

RENDERED: JANUARY 18, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000712-MR

PATRICK K. HUTCHINSON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 09-CR-01338

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GOODWINE, JONES AND NICKELL, JUDGES.

NICKELL, JUDGE: In his ongoing quest for custody credit for time spent at Central State Hospital while committed under KRS¹ 202A, Patrick K. Hutchinson, *pro se*, appeals from an order entered by the Fayette Circuit Court on March 29,

¹ Kentucky Revised Statutes.

2017. That order dismissed an attempted appeal due to noncompliance with CR² 73.02(1)(a). On review of the record, briefs and law, we affirm.

We begin by noting Hutchinson’s *pro se* brief does not comply with CR 76.12(4)(c)(vii) which requires an appendix containing the item being appealed. Hutchinson attached to his brief an order from this Court entered on November 8, 2017, denying and granting three separate motions he filed in this Court. He did not attach the trial court order from which this case clearly flows. “While *pro se* litigants are sometimes held to less stringent standards than lawyers in drafting formal pleadings, *see Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), Kentucky courts still require *pro se* litigants to follow the Kentucky Rules of Civil Procedure.” *Watkins v. Fannin*, 278 S.W.3d 637, 643 (Ky. App. 2009). Due to our resolution of this action, we have chosen not to penalize the appellant.

This is Hutchinson’s latest attempt to recycle an argument that has previously failed. We quote the basic facts from *Hutchinson v. Commonwealth*, 2013-CA-001008-MR, 2014 WL 6609337, at *1 (Ky. App. Nov. 21, 2014).

Patrick K. Hutchinson appeals, *pro se*, from a Fayette Circuit Court order denying his motion made pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. He argues he is entitled to receive sentence credit for several

² Kentucky Rules of Civil Procedure.

years that he was involuntarily hospitalized. We disagree and affirm.

On September 13, 2004, Hutchinson was indicted on two charges of murder, two charges of attempted murder and one charge of first-degree wanton endangerment. Following an evaluation at the Kentucky Correctional Psychiatric Center (KCPC) and a hearing before the Fayette Circuit Court, Hutchinson was found incompetent to stand trial. On November 18, 2004, he was involuntarily hospitalized pursuant to Kentucky Revised Statutes (KRS) 504.110(2) and KRS Chapter 202A. The indictment against him was dismissed without prejudice.

Over the next five years, the circuit court conducted annual reviews of Hutchinson's status, and found, in reliance on the sworn certification of KCPC mental health professionals, that he continued to meet the criteria of KRS 504.211(2) and KRS 202A.026, and ordered him to remain hospitalized.

In 2009, the circuit court was notified by KCPC that Hutchinson had become competent to stand trial, and on September 10, 2009, he was re-indicted on the original charges. He entered a plea of guilty but mentally ill to two counts of murder, one count of attempted murder, and one count of first-degree assault, and received a sentence of twenty-five years' incarceration. In the final judgment, Hutchinson was given credit for the period of 280 days between February 13, 2004, the date he was arrested, and November 18, 2004, the date the indictment was dismissed and he was involuntarily hospitalized.

On March 18, 2013, Hutchinson filed a CR 60.02 motion, claiming he also should have received credit for the lengthy period (67 months) that he was involuntarily hospitalized. The trial court denied the motion and this appeal followed.

In the 2014 appeal, Hutchinson claimed he was entitled to custody credit under KRS 532.120. A panel of this Court disagreed, holding the claim was directly refuted by *Commonwealth v. Todd*, 12 S.W.3d 695 (Ky. App. 1999). Because he was lodged in a mental health facility pursuant to “a KRS 202A commitment[,]” rather than being held in custody pursuant to KRS 532.120 and a pending indictment, the panel concluded the requested relief was properly denied.

On November 7, 2016, Hutchinson filed a handwritten *pro se* motion labeled:

Motion for Extention [sic] of Time Pursuit [sic] to Rcp
Rule 6.02 To file Motion for Relation Back Pursuit [sic]
TO [sic] Rcp Rule 15.03 To file Petition for Declaratory
Judgment and for Injunctive Relief Pursuit [sic] TO [sic]
KRS 418.040

The petition requested a declaratory judgment finding KRS 532.120 is unconstitutional coupled with injunctive relief. The same day he filed a motion to proceed *in forma pauperis*.

On November 15, 2016, the trial court entered an order denying the motion. First, the trial court noted Hutchinson asked to file the petition *in forma pauperis* but included no required documentation about his financial status. Despite this flaw, the trial court addressed the petition, noting it repeated the exact argument raised in the motion filed on March 18, 2013, which the trial court had

denied, and this Court had affirmed on appeal. About the petition the trial court wrote,

Hutchinson's arguments then and now are the same, i.e., he was entitled to custody credit while he was hospitalized pursuant to KRS 202A. The criminal charges had been Dismissed [sic] without prejudice when Hutchinson was incompetent and hospitalized by the Court Order pursuant to KRS 202A. This issue has previously been considered by this Court and the Court of Appeals and cannot be raised again in this pending Motion. The pending Motion is DENIED under the "Law of the Case" doctrine and *Res Judicata*.

No notice of appeal of that order appears in the trial court record. CR 73.02(1) dictates a notice of appeal must be "filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2)." Failure to file a timely notice of appeal "shall result in a dismissal or denial." CR 73.02(2).

Instead, another *pro se* motion³ for an extension of time of thirty days to file a notice of appeal was filed in the circuit court record on December 19, 2016. That motion references CR 6.02 and CR 73.02(1). The motion cites cases about "excusable neglect," a term appearing in both rules, but fails to allege error

³ Enclosed with the motion were the order entered on November 15, 2016; a Kentucky Department of Corrections form requesting a certification of funds deposited into his institutional account; a notarized statement of his institutional account dated December 6, 2016; a motion to proceed *in forma pauperis* bearing a service date of December 7, 2016; and, a handwritten affidavit of indigency signed and notarized on December 12, 2016, but showing no service date.

or why it should be excused. Hutchinson claims his request should be granted because he is a prisoner and

the staff in inmate accounts does not process the request for certification of funds Deposited [sic] in appellant account when requested, **there has been cases were [sic] they were lost or d [sic] sometime not processed in the 30 days** for appellants to file the Notice of Appeals.

(Emphasis added.) We note flaws in the motion. First, Hutchinson does not specify the date on which he asked the Department of Corrections to provide the accounting. The record shows only the accounting was completed on December 6, 2016. Second, in the space requesting the “deadline date,” he wrote “filing Notice of Appeal,” not the month, date and year as requested. Third, close inspection reveals Hutchinson did not allege *his* particular request was lost or untimely processed—only that “there has been cases” where that happened.

In a letter to the circuit clerk referencing February 15, 2017, and filed in the record on February 20, 2017, Hutchinson claims he mailed to the clerk on December 2, 2016, a notice of appeal and associated documents. The letter questions why he has not received confirmation the notice of appeal has been filed.

On March 3, 2017, this Court sent a letter to Hutchinson advising him no appeal in his name was currently pending in the Kentucky Court of Appeals. A motion styled, “*Ex Prate* [sic] Motion . . . to Hold Appeal in Abyance [sic] and

Extention [sic] of Time to file Appeal brief As Soon as This Court Send Appellant his Appeal Docket Number,” was returned to Hutchinson unfiled.

That motion, along with the letter from this Court, was then filed by the Fayette Circuit Clerk on March 17, 2017. The gist of the motion is the Fayette Circuit Clerk is sending records to the appellate court without alerting the prisoner, resulting in the prisoner lacking the docket number, not knowing when the brief is due, and, being required to show cause why his appeal should not be dismissed. Also, on March 17, 2017, Hutchinson moved the trial court to show cause why the notice of appeal and extension of time he claimed he “file[d]” on or about December 7, 2016,⁴ had not been filed.

On March 29, 2017, the Fayette Circuit Court entered an order detailing events in Hutchinson’s case from which we quote:

Patrick Hutchinson filed the same Motion on November 7, 2016 as he did on March 18, 2013. It was the same issue in both pleadings, i.e., whether he was entitled to custody credit for time spent at Central State Hospital while he had been declared incompetent and while the Indictment was Dismissed [sic]. The Court DENIED both requests in written Opinions. The Court of Appeals AFFIRMED the first Petition on November 21, 2014.

⁴ This date may be inconsistent with the letter Hutchinson wrote to the Fayette Circuit Court Clerk on February 15, 2017, wherein he states, “On 12-2-2016 I sent you a notice of appeal in the above case. I sent a [sic] affidavit of indengces [sic] and a six month [sic] statement with the notice of appeal.”

Not to be deterred, Hutchinson filed the pending Motion raising the same issue on November 7, 2016 raising the same issue which had been Denied by this Court and Affirmed by the Court of Appeals. The Court entered an Opinion on November 15, 2016 which DENIED Hutchinson's second Motion on the same issue.

Hutchinson then files [sic] a "Motion for Extension of Time pursuant to Rule 6.02 to file Notice of Appeal pursuant to Rule 73.02(1)", on December 19, 2016. Within that Motion, Hutchinson writes that he ". . . appeals to the Kentucky Court of Appeals . . . of this Court's Order entered on November 15, 2016." He also requests in that Motion for an extension of time to file his Notice of Appeal. He complains the staff at the institution did not process his request on funds on deposit. It appears from the Record he did not request this information until December 6, 2016.

Hutchinson then files [sic] a letter in which he complains that he had sent a Notice of Appeal to the Clerk on December 2, 2016 (which he had not) and wanted to know why it had not been processed. Then on March 17, 2017, he files a "Motion to Show Cause" for the Court to show why his appeal was not filed by this Court." [sic]

By reason of all of the foregoing and after review of this Court Record, this Court determines that Hutchinson did not file any proper or timely Notice of Appeal from the Opinion entered on November 15, 2016. Therefore, this Court's Opinion of November 15, 2016 is final. Hutchinson's untimely Motion for Extension of Time filed December 19, 2016 from a November 15, 2016 Opinion exceeded the 30 day [sic] requirement to take an appeal. [CR] 73.02(1)(a). The failure of Hutchinson to timely file Notice of Appeal should result in a dismissal or denial. CR 73.02(2). Since no notice of appeal was timely filed, this Court took no action in regard to the untimely Motion.

Even considering the total lack of merit to the last request[,] i.e., both this Court and the Court of Appeals [have] Denied [sic] his request for additional custody credit, Hutchinson has suffered no prejudice.

It is from this order Hutchinson has timely appealed.

Hutchinson attempts to garner review of whether he is entitled to custody credit, but that precise question was answered in the negative by this Court in 2014, and there is currently no valid appeal of that question before us. As the trial court recognized, and the Commonwealth argues on appeal, Hutchinson is attempting to pursue a successive collateral attack which is forbidden. *Foley v. Commonwealth*, 425 S.W.3d 880, 884 (Ky. 2014). Furthermore, the single issue appropriate for our review is whether the trial court abused its discretion in denying Hutchinson's motion for an extension of time to file his notice of appeal. We hold it did not.

CR 73.02(1)(a) allows thirty days for the filing of a notice of appeal. Failure to abide by the rule results in dismissal or denial. CR 73.02(2). "Filing a notice of appeal within the prescribed time frame is still mandatory and failure to do so is fatal to an appeal." *Commonwealth v. Opell*, 3 S.W.3d 747, 751 (Ky. App. 1999) (quoting *Fox v. House*, 912 S.W.2d 450, 451 (Ky. App. 1995)).

Hutchinson attempts to invoke CR 6.02 to garner more time. That rule has two provisions. CR 6.02(a) applies when an "enlargement" of time is requested before time runs. Hutchinson's motion was filed *after* the thirty-day

window had closed. Therefore, CR 6.02(a) is inapplicable. CR 6.02(b) applies when the window for filing has closed, but only on a showing of excusable neglect and, “it may not extend the time for taking any action under Rules 50.02, 52.02, 59.02, 59.04, 59.05, 60.02, 72.02, 73.02 and 74 except to the extent and under the conditions stated in them.”

Hutchinson attempts to invoke CR 73.02(1), but its relief is beyond his reach. CR 73.02(1)(d) reads as follows:

[u]pon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment or an order which affects the running of the time for taking an appeal, the trial court may extend the time for appeal, not exceeding 10 days from the expiration of the original time.

CR 73.02(1)(d) is triggered only by showing excusable neglect due to lack of knowledge of entry of a judgment or order. In that scenario, the trial court may grant a maximum of ten days beyond the original thirty days. Hutchinson has not argued he did not know the order had been entered. Furthermore, such an argument would be wholly inconsistent with his claim he timely mailed the notice of appeal, but the clerk did not file it. Thus, CR 73.02(1) does not provide the answer Hutchinson seeks.

For the reasons explained above, the trial court’s denial of an extension of time to file a notice of appeal was proper and not an abuse of discretion. We affirm the order entered by the Fayette Circuit Court.

ALL CONCUR.

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