

RENDERED: May 23, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky
Court of Appeals**

2003-CA-000254-OA

RICKY DALE FARMER

PETITIONER

v. ORIGINAL ACTION
REGARDING DAVIESS CIRCUIT COURT
ACTION NO. 01-CR-00416

THOMAS O. CASTLEN, JUDGE
DAVIESS CIRCUIT COURT

RESPONDENT

COMMONWEALTH OF KENTUCKY

REAL PARTY IN INTEREST

OPINION AND ORDER

*** **

BEFORE: EMBERTON, Chief Judge, BAKER and McANULTY, JUDGES.

BAKER, Judge: Petitioner asks this Court to issue a writ of mandamus compelling the respondent to dismiss a pending indictment and to order petitioner's immediate release from detention. The facts upon which the petition is based commenced on July 25, 2002, when the respondent judge signed an agreed

order dismissing an indictment which charged petitioner with burglary in the first degree, possession of a firearm by a convicted felon, operating a motor vehicle on a suspended or revoked license, and being a first degree persistent felony offender. The dismissal of the indictment was predicated upon the Commonwealth's representation that it could not proceed because of its inability to contact the victims, as well as a lack of cooperation on the part of witnesses. On the basis of this signed order, petitioner was released from detention.

On August 7, 2002, the respondent judge issued an order in which he outlined the circumstances surrounding his signing of the July 25, 2002 order of dismissal. In his second order, the respondent judge stated that, upon subsequent review of the file and uniform citation in the case, as well as petitioner's prior record as set forth in the PFO count of the indictment, he had concluded that dismissal of the charges were "not in the interest of justice" and that he had instructed the clerk not to enter the order of dismissal. By the time the respondent judge notified the clerk of the change in his decision, however, the word "entered" had been stamped on the July 25, 2002 order, but it had not yet been entered into the clerk's computer or otherwise noted in the record. At the direction of the respondent judge, the clerk changed the word "entered" to "tendered", and the judge deleted his signature by covering it

with "white-out." Noting that petitioner had been released on the basis of the signed order, the respondent judge set aside the prior order of dismissal and directed that the indictment warrant against petitioner be re-issued. Petitioner was subsequently arrested and remains in detention under a \$75,000.00 full cash bond.

We are of the opinion that the procedure by which the July 25, 2002, order of dismissal was set aside was not proper. In Putman v. Fanning, Ky., 495 S.W.2d 175, 176 (1973), the former Court of Appeals made very clear that control over a judgment and/or order is lost by the act of placing it in the hands of the clerk for entry:

The decree, though signed and delivered to the clerk of the circuit court, had not yet been physically noted in the civil docket as required by CR 58 and CR 79.01, but the duty of the clerk to make the notation "forthwith upon receipt of the signed judgment or order" (CR 58) is a ministerial function which cannot be affected by the propriety or impropriety of the judicial action embodied in the document itself and is not subject to the control of the trial judge. Once the judgment or order is received by the clerk, the rule requires without condition or exception that it be noted. (Emphasis added.)

On the basis of this long-established case law, we conclude that a judge must properly allow the clerk to complete the process of entry of an order once it is presented to the clerk for that purpose. Similarly, upon receipt of a signed

order, the circuit clerk has no option but to "forthwith" complete the process of entering it and making the requisite docket notation. As the July 25, 2002 order was signed and delivered to the clerk, we must conclude that the respondent judge may not take any action which would impede the circuit clerk's ministerial duty of entering and of noting the order in the docket.

We emphasize, however, that this opinion is not to be construed as limiting the authority of the trial court, on motion by any party or *sua sponte*, to alter, amend or vacate the order once it has been properly entered and the ten-day period set out in Ky. R. Civ. P. (CR) 59.04 has started to run. Nothing presented by this petition causes us to question the decision-making process of the respondent judge; our only concern is the procedure by which his change of opinion was accomplished.

Accordingly, that portion of the petition which seeks to compel entry of the July 25, 2002 order of dismissal is hereby GRANTED and the respondent judge is DIRECTED to re-sign the order of dismissal and to instruct the circuit clerk to forthwith enter and properly note the signed order upon the docket. That portion of the petition which seeks petitioner's immediate release from detention is hereby GRANTED, subject to

any further orders of the Daviess Circuit Court which may be made in keeping with CR 59.

Finally, the motion of the Commonwealth for leave to respond to the petition for the writ is GRANTED and the tendered response is ORDERED FILED on the date of entry of this order. The tendered response was considered by the Court in ruling on the petition.

ALL CONCUR.

ENTERED: May 23, 2003

/s/ Matthew J. Baker
JUDGE, COURT OF APPEALS

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