

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

OCT 31 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THOMAS MICHAEL PIERCE,)	2 CA-HC 2012-0007
)	DEPARTMENT B
Petitioner/Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
THE STATE OF ARIZONA,)	Appellate Procedure
)	
Respondent/Appellee.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR20582 and CR20748

Honorable Howard Hantman, Judge

DISMISSED

Thomas Michael Pierce

Florence
In Propria Persona

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for
Respondent/Appellee

K E L L Y, Judge.

¶1 Thomas Pierce appeals from the trial court's April 17, 2012 denial of his February 2, 2012 "Amended Petition for Writ of Habeas Corpus," his February 24, 2012, "Motion to Dismiss State's Actions for Lack of Subject Matter Jurisdiction" and his April

11, 2012, “Motion to Dismiss State’s Cause for Want of Subject Matter Jurisdiction.” We conclude we lack subject matter jurisdiction due to Pierce’s untimely notice of appeal.

¶2 Section 12-2101, A.R.S., governs appeals in civil proceedings and § 12-2101(A)(11)(a) grants this court jurisdiction to consider a petitioner’s appeal from an order or judgment refusing his discharge in habeas corpus proceedings. “It has long been held in Arizona that an appeal in a habeas corpus matter is governed by the provisions of the civil and not the penal code, and failure to comply with the civil appeal statutes is grounds for dismissal.” *Anderson v. Anderson*, 6 Ariz. App. 563, 565, 435 P.2d 70, 72 (1967).

¶3 Rule 9(a), Ariz. R. Civ. App. P., requires a notice of appeal be filed not later than thirty days after the entry of the judgment from which the appeal is taken, and “the timely filing of a notice of appeal is a jurisdictional prerequisite to appellate review.” *In re Marriage of Gray*, 144 Ariz. 89, 90, 695 P.2d 1127, 1128 (1985). “[H]ence, where the appeal is not timely filed, the appellate court acquires no jurisdiction other than to dismiss the attempted appeal.” *James v. State*, 215 Ariz. 182, ¶ 11, 158 P.3d 905, 908 (App. 2007), quoting *Edwards v. Young*, 107 Ariz. 283, 284, 486 P.2d 181, 182 (1971) (alteration added).

¶4 Here, the trial court’s signed minute entry ruling was filed by the clerk of court on April 17, 2012, and Pierce did not file his notice of appeal until May 29, 2012. Although Pierce states, in his notice of appeal, that he also appeals from the court’s May

24, 2012 “denial of his . . . Motion for Reconsideration,” such a motion “may not be employed as a substitute for a motion pursuant to Rule 50(b), 52(b), 59 or 60 of [the Arizona Rules of Civil Procedure], and shall not operate to extend the time within which a notice of appeal must be filed.”¹ Ariz. R. Civ. P. 7.1(e). Pursuant to Rule 9(b), Ariz. R. Civ. App. P., the time to appeal a judgment may only be extended by timely filed motions (1) for judgment as a matter of law under Rule 50(b), Ariz. R. Civ. P.; (2) for additional findings of fact under Rule 52(b) Ariz. R. Civ. P.; (3) to alter or amend the judgment under Rule 59(1), Ariz. R. Civ. P., or (4) for a new trial under Rule 59(a). Pierce’s “Motion for Reconsideration” may not be considered a motion pursuant to Rule 59 because it does not refer to that rule and there is no basis to conclude the trial court considered it to be a Rule 59 motion. *See James*, 215 Ariz. 182, ¶ 16, 158 P.3d at 909 (to extend time for appeal, reconsideration motion must refer to Rule 59 or trial court must indicate on record that motion considered as filed under that rule).²

¶5 Because Pierce failed to file a timely notice of appeal from the trial court’s final order denying his “Amended Petition for Writ of Habeas Corpus,” we are without

¹Pierce does not make any argument regarding his “Motion for Reconsideration” in his opening brief and, therefore, were an order denying that motion properly before us, *see infra* n.2, he would have waived our review of it. *See Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 502-03, 851 P.2d 122, 127-28 (App. 1992).

²Additionally, we see nothing in the record before us to support Pierce’s representation that the trial court denied his “Motion for Reconsideration” on May 24, 2012. Because Pierce appears to have filed his notice of appeal before the trial court ruled on the motion, that court has been divested of jurisdiction to rule on it or any similar motions filed since Pierce’s notice of appeal. *See City of Phx. v. Leroy’s Liquors, Inc.*, 177 Ariz. 375, 381, 868 P.2d 958, 964 (App. 1993).

jurisdiction to consider the appeal and must dismiss it. *See James*, 215 Ariz. 182, ¶ 11, 158 P.3d at 908. Accordingly, this appeal is dismissed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge