

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001147-DG

MELVIN WILSON SHADOWEN

APELLANT

ON DISCRETIONARY REVIEW
FROM JEFFERSON CIRCUIT COURT
v. ACTION NO. 98-XX-000103

COMMONWEALTH OF KENTUCKY

APELLEE

OPINION
AFFIRMING
** **

BEFORE: BUCKINGHAM, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Appellant, Melvin Shadowen, appeals from an order of the Jefferson Circuit Court dismissing his appeal from the Jefferson District Court on the grounds that it was untimely filed. As the Kentucky Supreme Court has held that weekend days are included in computing the five-day period in which a motion for a new trial must be filed pursuant to RCr 10.06, we affirm.

On September 8, 1998, appellant was convicted in a bench trial in Jefferson District Court of Criminal Trespass in the First Degree and Assault in the Fourth Degree. On September 15, 1998, appellant served upon the Commonwealth and

filed with the trial court a motion for a new trial. The motion was based upon the ground of ineffective assistance of counsel. On September 21, 1998, the Jefferson District Court denied appellant's motion.

Appellant filed a notice of appeal on September 23, 1998. On December 2, 1998, the Commonwealth filed a motion to dismiss on the grounds that the circuit court lacked jurisdiction to hear the appeal as it was untimely filed pursuant to RCr 12.04(3). On March 30, 1999, the circuit court granted the Commonwealth's motion. The court found that appellant's motion for a new trial was not filed within five days of the verdict as required by RCr 10.06, stating, "Although the Appellant has contended that Saturdays and Sundays are excluded from the computation of that time, the Kentucky Supreme Court has ruled that such days are to be *included*, see Byrd v. Commonwealth, Ky., 825 S.W.2d 272 (1992)." Having determined that the motion for new trial was untimely, the court found, per RCr 12.04(3), that the time to file the notice of appeal was not extended and therefore appellant was required to file his notice of appeal within ten days of the judgment, September 8, 1998. Thus the court found that appellant's notice of appeal, filed September 23, 1998, was untimely and granted the Commonwealth's motion to dismiss. Appellant filed a motion to reconsider, which was denied on April 27, 1999. Appellant filed a motion for discretionary review which was granted by this Court on July 12, 1999. This appeal followed.

On appeal, appellant argues that the circuit court erred in finding that his motion for a new trial, and hence, his notice of appeal, were untimely. Appellant contends that his motion for a new trial was served upon the Commonwealth within five days of entry of the verdict, as days are calculated pursuant to RCr 1.10(a). Therefore, RCr 12.04(3) required the notice of appeal to be filed within ten days after entry of the order denying the motion for new trial, rather than ten days after the entry of the judgment of conviction. Appellant contends that his notice of appeal was timely, because the motion for new trial was denied on September 21, 1998, and his notice of appeal was filed on September 23, 1998, well within ten days. RCr 12.04(3).

From a literal reading of RCr 1.10 as applied to RCr 10.06(1), it would appear that appellant's interpretation is correct. RCr 1.10, "Time", states, in pertinent part:

Whenever these Rules do not provide otherwise with respect to time, the following shall apply:

(a) In computing any period of time prescribed or allowed by these Rules, by order of court or by any applicable statute, the day of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included

unless it is a Saturday, a Sunday or a legal holiday. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. (emphasis added).

RCr 10.06(1) states:

The motion for a new trial shall be served not later than five (5) days after return of the verdict. A motion for a new trial based upon the ground of newly discovered evidence shall be made within one (1) year after the entry of the judgment or at a later time if the court for good cause so permits. (emphasis added).

As appellant's motion for new trial was not based on newly discovered evidence, it was required to be served within five days of the verdict. Since this period of time is less than seven days, it would appear from RCr 1.10(a) that intermediate Saturdays and Sundays are excluded from the time computation. Appellant was convicted on Tuesday, September 8, 1998. As this was the "day of the act", this day is not included. RCr 1.10(a). Appellant's time would begin to run on Wednesday, September 9, 1998. Per RCr 1.10(a), Saturday, September 12, and Sunday, September 13, would be excluded from the time computation.

Therefore, the fifth day would be Tuesday, September 15, 1998, which is the day appellant served his motion for a new trial.

Thus, it would appear that appellant's motion for a new trial and his notice of appeal were timely.

Unfortunately for appellant, however, we are bound by the holding of the Kentucky Supreme Court in Byrd v. Commonwealth, Ky., 825 S.W.2d 272 (1992). Although the plain language of RCr 1.10(a) appears to be in conflict with Byrd, the Court included weekend days in computing a five-day period for a motion for new trial, stating:

It was not reversible error for the trial judge to decline to have an evidentiary hearing on the motion for a judgment notwithstanding the verdict or for a new trial. Here the motion was untimely filed on December 7, because the jury verdict was rendered on November 30, 1989 and the motion for a new trial had to be served on or before December 5, pursuant to RCr 10.06 and 10.24. Marcum v. Commonwealth, Ky., 412 S.W.2d 241 (1967). In any event there was no abuse of discretion by the trial judge in overruling the motions. (emphasis added).

Byrd, 825 S.W.2d at 278. Applying the Supreme Court's method of computing time in Byrd to the instant case, Saturday,

September 12, and Sunday, September 13, would be included in calculating the five-day period in which appellant was required to serve his motion for a new trial. Hence, the fifth day would have been Sunday, September 13. The court would have allowed the filing on Monday, September 14. As appellant's motion for a new trial was served on Tuesday, September 15, it was, therefore, untimely according to Byrd. As the motion for new trial was untimely, the notice of appeal was required to be filed within ten days of the actual date of the judgment appealed from, which was September 8, 1998. RCr 12.04(3); Perkins v. Commonwealth, Ky., 442 S.W.2d 310, 311 (1969). As appellant filed his notice of appeal on September 23, 1998, more than 10 days after the judgment, the circuit court did not err in finding that it was untimely filed, and did not err in granting the Commonwealth's motion to dismiss.

For the foregoing reasons, the decision of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Russell D. Dougherty
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BRIEF FOR APPELLEE:

Karl Price
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