



Missouri Court of Appeals
Southern District

Division Two

LARRY JOHN JACK,)
)
Movant-Appellant,)
v.) No. SD30512
) Filed: 8-9-11
STATE OF MISSOURI,)
)
Respondent-Respondent.)

APPEAL FROM THE CIRCUIT COURT OF JASPER COUNTY

Honorable David B. Mouton, Circuit Judge

APPEAL DISMISSED

Larry Jack (Appellant) was charged with four counts of first-degree sodomy. On June 20, 2008, Appellant pled guilty to two of the charges pursuant to a plea agreement. The State dismissed the other two charges. Appellant was sentenced to serve concurrent, 15-year terms of imprisonment. He was delivered to the Department of Corrections on June 25, 2008.

On December 21, 2009, Appellant filed a *pro se* motion with the plea court to withdraw his guilty plea pursuant to Rule 29.07.¹ This motion was denied in a judgment entered on January 12, 2010. Appellant did not file an after-trial motion.

¹ All references to rules are to Missouri Court Rules (2010).

On February 11, 2010, Appellant filed a *pro se* Rule 24.035 post-conviction motion. On February 16, 2010, the motion court entered an order denying the motion as untimely. Appellant did not file an after-trial motion.

On March 18, 2010, Appellant attempted to file one *pro se* notice of appeal directed at the separate rulings made by the plea court and the motion court. The notice of appeal was not accompanied by either the required docket fee or a motion to proceed *in forma pauperis*.² Appellant was notified and filed his motion to proceed *in forma pauperis* with the trial court on April 14, 2010. The trial court sustained the motion on April 22, 2010. Appellant's notice of appeal was filed that same day. The State has requested that this appeal be dismissed as untimely. For the reasons that follow, we agree and dismiss the appeal.

The Rule 29.07(d) Motion

We first address the timeliness of Appellant's attempt to appeal from the denial of his Rule 29.07 motion. Appellant's motion was filed 18 months after his sentence was imposed. To correct manifest injustice, a trial court after sentence may set aside a judgment of conviction and permit a defendant to withdraw his or her plea. Rule 29.07(d). Although such a post-conviction motion retains the same docket number as the criminal case, the motion is treated as though it were a separate civil proceeding. *State v. Larson*, 79 S.W.3d 891, 893 (Mo. banc 2002); *State v. Tayon*, 117 S.W.3d 721, 722 (Mo. App. 2003).

The denial of a post-conviction Rule 29.07(d) motion is appealable. *Brown v. State*, 66 S.W.3d 721, 722 (Mo. banc 2002); *State v. Johnson*, 172 S.W.3d 900, 901 n.3

² The motion court's docket entry noted: "[n]o motion to proceed as a poor person received. No filing fee received."

(Mo. App. 2005); *Hamilton v. State*, 865 S.W.2d 374, 376 (Mo. App. 1993). In reviewing the denial of such a motion, we are required to follow the applicable rules of civil procedure governing when a notice of appeal must be filed to be timely. See *State v. Thomas*, 96 S.W.3d 834, 838 (Mo. App. 2002).

Rule 81.04(a) requires a notice of appeal to be filed “not later than ten days after the judgment or order appealed from becomes final.” *Id.* Rule 81.05(a)(1) states that “[a] judgment becomes final at the expiration of thirty days after its entry if no timely authorized after-trial motion is filed.” Here, the judgment denying Appellant’s Rule 29.07(d) motion was entered on January 12, 2010. Because Appellant did not file an after-trial motion, the judgment became final on February 11, 2010. Rule 81.05(a)(1). Therefore, Appellant’s notice of appeal had to be filed no later than February 22, 2010. Rule 81.04(a).³ Because no timely notice of appeal was filed in connection with the denial of Appellant’s Rule 29.07(d) motion, this Court lacks appellate jurisdiction and must dismiss this aspect of Appellant’s appeal. See *Spicer v. Donald N. Spicer Revocable Living Trust*, 336 S.W.3d 466, 471-72 (Mo. banc 2011).

The Rule 24.035 Motion

We next address the timeliness of Appellant’s attempt to appeal from the denial of his Rule 24.035 motion. Rule 24.035(k) states, in relevant part, that “[a]n order ... overruling a motion filed under the provisions of this Rule 24.035 shall be deemed a final judgment for purposes of appeal by the movant or the state.” On appeal, we are required to follow the applicable rules of civil procedure governing when a notice of appeal must

³ Because the last day of the 10-day time period was a Sunday, Appellant had until the end of the next business day to file his notice of appeal. Rule 44.01(a).

be filed to be timely. See *Twitty v. State*, 322 S.W.3d 608, 609-10 (Mo. App. 2010); *Wise v. State*, 219 S.W.3d 270, 272 (Mo. App. 2007).

As noted above, Rule 81.04(a) requires a notice of appeal to be filed “not later than ten days after the judgment or order appealed from becomes final.” *Id.* Rule 81.05(a)(1) states that “[a] judgment becomes final at the expiration of thirty days after its entry if no timely authorized after-trial motion is filed.” Here, the order denying Appellant’s Rule 24.035 motion was entered on February 16, 2010. That order is deemed to be the final judgment for purposes of appeal. Rule 24.035(k). Because Appellant did not file an after-trial motion, the order became final on March 18, 2010. Rule 81.05(a)(1). Therefore, Appellant’s notice of appeal had to be filed no later than March 29, 2010. Rule 81.04(a).⁴

On March 18, 2010, Appellant attempted to file a notice of appeal relating to the denial of his Rule 24.035 motion. His *pro se* notice, however, was not accompanied by either the required docket fee or a motion to proceed *in forma pauperis*. A trial court clerk is prohibited from accepting or filing a notice of appeal unless “[t]he docket fee is deposited therewith; or ... [a]n order permitting the appellant to prosecute the appeal in forma pauperis accompanies the notice of appeal.” Rule 81.04(d)(1) and (3). Appellant did not file a motion to proceed *in forma pauperis* until April 14, 2010. His notice of appeal was not filed until April 22, 2010, when the order granting his motion to proceed *in forma pauperis* was sustained. Thus, Appellant’s notice of appeal from the order denying his Rule 24.035 motion was untimely. In the absence of a timely notice of

⁴ Similarly, because the last day of the 10-day time period was a Sunday, Appellant had until the end of the next business day to file his notice of appeal. Rule 44.01(a).

appeal, this Court lacks appellate jurisdiction and also must dismiss this aspect of Appellant's appeal. See *Spicer*, 336 S.W.3d at 471-72.

Appellant's appeal is dismissed for lack of appellate jurisdiction.

Jeffrey W. Bates, Judge

BARNEY, J. – Concur

SCOTT, J. – Concur

Attorney for Appellant: Appellant acting pro se.

Attorney for Respondent: Chris Koster, Atty. Gen.,

John M. Reeves, Asst. Atty. Gen. of Jefferson City, MO.

Division II