

RENDERED: AUGUST 16, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000541-MR

CANON HARPER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HON. ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 15-CR-002253

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER DISMISSING

** ** * * * * * ** ** **

BEFORE: ACREE, KRAMER AND NICKELL, JUDGES.

NICKELL, JUDGE: On April 5, 2019, appellant filed a notice of appeal stating he was appealing the Jefferson Circuit Court order entered on March 7, 2019, denying his motion to withdraw his guilty plea. On April 16, 2019, this Court entered an order directing appellant to show cause why this appeal should not be dismissed as interlocutory as a final and appealable order had not been entered. Appellant filed a response to the show cause order arguing that this Court should apply the relation forward doctrine and allow the appeal to proceed.

“A final order or judgment is one ‘adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02.’ CR¹ 54.01. In a criminal case, this is ordinarily the judgment of conviction and sentence, or a similarly named document.” *Cassetty v. Commonwealth*, 495 S.W.3d 129, 132 (Ky. 2016).

“The rule of relation forward allows a premature notice of appeal to invoke the appellate court’s jurisdiction,” as the notice of appeal serves the purpose of CR 73.02, giving timely notice of the intent to appeal. *Id.* at 133 (citing *Johnson v. Smith*, 885 S.W.2d 944 (Ky. 1994)). “[T]he rule does ‘not permit a notice of appeal from a clearly interlocutory decision . . . to serve as a notice of appeal from the final judgment.’” *Id.* (quoting *FirsTier Mortgage v. Investors Insurance Co.*, 498 U.S. 269, 276, 111 S.Ct. 648, 112 L.Ed.2d 743 (1991)).

Instead, the relation forward rule

applies to “the unskilled litigant who files a notice of appeal from a decision that he reasonably but mistakenly believes to be a final judgment, while failing to file a notice of appeal from the actual final judgment.” With respect to a clearly interlocutory order: “A belief that such a decision is a final judgment would not be reasonable.”

Id. at 133-34 (quoting *FirsTier Mortgage*, 498 U.S. at 276, 111 S.Ct. 648).

Relation forward “applies only where the notice of appeal identifies a technically

¹ Kentucky Rules of Civil Procedure.

‘nonfinal order [that] would be appealable if followed by the formal entry of judgment.’” *Id.* at 134 (quoting *Board of Regents of Western Kentucky University v. Clark*, 276 S.W.3d 819, 821 (Ky. 2009)).

In other words, it applies to the type of decision that would result in a final judgment but for some technicality staying the court’s hand, such as the filing of a post-trial motion tolling finality of the court’s judgment. In such instances, the relevant final judgment is readily ascertainable because the order or judgment identified in the notice of appeal is either directly related to the final order (as in the case with post-judgment orders) or in fact becomes the final judgment (as in the case of judgments made temporarily interlocutory by post-judgment motions).

Id. Thus, the relation forward applies where a post-judgment motion has been properly filed.

Relation forward also applies to notices of appeals filed after a bench ruling, but prior to entry of an order or judgment. In *Wright v. Ecolab, Inc.*, 461 S.W.3d 753, 759 (Ky. 2015), the Supreme Court of Kentucky set forth the United States Supreme Court’s construction of the federal relation forward doctrine:

[A] premature notice of appeal does not ripen until judgment is entered. Once judgment is entered, the Rule treats the notice of appeal “as filed after such entry[.]”...it permits a premature notice of appeal from [a] bench ruling to relate forward to judgment and serve as an effective notice of appeal *from the final judgment*.

Id. (quoting *FirsTier Mortgage*, 498 U.S. at 275, 111 S.Ct. 648).

The relation forward doctrine does not apply to the facts of this case.

This case does not involve a post-judgment motion or an appeal from a bench ruling that simply had not been reduced to an order. Appellant filed a notice of appeal from an order denying his motion to withdraw his guilty plea which is simply not a final and appealable order but, rather, a clearly interlocutory order. While appellant directs this Court to the dissenting opinion in *Wright v. Swigart*, 2012-CA-001956, 2013 WL 424662 (Ky. App. Aug. 16, 2013), the Court of Appeals' majority opinion dismissing the case was affirmed by the Supreme Court of Kentucky in *Wright v. Ecolab, Inc. supra*. "As an intermediate appellate court, this Court is bound by the published decisions of the Kentucky Supreme Court. SCR² 1.030(8)(a)." *Kindred Healthcare, Inc. v. Henson*, 481 S.W.3d 825, 829 (Ky. App. 2014).

Having considered appellant's response, and being otherwise sufficiently advised, this Court holds that appellant has demonstrated INSUFFICIENT CAUSE to prevent the dismissal of this appeal. Therefore, this Court ORDERS that the above-styled appeal be hereby DISMISSED.

ENTERED: AUGUST 16, 2019



JUDGE, COURT OF APPEALS

² Rules of the Supreme Court of Kentucky

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