

RENDERED: July 2, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-2166-MR

CHARLES H. PLOUVIER

APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY RAIKES, JUDGE
INDICTMENT NO. 94-CR-094

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ABRAMSON, DYCHE, and HUDDLESTON, Judges.

ABRAMSON, JUDGE: Charles H. Plouvier appeals from an order of the Nelson Circuit Court denying his motion for a stay of execution of his sentence pending appeal, pursuant to Kentucky Rule of Criminal Procedure (RCr) 12.76(2). He argues that the court abused its discretion when it refused to grant him the stay. After a review of the record and the applicable law, we affirm the circuit court's order.

A jury found Plouvier guilty of receiving stolen property, \$300 or more, and of being a first-degree persistent

felony offender. The court sentenced him to a sentence of twenty (20) years on September 15, 1995. The Kentucky Supreme Court affirmed the conviction in an unpublished opinion rendered April 24, 1997, and denied Plouvier's petition for rehearing. On July 17, 1997, Plouvier filed a motion for stay of execution of sentence citing RCr 12.76(2). The circuit court denied the motion by order entered July 23, 1997. The decision affirming Plouvier's conviction became final on September 4, 1997. Plouvier appeals the circuit court's July 23 order.

On appeal, Plouvier asserts that he was entitled to an order staying the execution of his sentence pending appeal. The Commonwealth responds that RCr 12.76 is not applicable because Plouvier's appeal was and is no longer pending. We agree with the Commonwealth.

"The execution of a sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail." RCr 12.76(2). The rule allows a defendant to choose between commencement of a sentence of imprisonment in the penitentiary or remaining in jail pending appeal. Blanton v Commonwealth, Ky., 690 S.W.2d 128, 129 (1985).

In his August 1997 motion, Plouvier asked for "recall of the sentence and all pertinent documents pertaining to this indictment number until the judgment becomes final through the

state and federal review process." In his reply brief, he stresses that he first requested that his sentence be stayed at his sentencing hearing in September 1995.

RCr 12.76 does not afford Plouvier the relief he requests. The time for Plouvier to appeal the circuit court's denial of his original request has long since passed. RCr 12.04. Furthermore, the issue is now moot. A court can only stay the execution of a sentence pending appeal if there is an appeal pending. Plouvier's appeal from his conviction may have been "pending" when he renewed his request for a stay in July 1997, because the Kentucky Supreme Court's April 1997 decision did not become final until September 1997. However, that appeal is certainly not pending any more. Finally, RCr 12.76 does not apply to any federal remedy Plouvier may have.

For the foregoing reasons, the decision of the circuit court is affirmed.

ALL CONCUR.

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