

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: AUGUST 27, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2007-SC-000633-DG

DATE 9/17/09 Kelly Keabard, C.
APPELLANT

ROBERT TURNER

V.
ON REVIEW FROM COURT OF APPEALS
CASE NO. 2006-CA-001185-MR
DAVISS CIRCUIT COURT NOS. 03-CR-00370
AND 03-CR-00431

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING

Appellant was indicted in the Daviess Circuit Court in case number 03-CR-00370 for second-degree burglary and being a persistent felony offender in the first degree. He was separately indicted in the Daviess Circuit Court in case number 03-CR-00431 for two counts of robbery, possession of marijuana, and being a persistent felony offender in the first degree. He subsequently entered into a plea agreement that disposed of both indictments and ultimately pled guilty to two counts of robbery in the first degree, burglary in the third degree, possession of marijuana, and being a persistent felony offender in the first degree. He received a combined sentence of sixteen years' imprisonment. Appellant, acting *pro se*, filed a motion, pursuant to RCr 11.42, to vacate his

sentence, alleging ineffective assistance of counsel when his attorney failed to accurately inform him about parole eligibility.

On April 6, 2006, the trial court entered an order denying Appellant's RCr 11.42 motion. On May 2, 2006, Appellant filed a notice of appeal and a motion to proceed *in forma pauperis* and for appointment of counsel. The notice of appeal identified case number 03-CR-00370, but failed to identify case number 03-CR-00431. The following day, the trial court denied Appellant's motion to proceed *in forma pauperis*. On May 18, 2006, Appellant submitted a second motion to proceed *in forma pauperis*, along with a motion to reconsider and a notice of appeal with a stamped tendered date of May 25, 2006. The trial court granted Appellant's motion to proceed *in forma pauperis* and appointed him counsel on June 5, 2006. Appellant's tendered May 25, 2006 notice of appeal was then filed on June 5, 2006.

The record indicates that Appellant's counsel and the Commonwealth submitted their briefs to the Court of Appeals and oral arguments were scheduled for June 19, 2007. However, on June 5, 2007, the Court of Appeals issued a show cause order requesting Appellant to explain why the appeal should not be dismissed as untimely filed. Upon consideration of Appellant's response, the Court of Appeals determined that the May 2, 2006, notice of appeal was never actually filed by the circuit court clerk because the *in forma pauperis* motion had been denied and not properly appealed. Accordingly, the denial of the *in forma pauperis* motion became final ten days later, on May 13,

2006. Meanwhile, the trial court's original denial of Appellant's RCr 11.42 motion, entered April 6, 2006, started the thirty day time limit to file a notice of appeal. The Court of Appeals concluded that Appellant's notice of appeal, filed on May 25, 2006, was untimely, thereby depriving it of jurisdiction.

Appellant thereafter petitioned this Court for discretionary review, which was granted. The sole issue for our consideration is whether the Court of Appeals erred in dismissing the appeal as untimely.

To be timely, a notice of appeal must be filed within thirty days after service of the judgment being appealed. CR 73.02(1)(a). If the appellant is indigent, he may file a motion to proceed *in forma pauperis* with the notice of appeal. As the RCr 11.42 motion was denied on April 16th, Appellant was in compliance with the procedural rules when he filed his notice of appeal and motion to proceed *in forma pauperis* on May 2nd.

However, the motion to proceed *in forma pauperis* was denied. Accordingly, Appellant's timely notice of appeal, though tendered, was never filed. Pursuant to CR 73.02(1)(b),

[i]f timely tendered and accompanied by a motion to proceed in forma pauperis . . . a notice of appeal . . . shall be considered timely but shall not be filed until the motion to proceed in forma pauperis is granted or, if denied, the filing fee is paid. If the motion to proceed in forma pauperis is denied, the party shall have ten days within which to pay the filing fee or to appeal the denial to the appropriate appellate court.

Here, Appellant did not properly appeal the denial of his *in forma*

pauperis motion within ten days, nor did he pay the filing fee. Rather, he submitted a new motion to “reconsider” fifteen days later, on May 18th. That motion was granted, and the second notice of appeal was considered filed on May 25th. However, under a strict application of CR 73.02(1), Appellant’s motion was untimely, as the May 25th notice of appeal was filed more than thirty days after the April 16th denial of his RCr 11.42 motion.

However, it is well-settled that Kentucky courts do not strictly apply procedural rules to *pro se* indigent prisoners. Moore v. Commonwealth, 394 S.W.2d 931, 932-33 (Ky. 1965). Instead, we will overlook a *pro se* litigant’s procedural missteps and base a determination on the merits of the case. Moreover, in Ready v. Jamison, this Court abandoned the standard of strict compliance with appellate procedural rules in favor of a substantial compliance standard. 705 S.W.2d 479, 481 (Ky. 1985). We explained: “With this new policy we seek to recognize, to reconcile and to further three significant objectives of appellate practice: achieving an orderly appellate process, deciding cases on the merits, and seeing to it that litigants do not needlessly suffer the loss of their constitutional right to appeal.” Id. at 482.

We believe that Appellant substantially complied with the rules of appellate procedure in this case. Clearly, by virtue of Appellant’s motion to reconsider the denial of his *in forma pauperis* motion, he sought review of that order. The proper procedure is not to ask the circuit court to reconsider its order, but rather to appeal the order to the Court of Appeals. See Gabbard v.

Lair, 528 S.W.2d 675, 677 (Ky. 1975); CR 73.02(1)(b). However, this defect does not warrant automatic dismissal and Appellant's loss of his constitutional right to an appeal of his RCr 11.42 motion.

“While our court continues to have a compelling interest in maintaining an orderly appellate process, the penalty for breach of a rule should have a reasonable relationship to the harm caused.” Ready, 705 S.W.2d at 482. Here, Appellant's original motion to proceed *in forma pauperis* and notice of appeal were timely filed. Though he should have appealed that denial to the Court of Appeals, Appellant did not unduly delay the appellate procedure; he moved for reconsideration within fifteen days. Importantly, the trial court considered Appellant's motion to reconsider on the merits and ultimately granted it. See Singleton v. Commonwealth, 740 S.W.2d 159, 160, n.2 (Ky.App. 1986) (Even though appeal was belatedly perfected, Court of Appeals nonetheless considered the appeal on the merits “in view of the fact the circuit court expressed an opinion upon the constitutional issue raised in the district court.”). Ultimately, the May 25th notice of appeal is untimely by a mere eleven days. In light of these circumstances, and the fact that Appellant was acting *pro se*, we conclude that the procedural defects do not warrant the harsh penalty of an automatic dismissal.

We likewise reject the Commonwealth's assertion that the Court of Appeals is precluded from considering an appeal of case number 03-CR-00431, as it was not identified in either notice of appeal. In Ready, this Court stated

that automatic dismissal is inappropriate “so long as the judgment appealed from can be ascertained within reasonable certainty from a complete review of the record on appeal and no substantial harm or prejudice has resulted to the opponent.” 705 S.W.2d at 482.

Appellant pled guilty and was sentenced for each indictment simultaneously. In addition, Appellant's RCr 11.42 motion addressed the convictions in both indictments, as does the trial court's order denying the motion. Even the Court of Appeals noted that the parties had “ostensibly treated this appeal as being taken from two separate circuit court actions” Appellant clearly intended to appeal both indictments to which he pled guilty. We are reasonably certain that Appellant's appeal includes case number 03-CR-00431. Further, this Court can discern no substantial harm or prejudice to the Commonwealth in so holding.

For the reasons stated herein, the Court of Appeals' dismissal of Appellant's appeal is reversed. The case is remanded to the Court of Appeals with directions to set aside the order of dismissal and to proceed with the appeal on its merits.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Erin Hoffman Yang
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane
Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Todd Dryden Ferguson
Assistant Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601-8204