

rel: October 9, 2020

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2190345

Kelvin Peacock

v.

MFG/Alabama, LLC

**Appeal from Covington Circuit Court
(CV-17-900112)**

THOMPSON, Presiding Judge.

Kelvin Peacock appeals from the judgment of the Covington Circuit Court ("the trial court") in favor of MFG/Alabama, LLC ("MFG"), Peacock's former employer, in Peacock's workers' compensation action against MFG.

2190345

Before considering the merits of this appeal, this court must first determine whether the Peacock's motion to alter, amend, or vacate the judgment was timely filed so as to toll the time for filing the notice of appeal. Peacock has appeared pro se throughout this litigation. The record before us indicates that the trial court entered the judgment on August 2, 2019. Subsequently, Peacock filed a motion to alter, amend, or vacate the judgment. The motion indicates that it was submitted on August 31, 2019. Peacock, who at the time of the trial of this action was incarcerated at the Bullock Correctional Facility and who continues to remain there, attached a "filing statement" to the motion. In that statement, he swore or affirmed that he had deposited the motion in the institutional mail system, postage prepaid and properly addressed to the trial court on August 31, 2019. He added that he had included the filing statement because he had no control over when a prison official would deliver the mail to the post office. The filing statement was witnessed by two other people. The motion to alter, amend, or vacate was date-stamped "filed" in the trial-court clerk's office on September 12, 2019.

This court asked the parties to submit letter briefs on the issue of the timeliness of Peacock's postjudgment motion. In response, Peacock stated that he had filed the motion on August 31, 2019, within 30 days of the entry of the judgment. See Rule 59(e), Ala. R. Civ. P. If the postjudgment motion is deemed filed on that date, then the time for filing a notice of appeal was tolled, and the notice of appeal filed on January 10, 2020, is timely.¹ Rule 4(a)(3), Ala. R. App. P. MFG stated that the postjudgment motion was filed on September 12, 2019, which would be untimely under Rule 59(e). If the postjudgment motion is deemed filed on that date, then the time for filing a notice of appeal was not tolled, and Peacock

¹The trial court purported to deny the postjudgment motion on December 27, 2019. If the postjudgment motion was filed on August 31, 2019, then the trial court no longer had jurisdiction to rule on the motion on December 27, 2019, because the motion would have been deemed denied by operation of law on Monday, December 2, 2019, because, although the 90th day after August 31, 2019, was Friday, November 29, 2019, that day was a state holiday. See Rule 59.1, Ala. R. Civ. P., and Rule 6, Ala. R. App. P. Thus, under those circumstances, the notice of appeal would then have had to be filed on or before January 13, 2020, to be timely. Peacock filed the notice of appeal on January 10, 2020. Therefore, although the trial court may not have had jurisdiction over the matter when it purported to deny the postjudgment motion, the notice of appeal would still be timely considering the date the postjudgment motion was deemed denied.

2190345

would have been required to file his notice of appeal no more than 42 days after the judgment was entered, i.e., September 13, 2019. In that case, the notice of appeal is untimely. "[A]n untimely filed notice of appeal results in a lack of appellate jurisdiction, which cannot be waived." Parker v. Parker, 946 So. 2d 480, 485 (Ala. Civ. App. 2006).

In their respective letter briefs, neither party addressed the basis for the date that party had given as the date the postjudgment motion had been filed, that is, August 31, 2019, for Peacock, and September 12, 2019, for MFG. However, because this issue implicates this court's jurisdiction, we must seek to determine the date the postjudgment motion was filed. Nunn v. Baker, 518 So. 2d 711, 712 (Ala. 1987) ("[J]urisdictional matters are of such magnitude that we take notice of them at any time and do so even ex mero motu.").

As mentioned, Peacock was incarcerated at all times relevant to this issue. Rule 4(c), Ala. R. App. P., states:

"If an inmate confined in an institution and proceeding pro se files a notice of appeal in either a civil or a criminal case, the notice will be considered timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system

2190345

designed for 'legal' mail to be processed by the United States Post Office, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a notarized statement that sets forth the date the filing was deposited in the institution's mail system."

Peacock's filing statement was not notarized; instead, it was witnessed by two other people. However, in Ex parte Wright, 860 So. 2d 1253, 1257 (Ala. 2002), our supreme court held that a notarized statement was not mandated by Rule 4(c), explaining that,

"[w]hile Rule 4(c), Ala. R. App. P., includes a provision that '[t]imely filing may be shown by a notarized statement that sets forth the date the filing was deposited in the institution's mail system' (emphasis added), this rule does not mandate such a notarized statement as the only way to establish the timeliness of a filing. Such a mandate would create still further issues about the availability and expense of a notary public that the rule is not drawn to resolve. The nonmandatory nature of the provision for the notarized statement is connoted by the use of the word may in contradistinction to the use of the word must elsewhere in the very same rule to connote a measure that is mandatory -- the inmate's use of the 'legal' mail system, if one is available in the institution, instead of the general mail system there."

This court has been faced with this situation before. In Parris v. Prison Health Services, Inc., 68 So. 3d 108 (Ala. Civ. App. 2009), the issue was whether Parris, an inmate, had timely filed his notice of appeal. The unverified certificate

2190345

of service included with Parris's notice of appeal indicated that he had "mailed" the notice on May 8, 2008, within the time allowed by law for the filing of a notice of appeal in the case. Other evidence suggested that the notice of appeal had been timely placed in the prison mail system, and, we noted, there was no evidence to contradict Parris's assertion. However, we concluded that, based on the record before us, we could not verify that Parris had delivered his notice of appeal to the prison mail system by May 19, 2008, the day on which the period for filing his notice lapsed. Noting that we were the first court to consider the timeliness of Parris's notice of appeal, we remanded the cause for the trial court in that case to determine whether Parris had, in fact, deposited his notice of appeal in the appropriate prison mail system in a timely manner. In doing so, we advised the trial court that it could conduct such proceedings and take such evidence as it deemed necessary to make its findings of fact and that a written return to remand, including the trial court's findings of fact, was to be made to this court. Parris, 68 So. 3d at 111-12.

2190345

Similarly, in Ex parte Wright, supra, our supreme court observed that the Court of Criminal Appeals had been the first court to have the opportunity to consider the timeliness of the filing of Wright's notice of appeal and that there had been no evidence before that court to contradict the averments in Wright's "Declaration of Mailing," which, if true, established that his notice of appeal was timely under the mailbox rule. Therefore, the supreme court reversed the Court of Criminal Appeals judgment dismissing Wright's appeal and remanded the cause with instructions for the trial court to determine whether Wright had timely deposited his notice of appeal in the internal mail system of the prison. Wright, 860 So. 2d at 1257.

More recently, in Cook v. Alabama Department of Corrections, 292 So. 3d 1140, 1141-42 (Ala. Crim. App. 2019), the Court of Criminal Appeals stated that, in the absence of a notarized statement, the factual assertions in a prisoner's certificate of service may be disputed and that the trial court is the appropriate tribunal to resolve such a factual dispute. As in this case, the unsworn certificate of service on Cook's notice of appeal contained two handwritten

2190345

signatures of designated witnesses to the filing of the certificate of service. The Court of Criminal Appeals had initially remanded the matter for the circuit court to determine whether Cook's notice of appeal had been timely filed. On return to remand, the Court of Criminal Appeals noted that, on remand, the circuit court had held an evidentiary hearing and had made findings of fact regarding the date on which it concluded Cook's notice of appeal had been mailed. Id.

In this case, Peacock's filing statement is unsworn. In their letter briefs, Peacock and MFG disagreed on the date the postjudgment motion was filed, but there is no indication in the record that the timeliness of the motion was considered by the parties or the trial court before this court raised the issue. Because we are unable to verify that Peacock's motion to alter, amend, or vacate was timely filed -- for example, no prison mail log or other evidence is contained in the record currently before us -- and because such a determination is required for us to determine whether we have jurisdiction over this appeal, on the authority of Cook, Parris, Wright, and the cases cited and relied upon in those opinions, we remand this

2190345

cause for the trial court to determine whether Peacock deposited the postjudgment motion in the prison mail system so as to be deemed timely filed. The trial court may hold an evidentiary hearing if necessary to make its determination. A written return to remand, including the trial court's findings of fact, shall be filed with this court as expeditiously as possible. See Parris, 68 So. 3d at 112.

REMANDED WITH INSTRUCTIONS.

Moore, Donaldson, Edwards, and Hanson, JJ., concur.