

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

STATE OF OHIO,	:	MEMORANDUM OPINION
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2009-T-0103
TIMOTHY SMITH,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2004 CR 00621

Judgment: Appeal dismissed.

Dennis Watkins, Lake County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Timothy Smith, pro se, PID: A481-851, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030-8000 (Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.,

{¶1} On October 9, 2009, appellant, Timothy Smith, pro se, filed a motion for delayed appeal, pursuant to App.R. 5(A). Along with the motion, appellant filed his notice of appeal, which indicates that he is appealing his judgment entry of conviction of February 25, 2005. Thus, his appeal is untimely by over four and one-half years.

{¶2} Appellee, the state of Ohio, filed its response in opposition to the motion on October 13, 2009. Appellant responded to appellee's opposition on October 29, 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 in criminal cases, an appeal may be taken only 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.”

{¶9} In his motion, appellant asserts the following as his reasons for failing to file a timely appeal: 1) he is functionally illiterate with a first grade level of education; 2) he just recently became aware that he could raise and argue ineffective assistance of counsel and prosecutorial misconduct; 3) the trial court told him that he could not appeal his sentence and conviction; 4) he was advised by his trial counsel to sign a waiver of rights form to waive his appellate rights without informing him that he could appeal, which he claims amounts to ineffective assistance of counsel and prosecutorial misconduct.

{¶10} While appellant’s reasons might explain some short lapse of time in initiating his direct appeal, his reasons do not justify a delay of over four and one-half years between the time of appellant’s conviction and sentence until the filing of his motion for delayed appeal. We find that appellant was not diligent in taking the proper steps to protect his own rights.

{¶11} Furthermore, as appellee correctly notes in its opposition to the motion for delayed appeal, despite his claim of ignorance and illiteracy, just two years ago appellant filed a timely appeal from the trial court's denial of his motion to withdraw his guilty plea in *State v. Smith*, 11th Dist. No. 2007-T-0076, 2008-Ohio-1501. In this court's sixteen-page opinion, we addressed numerous issues raised by appellant, *pro se*, regarding his guilty plea, including ineffective assistance of counsel. Therefore, the core issues appellant seeks to raise in his present delayed appeal were previously addressed by this court in *Smith*, *supra*.

{¶12} Accordingly, it is ordered that appellant's motion for leave to file a delayed appeal is hereby overruled.

{¶13} Appeal dismissed.

MARY JANE TRAPP, P.J., concurs,

COLLEEN MARY O'TOOLE, J., dissents.