

RENDERED: MARCH 31, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000180-MR

EDDIE JUDGE FELDER, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 04-CR-00401

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER
DISMISSING APPEAL

** ** * * *

BEFORE: GUIDUGLI AND SCHRODER, JUDGES; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Eddie Judge Felder, Jr. (Felder) brings this appeal of an amended order of the Fayette Circuit Court, entered January 12, 2005. The order amended the court's Final Judgment and Sentence of Probation, entered December 20, 2004, to reflect Felder's entry of a conditional guilty plea. Because Felder did not timely file his notice of appeal, we have no

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

jurisdiction to consider the appeal. Therefore, it must be dismissed.

On November 17, 2004, Felder entered a conditional guilty plea² to flagrant nonsupport,³ specifically reserving his right to appeal the issue of double jeopardy.⁴ Felder's guilty plea form referenced that the plea was conditional, and the court's guilty plea judgment referenced acceptance and entry of the plea "as prayed in the (guilty plea petition)." On December 20, 2004, final judgment was entered sentencing Felder to one year imprisonment, probated for five years. At the sentencing hearing, discussion took place before the court that the plea was conditioned on reserving the issue of double jeopardy for appeal. Although the Final Judgment and Sentence of Probation referenced Felder's guilty plea, it neglected to mention that the plea was conditional. The record is silent as to how this error came before the attention of the court as no motion or hearing is apparent of record. The only item in the record referencing this error is an amended order, entered January 12, 2005, amending the Final Judgment and Sentence of Probation to "reflect that (Felder) entered a conditional guilty plea," and further restating Felder's right to appeal as explained to him

² Kentucky Rules of Criminal Procedure 8.09.

³ Kentucky Revised Statutes 530.050, class D felony.

⁴ U.S. CONST. amend. V; KY. CONST. § 13.

at sentencing. On January 20, 2005, Felder tendered his notice of appeal of the January 12, 2005, amended order, and this appeal followed.

Pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.10, clerical mistakes in judgments "may be corrected by the court at any time on its own initiative." There is no question that this amended order constituted the correction of a clerical error, in that the amended order "embodie[d] the trial court's oral judgment as expressed in the record" as it "supplie[d] language that was inadvertently omitted from the oral judgment." Viers v. Commonwealth, 52 S.W.3d 527, 529 (Ky. 2001). See also Cardwell v. Commonwealth, 12 S.W.3d 672, 674-75 (Ky. 2000), holding that the incorrect reduction of an oral judgment to writing is a clerical error which can be corrected under RCr 10.10 when the record unmistakably reveals the content of the oral judgment.

The problem herein arises from the fact that the notice of appeal, although being filed within thirty days of the entry of the amended order, was not filed within thirty days of the entry of the final judgment. As stated in United Tobacco Warehouse, Inc. v. Southern States Frankfort Cooperative, Inc., 737 S.W.2d 708, 709-10 (Ky.App. 1987) in the case of a judgment amended due to a clerical error:

"[t]he time for appeal from the underlying judgment correspondingly dates from the original rendition of the judgment . . . " and not from the entry of the amended judgment.

As the filing of the notice of appeal was outside of the thirty-day time limit in RCr 12.04(3) for taking an appeal, we lack jurisdiction to consider the appeal, and it must be dismissed. United Tobacco Warehouse, *supra*.

It is hereby ORDERED that this appeal be, and it is, DISMISSED.

ALL CONCUR.

ENTERED: March 31, 2006

/s/ John D. Miller
SENIOR JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

BRIEF FOR APPELLEE:

Gene Lewter
Lexington, Kentucky

Gregory D. Stumbo
Attorney General of Kentucky

Samuel J. Floyd, Jr.
Assistant Attorney General
Frankfort, Kentucky