RENDERED: November 21, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001730-MR

TERRY LYNN WHITE (NOW DANIELS) APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOHN WOODS POTTER, JUDGE
ACTION NO. 95-FC-002879

TERRANCE LEE WHITE, SR. APPELLEE

OPINION AND ORDER DISMISSING APPEAL
** ** ** ** **

BEFORE: GUIDUGLI, MILLER AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Terry Lynn White (now Daniels) (hereinafter "Daniels") filed her notice of appeal on July 12, 2000, following the Jefferson Circuit Court's denial of her motion to add a finality endorsement to the court's order entered on December 3, 1999. The trial court's denial of said motion, following a hearing, was entered on June 22, 2000. For the reasons stated hereafter, we are constrained to dismiss this appeal because it was untimely filed.

This dissolution of marriage action has had a long and tortured history. The original action was filed in 1995 and the decree of dissolution was entered on February 4, 1997. Since 1995, there has been over ten (10) pages of entries in the court

docket sheet. The entire record is not included in this appeal as a previous order was on appeal when this issue arose. (That appeal was eventually dismissed for failure to perfect the appeal). Although the record on appeal is devoid of significant portions of the record, the report of the Domestic Relations Commissioner (DRC) filed August 24, 1999, indicates that post-decree issues were referred to him by order of the trial judge on September 8, 1998. The DRC held three hearings on the issues presented to him and filed his report, as stated, on August 24, 1999. Each party filed exceptions thereto. After another hearing before the trial court, the court entered its order on November 7, 1999. The trial court order, in relevant part, stated:

> Mr. White has been his own worst enemy. He has tried to practice the case Pro Se, he has tried to utilize an attorney (changing attorney's frequently) and has done both simultaneously. The confusion created by his actions have made it difficult at time for both parties to prove their case. This was true for Mr. White before the Commissioner where he bore the burden of proof.
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> After reviewing the Commissioner's Report, reviewing the Memorandum, and hearing oral argument, **IT IS HEREBY ORDERED:**
>
> (1) The Report of the Commissioner is **CONFIRMED** except that Mr. White may have Judgment against Ms. White for the educational expenses he overpaid to LeNisha.
>
> (2) Mr. White shall have Judgment against Ms. White in the amount of $2,200.00 together with interest at the rate of 12% from the date hereof until paid.
>
> (3) This is a final Order, there being no just cause for delay.

In keeping with the adversary nature of this action, both parties filed exceptions to this order. Daniels filed a motion pursuant to CR 59.05 and CR 60.02, to modify and set aside the court order on November 10, 1999. Following another hearing the trial court entered an order denying Daniels' motion on December 3, 1999. No further action was taken in this case until several unrelated motions were filed in April and May of 2000. Thereafter, on June 14, 2000, Daniels filed her motion to add finality endorsement to the court's order of December 3, 1999. Therein Daniels alleged that her attorney "never received a copy of the Order denying [her] motion for reconsideration or other relief." She attached an affidavit of her attorney's paralegal who swore that the affiant had searched the "office's case file and [was] unable to locate a copy of the aforementioned order." Following another hearing on this motion and several others filed before and after the motion, the trial court denied Daniels' motions by order entered on June 20, 2000. This appeal followed.

On appeal, Daniels contends that she is appealing the series of orders entered November 11, 1999, December 3, 1999, and June 20, 2000. Her argument focuses on the November 11, 1999 order, which granted White judgment in the sum of $2,200 plus interest. It should be noted that White has filed no appellate brief. Despite this fact and the fact that Daniels may be correct that the trial court may have committed a clear abuse of discretion in this case, we are constrained to dismiss this appeal as untimely.

We believe this case is similar to Stewart v. Kentucky Lottery Corp., Ky. App., 986 S.W.2d 918 (1998), and that we are bound by its holding. In Stewart, the issue was also whether or not the appeal was timely filed. In Stewart, this Court held:

> Appellant concedes that entry of the order denying the motion to reconsider was noted in the clerk's docket on April 11, and hence, that the time for taking an appeal from the summary judgment began to run on that date. He urges instead that since neither party received notice of entry of the order denying the motion to reconsider, his appeal should not be dismissed. Moreover, he argues that the clerk's electronic docket sheet does not comply with the requirements of the civil rules. We are constrained to disagree with both contentions.
>
> True enough, apparently neither party received notice of entry of the order denying the motion to reconsider. Nevertheless, CR 77.04(4) plainly states that the clerk's failure to serve notice or a party's failure to receive notice does not affect the time for taking an appeal. The rule further provides that a trial court is not authorized to grant an extension of time for filing a notice of appeal for any period beyond ten days past the expiration for the time for taking an appeal. Brown v. Harris, Ky., 321 S.W.2d 781 (1959). Our courts have consistently enforced the harsh dictates of CR 77.04(4). See, e.g., Demos v. Commonwealth, Ky. App., 765 S.W.2d 30 (1989); Arnett v. Kennard, Ky., 580 S.W.2d 495 (1979); Electric Plant Board of City of Hickman v. Hickman-Fulton Counties Rural Electric Cooperative Corp., Ky. App., 564 S.W.2d 845 (1978). The reason for the rule is well stated in 7 Kurt A. Phillips, Jr., Kentucky Practice, CR 77.04 (5th ed.1995) as follows:
>
> > This Rule is somewhat unusual in that, after carefully providing methods for the giving of notice of judgments and orders, it denies a party the right to rely on the actual giving or receiving of this notice insofar as it affects either

> (1) the validity of the judgment or order, or (2) the running of the time within which an appeal may be taken. This simply recognizes that otherwise endless problems would continually arise concerning the giving or receipt of notice which might impair the effectiveness or cloud the finality of judgments and orders. (Footnote omitted).

We are not unsympathetic to appellant's plight stemming from his not receiving notice of entry of the order which triggered the running of the time for taking an appeal or to the inherent unfairness of the rule in such a situation. Nevertheless, CR 77.04(4) permits but one interpretation and has been consistently applied in conformity with that interpretation both by this court and by the Supreme Court. To refuse to apply the rule in the instant action, therefore, would ignore the plain meaning of the rule and existing precedent which we are required to follow. This we decline to do because adopting an interpretation of the rule inconsistent with its plain meaning and existing precedent is a matter which addresses itself to the supreme court and not this court.

The timely filing of a notice of appeal is not jurisdictional, but rather is a matter of procedure. Johnson v. Smith, Ky., 885 S.W.2d 944 (1994). Nevertheless, the supreme court squarely held in Johnson that the timely filing of a notice of appeal in compliance with CR 73.02 is the method by which the jurisdiction of the appellate court is invoked and that automatic dismissal of an appeal is the penalty for late filing of such a notice. 885 S.W.2d at 950. The substantial compliance doctrine simply does not apply to notices of appeal. Therefore, we are powerless to somehow excuse appellant's failure to comply with the rule regardless of whether he received notice of entry of the order denying his motion for reconsideration. It follows that the circuit court did not err by denying appellant's CR 60.01 and CR 60.02 motion seeking to correct the record by changing the controlling dates noted in the clerk's docket. See United

Bonding Ins. Co. Don Rigazio, Agent v. Commonwealth, Ky., 461 S.W.2d 535 (1970).

Stewart, Id. at 920, 921. See also, Milby v. Wright, Ky., 952 S.W.2d 202 (1977); Fox (Simmons) v. House, Ky. App., 912 S.W.2d 450 (1995).

Despite Daniels' allegations of not receiving a copy of the order denying her motion to reconsider, the trial court's failure to make additional findings as requested, appellee's failure to filed an appellate brief, and the merits of her allegations on appeal, we are constrained to dismiss her appeal because it was not filed within 30 days after entry of the final and appealable order. CR 73.02.

For the foregoing reasons, it is HEREBY ORDERED that this appeal be DISMISSED.

ALL CONCUR.

ENTERED: November 21, 2001

/s/ Daniel T. Guidugli
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Thomas Clay
Louisville, KY

NO BRIEF FILED FOR APPELLEE