

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-000311-MR

JEREMY EDWARD DEVERS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE CHARLES L. CUNNINGHAM, JUDGE  
ACTION NO. 90-CR-001926

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER  
DISMISSING

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BEFORE: MAZE, NICKELL, AND STUMBO, JUDGES.

MAZE, JUDGE: Jeremy Edward Devers appeals from a Jefferson Circuit Court order denying his motion made pursuant to Kentucky Rules of Civil Procedure (CR) 60.02(e). Because the notice of appeal was untimely filed, we dismiss.

In 1992, following a jury trial, Devers was convicted of murder and burglary in the first degree. Devers was a juvenile at the time the crimes were

committed, and his case had been transferred to the circuit court where he was tried as an adult. In order to avoid the death penalty, Devers entered into a sentencing agreement pursuant to which he was sentenced to life in prison without the possibility of parole for twenty-five years. The Kentucky Supreme Court affirmed his conviction on direct appeal. In 2006, Devers filed a motion pursuant to CR 60.02 and Kentucky Rules of Criminal Procedure (RCr) 11.42, seeking a new sentencing hearing on the grounds that a change of law had occurred. The motion was denied, and the trial court's order was affirmed on appeal. *Devers v. Commonwealth*, 2006-CA-002049-MR (Ky. App. Mar. 7, 2008).

On November 19, 2010, Devers filed a CR 60.02 motion alleging various errors in his juvenile transfer hearing in 1990. The order denying Devers's CR 60.02(e) motion was entered on December 22, 2010. Devers's notice of appeal was filed in the Jefferson Circuit Court Clerk's office on January 31, 2011. Because the notice was filed more than thirty days from the date of entry of the order, this Court entered an order asking Devers to show cause why his appeal should not be dismissed for failure to file a timely notice of appeal. *See* CR 73.02(1). Devers was directed to include with his response "a copy of any mail logs or the envelope showing the date the Notice of Appeal was placed with prison authorities for mailing."

Devers submitted a response which stated that his notice of appeal, certificate as to transcript, and motion to proceed *in forma pauperis* were delivered to prison authorities for mailing on January 6, 2011, well within the thirty-day

limit. As proof, he attached a copy of a page from the prison mail room log, showing that three pieces of mail were brought by Devers to the mail room on January 6, 2011, to be sent to the Jefferson Circuit Court Clerk, the Commonwealth Attorney, and the Court of Appeals. The log shows that these items were sent out from the mail room on January 7, 2011.

The response further stated that Devers had received a letter from the Jefferson Circuit Court Clerk, dated January 25, 2011, informing him that his \$10.00 filing fee had been received, but that no notice of appeal appeared to have been filed. Devers explained that upon receipt of this letter, he immediately retrieved his copies of the notice of appeal, designation of record, certificate as to transcript and motion to proceed *in forma pauperis*, “whited out” the original date of January 6, 2011, and resubmitted all documents to the circuit court with the new date of January 28, 2011. He could not explain why his original notice of appeal was not timely received by the Jefferson Circuit Court.

The motion was ultimately passed to the merits panel for resolution, after the Court determined that it was unable to decide the issue on the basis of the facts then before it. The parties were instructed to address the issue in their briefs. Neither Devers nor the Commonwealth has complied with this directive from the Court. Therefore, we must decide the issue on the basis of the documentation previously submitted by Devers in his response to the show cause order, and the record before us.

Kentucky’s “mailbox rule” as it applies to incarcerated persons states:

If an inmate files a notice of appeal in a criminal case, the notice shall be considered filed if its envelope is officially marked as having been deposited in the institution's internal mail system on or before the last day for filing with sufficient First Class postage prepaid.

RCr 12.04(5).

The circuit court record contains the letter from the Jefferson County Criminal Court Appeals Division referred to by Devers in his response to the show cause order. It is dated January 25, 2011, and states "Enclosed, please find your receipt for \$10.00 filing fee in order to proceed on appeal *in forma pauperis*. However, no notice of appeal appears to be filed." The record also contains a notarized affidavit of indigency, signed by Devers on January 19, 2011. The date of the affidavit casts doubt on Devers's assertion that he placed a motion to proceed *in forma pauperis* along with his notice of appeal in the mail on January 6, 2011.

The only notice of appeal contained in the circuit court record is the notice filed by Devers after he received the January 25, 2011, letter from the clerk. The notice is date stamped January 31, 2011. The notice which Devers allegedly placed in the prison mail room on January 6, 2011, is not in the record. Under the circumstances, Kentucky's mail box rule cannot apply to the January 6, 2011, notice because it was never received.

"The timely filing of a notice of appeal in compliance with CR 73.02 is the method by which the jurisdiction of the appellate court is invoked and . . . automatic dismissal of an appeal is the penalty for late filing of such a notice."

*Stinson v. Stinson*, 381 S.W.3d 333, 336 (Ky. App. 2012) (internal citations omitted). For the foregoing reasons, this appeal is dismissed.

ALL CONCUR.

ENTERED September 26, 2014

/s/ Irv Maze  
JUDGE, COURT OF APPEALS

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