, citing Griffin and Katz, Sentencing Consistency: Basic Principles Instead of Numerical Grid: The Ohio Plan (2002), 53 Case W.R.L.Rev. 1. R.C. 2929.11 mandates that "[t]he overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender." R.C. 2929.12(A) grants trial courts broad discretion in fashioning sentences that fulfill these overriding purposes of felony sentencing, and mandates that our trial courts consider the listed seriousness and recidivism factors when doing so. As appellant pleaded guilty to the crimes for which he was sentenced, the errors he might raise on appeal are limited. Surely it would be most cost effective for this court to consider any such alleged error, and so bring this matter to a quick, *final* close.

{¶21} In sum, the majority, hypnotized by App.R. 5(A), ignores the mandate of the Supreme Court of Ohio that court rules be construed so cases are decided on the merits. It ignores the intent of the General Assembly that the courts deal with criminal cases in the most cost effective manner complying with justice. I humbly suggest this is not a proper application of the appellate rules.

{¶22} This court has an affirmative constitutional and statutory duty to review the trial court for error. We are the constitutional quality control, and backstop for the citizens of the state of Ohio. By skirting this appeal, as well as others, I humbly submit we are not performing our duties to the best of our statutory and constitutional obligation.

{¶23} Differing opinions are integral to the appellate process. The authors of our constitution certainly understood this, providing that courts of appeals should hear and

decide matters brought before them in panels of three. I find unfounded the majority's insinuation that it is a violation of the rules governing this court, and indicative of a desire to promote a particular social agenda, when a member of an appellate panel expresses a different view than her colleagues on the law applicable to a case, after reviewing case law, statute, and learned treatise. I find the language in which this sentiment is expressed lacks congeniality and comity.

{¶24} Thus, I respectfully dissent from the majority.