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OPINION OF AUGUST 3, 2018 WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000314-MR

GENARO HERRERA HERNANDEZ

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 13-CR-001336

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER
DISMISSING

** ** * ** * **

BEFORE: DIXON, KRAMER AND NICKELL, JUDGES.

NICKELL, JUDGE: The question presented is whether the Jefferson Circuit Court abused its discretion in reducing by more than one-half the fee demanded by a certified freelance court interpreter for services provided in the defense of Genaro Herrera Hernandez, an indigent criminal defendant from Guatemala. The services

were provided pursuant to a court order authorizing defense counsel to utilize interpreter services believed “to be reasonably necessary to ensure effective representation.” On review of the record, the briefs, and the law, we hold the appeal was not timely filed, is not properly before us, and must be dismissed.

Hernandez was indicted for murder, first-degree assault, and other crimes after his vehicle struck a motorcycle resulting in the cyclist’s death and injuries to his passenger. Hernandez pled guilty and was sentenced to serve a term of ten years. Generally, “an unconditional guilty plea waives all defenses except that the indictment does not charge a public offense.” *Jackson v. Commonwealth*, 363 S.W.3d 11, 15 (Ky. 2012). A guilty plea specifically waives the right to appeal. *Windsor v. Commonwealth*, 250 S.W.3d 306, 307 (Ky. 2008). Hernandez did not appeal the judgment and has no personal stake in this appeal; he may be unaware it is even occurring.

As briefed by the Louisville Metro Public Defender (“LMPD”), this case focuses entirely on a bill for Spanish language interpretation and translation services submitted by Ilse Apestequi who provided such services for Hernandez’ defense on multiple occasions pursuant to a sealed *ex parte* order. The trial court approved Apestequi’s first bill for \$777.00 and her third bill for \$339.43. However, the trial court questioned Apestequi’s second invoice, seeking \$2,520.00 for written translation and transcription of a sixty-nine-minute audiotaped police

interview with Hernandez, finding the amount unreasonable and unnecessary. A reduced payment of \$1,200.00 was approved on August 5, 2015.

Defense counsel moved the trial court to reconsider the reduction, and asked to be heard *ex parte* on the motion. The motion to reconsider was granted without a hearing. Despite an affidavit from Apestequi accounting for the time reflected on her invoice and distinguishing in-court translation from interpretation of recordings, the trial court stood firm in approving the reduced fee, entering an eight-page opinion and order on February 4, 2016, denying the defense request for additional funds. The trial court described the fee dispute in exacting detail, beginning with its calculation of Apestequi's bill being "60 times the amount ordinarily spent by the Court's staff interpreters." The trial court found a fee of "only 30 times the amount the Jefferson Circuit Court's Staff Interpreters spend on such translations to be reasonable and within its discretion." (Emphasis in original.) The final paragraph of the order reads:

Wherefore, IT IS HEREBY ORDERED that [Hernandez'] motion for additional fees is denied. [Hernandez] has not provided the Court with any authority that this Order is final and appealable for himself, the Office of the Public Defender, the Interpreter, and/or the Finance Cabinet. However, to allow further review of the issues by an appellate body, the Court will designate this Order as final and

appealable.¹ Defendant is once again free to proceed *in forma pauperis*, here and on appeal.

(Footnote added). In Hernandez’ name in his now-concluded criminal case, LMPD filed a notice of appeal—challenging not the judgment of conviction but the order approving payment of the reduced fee—alleging the trial court abused its discretion.

During the briefing process, the Commonwealth moved this Court to dismiss the appeal for failure to name an indispensable party, arguing LMPD—which contracted for Apestequi’s services—or Apestequi—who provided the services—or both, should have intervened or petitioned the trial court to pursue the matter. A motion panel ordered the parties to address the motion to dismiss in the briefs and passed the matter to this merits panel for resolution.

Citing *Browning v. Preece*, 392 S.W.3d 388, 391 (Ky. 2013)

(defining an indispensable party as one “whose absence prevents the Court from granting complete relief among those already parties” (internal citation omitted)), the Commonwealth argues failure to name an indispensable party in the notice of appeal is a jurisdictional defect that cannot be remedied once the window for filing the notice of appeal has closed. To the contrary, claiming *Boyle County Fiscal*

¹ This language does not convert the order into one that is appealable. *Tax Ease Lien Investments 1, LLC v. Brown*, 340 S.W.3d 99, 103 (Ky. App. 2011).

Court v. Shewmaker, 666 S.W.2d 759, 762-63 (Ky. App. 1984), “is directly on point,” LMPD maintains the appeal is properly before us.

We have determined the appeal cannot go forward on multiple grounds, the first of which is lack of timeliness. LMPD has posed a civil question in a criminal case. Whether proceeding under CR² 73.02 or RCr³ 12.04(3), notice was not timely filed. Both rules provide a thirty-day window in which to appeal. RCr 12.02 addresses the applicability of civil rules to criminal actions; it specifies CR 73.02(1)(e)—governing timing of the filing of the notice of appeal—“shall apply also in criminal actions” unless a sentence of death, life imprisonment or imprisonment for twenty years or more is imposed. Hernandez was sentenced to a term of ten years making the above-mentioned exception inapplicable.

Once he decided to plead guilty, Hernandez wished to expedite matters. He pled guilty, waived filing of the Presentence Investigation Report, was

² Kentucky Rules of Civil Procedure. “[N]otice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2).” CR 73.02(1)(a).

³ Kentucky Rules of Criminal Procedure. RCr 12.04(3) reads in relevant part:

[t]he time within which an appeal may be taken shall be thirty (30) days after the date of entry of the judgment or order from which it is taken, subject to Rule 12.06, but if a timely motion has been made for a new trial an appeal from a judgment of conviction may be taken within thirty (30) days after the date of entry of the order denying the motion; provided, however, that in the case of a motion for new trial made later than five (5) days after return of the verdict, the appeal must be from the order overruling or denying the motion, and the review on appeal shall be limited to the grounds timely raised by the motion as provided by Rule 10.06.

sentenced and judgment was entered—all on the same day—September 25, 2015. Assuming LMPD properly challenged the reduced fee in the resolved criminal case—a premise we do not endorse—it should have done so within thirty days of entry of judgment—on or before October 26, 2015. It did not. Notice of Appeal was not filed in the Jefferson Circuit Court until March 7, 2016. Failure to file within the thirty-day window was fatal. *Fox v. House*, 912 S.W.2d 450, 451 (Ky. App. 1995); CR 73.02(2). There are some exceptions to the strictly enforced thirty-day window, *see e.g., United Tobacco Warehouse, Inc. v. Southern States Frankfort Co-op., Inc.*, 737 S.W.2d 708, 709-10 (Ky. App. 1987), but none apply here. LMPD has not cited any exception to the procedural rules tolling the time for filing a notice of appeal on moving for reconsideration of fees for an expert.

In addition to lack of a timely appeal being filed, the trial court lost jurisdiction of the criminal case on October 5, 2015—ten days after entry of judgment because no motion to alter, amend or vacate was filed. *Commonwealth v. Steadman*, 411 S.W.3d 717, 721 (Ky. 2013); *Commonwealth v. Marcum*, 873 S.W.2d 207, 211 (Ky. 1994); *Silverburg v. Commonwealth*, 587 S.W.2d 241, 244 (Ky. 1979).

Interestingly, LMPD filed its appeal in Hernandez’ criminal case, but it did *not* appeal from Hernandez’ criminal judgment entered on September 25,

2015. Instead, it appealed—in Hernandez’ name⁴ and in his completed case—from the order entered on February 4, 2016, challenging only “the payment of reasonable and necessary expert fees under KRS Chapter 31,” conveying an illusory appearance the notice of appeal filed on March 7, 2016, was timely.

We now address the concern raised by the Commonwealth—whether the proper parties are before this Court. The short answer is “no” and that flaw cannot be remedied because there is no procedural mechanism to add an indispensable party to a criminal appeal. CR 13.08 authorizes a court to order entities needed for the grant of complete relief, who were not named in the original *civil* action, “to be brought in as defendants[.]” RCr 12.02 does not make CR 13.08 applicable to a criminal matter. Moreover, LMPD did not urge the trial court to apply CR 13.08 to Hernandez’ case.

The notice of appeal lists Defendant Genaro Herrera Hernandez⁵ as Appellant, and the Commonwealth of Kentucky as Appellee, neither of whom is a

⁴ By filing this appeal in Hernandez’ name, his constitutional rights and ability to file post-conviction motions may be impacted. *See Foley v. Commonwealth*, 425 S.W.3d 880, 884 (Ky. 2014).

⁵ On January 28, 2016, LMPD moved on Hernandez’ behalf for leave to proceed *in forma pauperis* on appeal and for appointment of counsel. On February 10, 2016, the motion was granted for the sole purpose of appealing “the decision of what is considered reasonable and necessary expert fees under KRS Chapter 31[.]” LMPD was appointed as counsel on the appeal which does not seek in any way to protect Hernandez’ constitutional rights. Moreover, as previously noted, Hernandez pled guilty and waived his right to appeal.

real party in interest in this matter. Apestequi has an interest because she is seeking her full fee. It has been suggested the Finance and Administration Cabinet (Cabinet) has an interest because it has been ordered to pay the fee, but the Cabinet is not charged with ensuring the trial court orders payment of the proper amount. Neither is a party to this appeal, and no issue to be resolved in this appeal involves Hernandez or the Commonwealth—the only parties listed in the notice of appeal.

To determine whether Apestequi is an indispensable party, we rely on *Fink v. Fink*, 519 S.W.3d 384, 384-85 (Ky. App. 2016) (quoting *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 519 (Ky. 2001)), discussing enforcement of an attorney’s fee ordered by a court to be paid directly to the attorney. *Fink* holds the person to whom a court orders payment “‘may enforce the order in his own name’ and, thus is the real party in interest and a necessary and indispensable party to any appeal from that order.”

The pertinent language in the order entered in this case by the Jefferson Circuit Court on August 4, 2015, reads:

IT IS THEREFORE ORDERED, pursuant to KRS 31.100(2), 31.110(1), and 31.185(5), that the Cabinet of Finance and Administration shall pay Ilse Apestequi, the sum of \$1,200.00 for services rendered and expenses incurred in connection with the defense in [*Commonwealth of Kentucky v. Genaro Herrera-Hernandez*].

Based on the trial court's language, Apestequi is an indispensable party to the litigation and "any appeal from that order." *Fink*, 519 S.W.3d at 385.

In the leading case of *City of Devondale v. Stallings*, 795 S.W.2d 954 (Ky. 1990), the Supreme Court held that the policy of strict compliance, rather than substantial compliance, applied to the naming of indispensable parties in the notice of appeal. *See also Hutchins v. Gen. Elec. Co.*, 190 S.W.3d 333, 337 (Ky. 2006) (court holding that "[a] policy of strict compliance governs the time within which an appellant must invoke the court's jurisdiction, naming all indispensable parties[.]"); *Commonwealth v. Maynard*, 294 S.W.3d 43, 46 (Ky. App. 2009). Failure to name an indispensable party is fatal to an appeal. *Courier-Journal, Inc. v. Lawson*, 307 S.W.3d 617, 623 (Ky. 2010) (citing *Braden v. Republic-Vanguard Life Ins. Co.*, 657 S.W.2d 241, 243 (Ky. 1983)). Therefore, this appeal is subject to dismissal because [Apestequi] is a real party in interest and an indispensable party.

Fink, 519 S.W.3d at 385.

LMPD failed to file a timely notice of appeal, improperly challenged the reduced fee in Hernandez' criminal case, and failed to name Apestequi as an indispensable party. Due to these errors, the appeal must be DISMISSED.

ORDER

The Commonwealth having moved to dismiss this appeal for failure to name an indispensable party; a response having been filed on behalf of Genaro Herrera Hernandez; and the Court being sufficiently advised, the motion is

GRANTED and the appeal is hereby DISMISSED for failure to name an indispensable party.

ALL CONCUR.

ENTERED: August 10, 2018

/s/ C. Shea Nickell
JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANT:

Cicely J. Lambert
Deputy Appellate Defender
Louisville, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

James Havey
Assistant Attorney General
Frankfort, Kentucky