RENDERED: August 11, 2000; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003267-MR

MARK W. THOMPSON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN RYAN, JUDGE
INDICTMENT NO. 82-CR-01166

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION AND ORDER
DISMISSING AND REMANDING

** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; BARBER AND BUCKINGHAM, JUDGES.

BARBER, JUDGE: Mark W. Thompson appeals from an order of the Jefferson Circuit Court denying his motion to vacate, alter, amend or correct sentence brought pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. After reviewing the record, we hold that the appeal was premature and therefore dismiss and remand to the circuit court for a ruling on the CR 52 motion currently pending.

On January 23, 1982, Thompson presented an altered prescription at a pharmacy for 150 tablets of the controlled substance, dilaudid (also known as hydromorphone). The

pharmacist told Thompson that he did not have enough of the drug at the store but he expected to receive more the following Monday. Thompson alleges that he received a portion of the prescription at that time and was told to return for the rest. On January 25, 1982, Thompson returned to the pharmacy and allegedly received the remainder of the prescription. As he was leaving the store, he was arrested by two police officers and charged with several drug offenses. Upon searching Thompson incident to the arrest, the police recovered two tablets of dilaudid in a bottle in his pocket and 150 tablets in a bottle he was holding in his hand.

In August 1982, the Jefferson County Grand Jury indicted Thompson on four felony counts of obtaining or attempting to obtain drugs by fraud or deceit (KRS 218A.140), one felony count of illegal possession of a controlled substance (hydromorphone) (KRS 218A.140), and one felony count of being a persistent felony offender in the second degree (PFO II)(KRS 532.080). Count 1 alleged that on January 23, 1982, Thompson unlawfully possessed the Schedule II narcotic, hydromorphone. Count 4 alleged that on January 25, 1982, Thompson obtained or attempted to obtain a Schedule II narcotic, hydromorphone, by fraud, deceit, forgery or alteration of a prescription. Count 5 alleged that on January 23, 1982, Thompson obtained or attempted to obtain a Schedule II narcotic, hydromorphone, by fraud, deceit, forgery or alteration of a prescription.[1] The PFO II

[1] Counts 2 and 3 alleged that on January 4 and 8, 1982, respectively, Thompson obtained or attempted to obtain a Schedule II narcotic, hydromorphone, by fraud, deceit, forgery or (continued...)

count was predicated on Thompson's prior conviction in July 1976 in Case No. 155821 on two felony counts of burglary in the third degree.

On January 26, 1984, Thompson pled guilty to all of the charges pursuant to a plea agreement with the Commonwealth. Under the plea agreement, the Commonwealth recommended sentences of one year on each of the five drug offenses, enhanced to five years on each count based on Thompson's status as a PFO II, to run concurrently for a total sentence of five years. Because he was ineligible for probation, Thompson waived preparation of a presentence investigation report and the trial court sentenced him to five years in prison consistent with the Commonwealth's recommendation.

On September 17, 1997, Thompson filed an RCr 11.42 motion and an extensive accompanying memorandum seeking to have his convictions and the sentences for Counts 1, 4, and 7 vacated or corrected based on double jeopardy and ineffective assistance of counsel. He alleged that he could not be convicted of multiple counts for both possession of and obtaining or attempting to obtain illegal drugs by a forged or altered prescription involving the incidents on January 23 and 25. He maintained that his attorney rendered ineffective assistance for failing to seek dismissal of at least two of the three drug counts because of double jeopardy. Thompson also alleged that counsel was ineffective for failing to challenge the PFO II count because his guilty plea on the predicate burglary offenses in

[1](...continued)
alteration of a prescription.

Case No. 155821 was invalid in that it was entered in violation of Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). He requested a hearing on the motion and appointment of counsel. The Commonwealth filed no response to the motion.

On December 3, 1997, the trial court entered a two-page opinion and order denying the motion without a hearing. The court stated that Thompson was required to raise his double jeopardy claim on direct appeal, and that his ineffective assistance claim failed because Thompson had indicated during the guilty plea that he was satisfied with his attorney's representation. The court held that because all of Thompson's complaints were refuted on the record, no evidentiary hearing on the RCr 11.42 motion was necessary.

On December 12, 1997, Thompson filed a motion for findings of fact and conclusions of law on all issues pursuant to RCr 11.42(6) and CR 52.02. In the motion, he listed 23 items on which he sought detailed written findings covering various issues pertinent to the double jeopardy and ineffective assistance of counsel claims. Apparently at the same time, Thompson tendered a motion to proceed on appeal in forma pauperis and for appointment of counsel, and a notice of appeal. The circuit court clerk entered the notice of appeal as filed on the date it was filed received. On December 17, 1997, the trial court entered an order granting the motion to proceed on appeal in forma pauperis and denying the motion to appoint counsel.

Based on the current state of the record, we are compelled to dismiss the appeal and remand the case to the circuit court. Under CR 73.02(1)(e) the running of the time for

appeal is terminated by a timely motion filed pursuant to, inter alia, CR 52.02. The full time for the appeal commences to run only upon entry and service of an order granting or denying the motion. Thompson's motion for additional findings of fact and conclusions of law filed pursuant to CR 52.02 has never been ruled on by the circuit court. Thompson prematurely tendered the notice of appeal before the trial court had issued an order granting or denying the CR 52.02 motion.

Kentucky courts have consistently interpreted CR 73.02(1)(e) to mean that the filing of a motion enumerated in the rule suspends the finality of a judgment until the motion is ruled on by an order of the trial court. See, e.g., White v. Hardin County Bd. of Educ., Ky., 307 S.W.2d 754, 755-56 (1957)(involving new trial motion under CR 59); Personnel Bd. v. Heck, Ky. App., 725 S.W.2d 13, 18 (1986). The trial court's order denying the RCr 11.42 motion is not a final and appealable order because the CR 52.02 motion is still pending. See, e.g., Johnson v. Commonwealth, Ky., 1998-SC-0180-MR (rendered March 23, 2000 and finality certification May 31, 2000). Absent a final and appealable order, this Court lacks jurisdiction to entertain the current appeal. See Lebus v. Lebus Ky., 382 S.W.2d 873, 874 (1964). Since the trial court's order is not final and appealable, we are required, sua sponte, to dismiss the appeal. Hook v. Hook, Ky., 563 S.W. 2d 716 (1978).

It is ORDERED that appellant's appeal is DISMISSED, and the case is REMANDED to the circuit court for a ruling on appellant's pending motion.

ALL CONCUR.

ENTERED: August 11, 2000

/s/ David A. Barber
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Mark Wayne Thompson
Eddyville, Kentucky

BRIEF FOR APPELLEE:

A.B. Chandler III
Attorney General

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky