

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	
)	
PLAINTIFF-APPELLEE,)	
)	CASE NO. 01 C.A. 166
VS.)	
)	
BILLY J. PRYOR,)	<u>OPINION</u>
)	<u>and</u>
)	<u>JOURNAL ENTRY</u>
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Motion for leave to file
delayed appeal

JUDGMENT: Motion denied.
Appeal dismissed.

APPEARANCES:

For Plaintiff-Appellee:	Paul J. Gains Prosecuting Attorney Janice T. O'Halloran Assistant Prosecuting Attorney Mahoning County Courthouse 120 Market Street Youngstown, Ohio 44503
For Defendant-Appellant:	Billy J. Pryor, <i>pro-se</i> #387-285 Lake Erie Correctional Inst. P.O. Box 8000 Conneaut, Ohio 44030-8000

JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: September 28, 2001

PER CURIAM.

This matter arises from defendant-appellant's, Billy J. Pryor's, motion for leave to file a delayed appeal pursuant to App.R. 5(A). Appellant pleaded guilty to two counts of aggravated robbery in Case No. 99-CR-363 and one count of aggravated robbery in Case No. 99-CR-471. Appellant was sentenced to three year concurrent sentences in Case No. 99-CR-363 and a three year sentence in Case No. 99-CR-471 to be served consecutive with the sentences in Case No. 99-CR-363. No timely appeal as of right was taken in these cases.

Appellant alleges he was not informed by the trial court of his right to appeal nor was he advised of that right by his trial counsel. Appellant further alleges that his trial counsel was ineffective in not notifying the trial court of an alleged sentencing error.

Appellant's allegations are without merit.

Whether to grant or refuse leave to file a delayed appeal is within the sound discretion of the appeals court. See *State v. McGahan* (1949), 86 Ohio App. 283. A delayed appeal should be granted where it appears on the face of the record the overruling of such motion would result in a miscarriage of justice. See *State v. Bendnarik* (1954), 101 Ohio App. 339. In this case the denial of appellant's motion for leave to file a delayed appeal does not result in a miscarriage of justice.

Appellant was sentenced almost one and one-half years ago. No direct appeal was ever attempted in this case. Even a *pro-se* appellant must take some affirmative steps to protect his rights in these matters. In the case of *State v. Riddick* (1995), 72 Ohio St.3d 88, the Ohio Supreme Court, in dealing with an application for reopening an appeal, stated:

"Lack of effort or imagination, and ignorance of the law, are not such circumstances and do not automatically establish good cause for failure to seek timely relief."

Initially we note that in both of appellant's cases, the sentencing entry by the trial court indicated that, "Defendant has been given notice under R.C. 2929.19(B)(3) and of his appellate rights under R.C. 2953.08." R.C. 2953.08 deals with the guidelines for appeals based on felony sentencing. Hence we have a presumption that appellant was notified of his right to appeal by the trial court.

The sentencing entry also states that "Defendant * * * was afforded all rights pursuant to Criminal Rule 32." Crim.R. 32(B) imposes a duty on the trial court to notify defendants of their right to appeal. There is a presumption as to the regularity in the proceedings unless a party demonstrates to the contrary. The entry validates notice was provided of the appellate rights afforded this defendant.

Next we note that appellant was convicted of first degree felonies. R.C. 2929.14 provides that the possible sentences for a

felony of the first degree is a prison term of 3, 4, 5, 6, 7, 8, 9, or 10 years. The trial court sentenced appellant to the minimum possible for a first degree felony in both of his cases. R.C. 2929.14(E)(3) also allows consecutive sentences in multiple offenses where the court finds them necessary, if, "the seriousness of the offenses requires consecutive service." In the March 28, 2000 sentencing judgment entry, the trial court noted that it had, "balanced the seriousness and recidivism factors."

For all the reasons stated above, appellant has not established good cause for his delayed appeal and said application is denied. Appeal dismissed.

Costs taxed against appellant.

Vukovich, J., concurs
Donofrio, J., concurs
Waite, J., concurs