

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-000714-MR

TERRY SMALLWOOD

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 04-CR-00313

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER DISMISSING APPEAL

** ** * ** * ** *

BEFORE: ACREE AND TAYLOR, JUDGES; EMBERTON,¹ SENIOR JUDGE.

ACREE, JUDGE: Attorney Sidney Trivette appeals from an order of the Pike Circuit Court holding him in contempt of court and imposing a \$200.00 fine. The Commonwealth had previously moved to dismiss the appeal due to the fact that Trivette's notice of appeal failed to name an indispensable party, as required by Kentucky Rule of Civil Procedure (CR) 73.03(1). Trivette's response requested that we allow him to amend the notice of appeal. The Kentucky Supreme Court has already fully addressed the issue of an appellant's failure to name an indispensable party in *City of Devondale v. Stallings*,

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

795 S.W.2d 954, 957 (Ky. 1990), and their determination of this issue is binding upon this Court.

Trivette was representing a criminal defendant during a pretrial conference when he became embroiled in a disagreement with a member of the Commonwealth Attorney's staff. The presiding judge, Hon. Eddy Coleman, found Trivette in contempt of court and ordered him to pay a \$200.00 fine. Judge Coleman stated that he had been observing Trivette for a number of years and had noted his habit of disrupting courtroom proceedings. Because the conduct in question occurred in open court, the judge found that a hearing to determine contempt was unnecessary. The trial court entered a written contempt order on March 25, 2005, and this appeal followed.

A brief history of the case is necessary to explain its procedural posture before us. The trial court's contempt order was styled *Commonwealth of Kentucky vs. Terry Smallwood*. Smallwood was the party represented by Trivette when the contempt occurred. Thus, Trivette's notice of appeal, filed March 31, 2005, was styled *Commonwealth of Kentucky vs. Terry Smallwood*. The body of the notice read as follows:

Notice is hereby given that W. Sidney Trivette hereby appeals to the Court of Appeals of Kentucky from the Order entered on the 25th day March, 2005 in the above styled action finding the undersigned in contempt of Court.

THIS 31st day of March, 2005.

The certificate of service contained a notation that the notice of appeal was served on Hon. Eddy Coleman. On June 27, 2005, the Clerk of the Court of Appeals returned Trivette's first brief, along with a notice of deficient pleading, noting that the judgment appealed from was not the first item in the brief's appendix. CR 76.12(4)(c)(vii).

Trivette filed his second brief on July 1, 2005. We note at the outset that this brief failed to comply with CR 76.12 (4)(c) (i-ii) in that it included neither an introduction, nor a statement concerning oral argument.

On October 12, 2005, the Commonwealth filed a motion to dismiss Trivette's appeal for failure to specify an indispensable party. On October 31, 2005, Trivette responded, noting that the trial court had improperly styled the original order and requesting leave to amend the style of the case and add the necessary parties. The motion panel determined that the issue would be best handled by the panel considering the merits of the appeal. Thus, we must first determine whether or not to grant the Commonwealth's motion to dismiss the appeal.

Trivette's response to the Commonwealth's motion argues that the trial court erred by bootstrapping its contempt order onto a pending case in which he was the attorney for the defendant appearing in court. Trivette contends that the Commonwealth is asking him to create his own case style and add parties within the notice of appeal without leave of the Court. We find this argument disingenuous. Although Trivette may have been obliged to continue the case style used by the trial court, we note that he clearly names himself as appellant within the body of the notice of appeal despite not

being a party named in the caption of the case. Furthermore, the notice of appeal filed by Trivette clearly fails to name either the Commonwealth or Terry Smallwood as parties within its body contrary to the requirements of CR 73.03(1) and in disregard of Official Form 22. Consequently, his argument that he was unable to name Judge Coleman as the appellee within the body of the notice of appeal is utterly unpersuasive.

The *Devondale* case, cited above, is dispositive of this appeal. The notice of appeal in *Devondale* listed the appellants and several of the appellees, but failed to list the City of Louisville and Jefferson County as parties within the body of the notice. *City of Devondale*, 795 S.W.2d at 956. However, counsel for Louisville and Jefferson County were listed in the certificate of service thereby establishing that both parties had actual notice of the appeal. Fifty-five days after its filing, counsel for the City of Devondale moved to amend the notice of appeal to include Louisville and Jefferson County, pointing out that they were indispensable parties to the appeal. This Court denied the motion and ultimately dismissed the appeal. On appeal to the Kentucky Supreme Court, counsel for the City of Devondale argued that it was an abuse of discretion for this Court to refuse its request to amend the notice of appeal because it had substantially complied with the requirements of CR 73.03(1).

In its opinion, the Supreme Court analyzed CR 73.02(2), the substantial compliance rule, noting that the rule itself made a distinction between failure to file a timely notice of appeal and failure to comply with other rules related to appeals. Specifically, the rule provides that failure to file a timely notice of appeal “**shall** result in

a dismissal of the appeal. The failure of any party **to comply with other rules** relating to appeals . . . does not affect the validity of the appeal” (Emphasis added.) The Supreme Court concluded:

A notice of appeal, when filed, transfers jurisdiction of the case from the circuit court to the appellate court. It places the named parties in the jurisdiction of the appellate court. In the case at bar, the notice of appeal omitted two indispensable parties to the lawsuit. Therefore, the notice of appeal transferred jurisdiction to the Court of Appeals of only the named parties.

Devondale, 795 S.W.2d at 957. Applying the reasoning in *Devondale* to the facts at hand, it is clear that Trivette's failure to include Judge Coleman as a party within his notice of appeal resulted in this Court never having obtained jurisdiction over him. Thus, we are unable to reach the merits of Trivette's appeal.

For the foregoing reasons, the motion of the Commonwealth is granted, and this appeal is DISMISSED.

ALL CONCUR.

ENTERED: June 8, 2007

/s/ Glenn E. Acree
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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