

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001414-MR

ANTHONY POTTS

APPELLANT

v.

APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 02-CR-00051

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER
DISMISSING

** ** *

BEFORE: KELLER AND TAYLOR, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Anthony Potts brings this *pro se* appeal from a June 6, 2007,

Order of the Montgomery Circuit Court denying appellant's Kentucky Rules of

¹ Senior Judge Daniel T. Guidugli 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.

Criminal Procedure (RCr) 11.42 motion to vacate sentence without an evidentiary hearing. We dismiss.

Following a jury trial, appellant was found guilty of three counts of first-degree possession of a controlled substance and with being a first-degree persistent felony offender. He was sentenced to a total of twenty-years' imprisonment. A direct appeal of his conviction was affirmed by Kentucky Supreme Court in Appeal No. 2003-SC-000500-MR.

Subsequently, appellant filed the underlying RCr 11.42 motion to vacate his sentence of imprisonment. By order entered June 6, 2007, the circuit court denied appellant's RCr 11.42 motion without appointment of counsel and without an evidentiary hearing. The docket also reveals that the clerk entered a notation of service of the order also on June 6, 2007. On July 9, 2007, appellant filed a motion to proceed *in forma pauperis* on appeal. Also, a notice of appeal was noted "tendered" by the Montgomery Circuit Court Clerk on the same day, July 9, 2007.

By order entered July 16, 2007, the circuit court granted the motion to proceed *in forma pauperis*, and the notice of appeal was entered also on July 16, 2007. For the reasons hereinafter delineated, we dismiss this appeal as the notice of appeal was not timely filed under Kentucky Rules of Civil Procedure (CR) 73.02(1)(b).

Under CR 73.02(2), the time for filing a notice of appeal is considered mandatory and subject to strict compliance. *Fox v. House*, 912 S.W.2d 450 (Ky.App. 1995). The failure to timely file the notice of appeal deprives the appellate court of jurisdiction. *Burchell v. Burchell*, 684 S.W.2d 296 (Ky.App. 1984). CR 73.02(1)(b) provides that if a notice of appeal is “timely tendered and accompanied by a motion to proceed in forma pauperis supported by an affidavit, a notice of appeal . . . shall be considered timely but shall not be filed until the motion to proceed in forma pauperis is granted.”

In this case, the order denying appellant’s RCr 11.42 motion was entered June 6, 2007; thus, the notice of appeal filing deadline was July 6, 2007. Appellant filed his motion to proceed *in forma pauperis* on July 9, 2007, and, his accompanying notice of appeal was also noted by the clerk “submitted” on July 9, 2007. The notice of appeal was subsequently filed July 16, 2007.

From the above facts, it is clear that appellant filed the motion to proceed *in forma pauperis* and tendered the notice of appeal some three days after the notice of appeal’s filing deadline. Stated differently, appellant’s notice of appeal was considered “tendered” on the date the motion to proceed *in forma pauperis* was filed and, likewise, is considered untimely under CR 73.02(1)(b). Consequently, dismissal of this appeal is mandated.

Now therefore be it ORDERED that Appeal No. 2007-CA-001414-
MR be and is hereby DISMISSED as untimely.

ALL CONCUR.

ENTERED: October 3, 2008

/s/ Jeff S. Taylor
Judge, Court of Appeals

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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