

RENDERED: SEPTEMBER 4, 2009; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2008-CA-001893-MR

ALLEN GRAY<sup>1</sup>

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE PAMELA R. GOODWINE, JUDGE  
ACTION NO. 03-CR-00469

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AND ORDER DISMISSING

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BEFORE: CAPERTON, DIXON, AND TAYLOR, JUDGES.

PER CURIAM: Appellant, Allen Gray, appeals *pro se* from an order of the Fayette Circuit Court denying him post-conviction relief pursuant to RCr 11.42.

Because we conclude that this is an interlocutory appeal, we dismiss the matter.

In May 2005, Appellant was convicted in the Fayette Circuit Court of wanton murder, three counts of fourth-degree assault, and tampering with physical

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<sup>1</sup> Appellant's last name is spelled "Grey" in some of the circuit court proceedings. Appellant's notice of appeal has his last name as "Gray," and we will therefore use that spelling in this opinion.

evidence. He was sentenced to a total of thirty-five years' imprisonment. On direct appeal, the Kentucky Supreme Court affirmed the convictions and sentence. *Grey v. Commonwealth*, 2005-SC-0000590-MR (May 24, 2007).

On December 20, 2007, Appellant filed a *pro se* RCr 11.42 motion alleging ineffective assistance of counsel. He also filed motions for appointment of counsel and an evidentiary hearing. On September 5, 2008, the trial court denied Appellant's RCr 11.42 motion without an evidentiary hearing, finding that all issues could be resolved from the record. Appellant's counsel thereafter filed a CR 59 motion to alter, amend or vacate the order denying post-conviction relief. There is no order of record ruling upon Appellant's CR 59 motion. Nevertheless, Appellant filed a notice of appeal in this Court on October 3, 2008.

CR 73.02(1)(e)<sup>2</sup> provides, in pertinent part:

The running of the time for appeal is terminated by a timely motion pursuant to any of the Rules hereinafter enumerated, and the full time for appeal fixed in this Rule commences to run upon entry and service under Rule 77.04(2) of an order granting or denying a motion under Rules 59.02, 52.02, or 59, except when a new trial is granted under Rule 59.

Effective January 1, 2007, RCr 12.02 was amended to specify that CR 73.02(1)(e) applies to criminal cases, thereby suspending the running for the time for appeal upon the filing of a CR 59.05 motion. Thus, Appellant's CR 59.05 motion, filed within ten days of the order denying his RCr 11.42 motion, suspended the running

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<sup>2</sup> We note that CR 73.02(1)(e) was amended effective April 1, 2009, to provide that a premature notice of appeal is suspended by filing of, among others, a CR 59.05 motion, and becomes effective when the motion is ruled upon. We view this amendment as inapplicable to Appellant's case.

of his time for appeal. Furthermore, our Supreme Court “has made it clear that a ruling on a post-judgment motion is necessary to achieve finality, and procedurally, a CR 59.05 motion stays finality until the motion is ruled upon.”

*Guillion v. Guillion*, 163 S.W.3d 888, 891 (Ky. 2005) (Citing *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454 (Ky. 2002)).

Accordingly, because the record contains no order granting or denying Appellant’s CR 59.05 motion, the order of the Fayette Circuit Court denying Appellant RCr 11.42 relief is not final and thus not ripe for appellate review. As such, the instant appeal is dismissed.

ALL CONCUR.

ENTERED: September 4, 2009

/s/ Donna L. Dixon  
JUDGE, COURT OF APPEALS

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