[Cite as *State v. Harris*, 2010-Ohio-3617.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94186

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVID HARRIS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-282277

BEFORE: Rocco, P.J., Blackmon, J., and Dyke, J.

RELEASED AND JOURNALIZED: August 5, 2010

APPELLANT

David Harris, pro se
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ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Matthew E. Meyer
Assistant Prosecuting Attorney
The Justice Center
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KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant appellant, David Harris, appeals from a common pleas court order denying his motion to set aside and reenter the court's prior order denying his petition for postconviction relief. We find that the court did not abuse its discretion by refusing to set aside its judgment. Accordingly, we affirm.

{¶ 2} Appellant was convicted of two counts of aggravated murder, aggravated robbery, and kidnapping following a jury trial in 1992. All of the

charges carried firearm specifications. The two aggravated murder charges were merged for sentencing. Appellant was sentenced to three years on the firearm specification, to be served prior and consecutive to a term of life imprisonment without the possibility of parole for 30 years on the aggravated murder charge, and concurrent sentences of 7 to 25 years of imprisonment on the robbery and kidnapping charges. His convictions were affirmed on appeal; the Ohio Supreme Court denied leave to appeal.

{¶ 3} Appellant filed a petition for postconviction relief in October 1995. The trial court dismissed his petition. In May 1998, appellant asked the court for relief from judgment, claiming that he did not receive notice that the court had denied his petition until after the time for filing an appeal had expired. The trial court denied this motion. This court subsequently affirmed the trial court's decision to dismiss his petition for postconviction relief.

{¶ 4} Appellant next filed a motion to vacate a void sentence in May 2005. The trial court denied this motion. Appellant's appeal from the trial court's decision was dismissed for failure to file the record.

{¶ 5} Most recently, on January 5, 2009, appellant filed a petition for postconviction relief. The trial court denied this petition in an entry filed January 26, 2009. On September 11, 2009, appellant moved the court to set aside the January 26 order to give him the opportunity to appeal from the

court's ruling. In his motion, he argued that he did not receive a copy of the court's order until July 2009, after the time for filing an appeal had expired. The trial court denied his motion to set aside on October 2, 2009. Appellant appealed from this order on November 2, 2009.

{¶ 6} Appellant contends that he failed to file a timely appeal from the judgment entered on January 26, 2009 because the court failed to notify him of the judgment. He claims his failure to learn of the judgment was the result of surprise, inadvertence or excusable neglect, because he contacted the clerk's office by mail every three weeks and was never informed that the court had ruled on his petition for postconviction relief. He first learned of the judgment when he called the clerk's office in July 2009. He asks this court to order the trial court to vacate and reenter its order denying his petition for postconviction relief so that he can appeal now.

{¶ 7} To fully appreciate the procedural posture of this case, we must unwind and analyze it step-by-step. Appellant's petition for postconviction relief was a collateral civil attack on his criminal conviction. See, e.g., *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111, 639 N.E.2d 67. It is therefore subject to the rules of civil procedure. Civ.R. 58(B) requires that, "[w]hen the court signs a judgment [in a civil matter], the court shall endorse thereon a direction to the clerk to serve upon all parties * * * notice of the judgment and its date of entry upon the journal. Within three days of

entering the judgment upon the journal, the clerk shall serve the parties in a manner prescribed by Civ.R. 5(B) and note the service in the appearance docket." Once the notice is served and noted on the docket, a party's failure to receive the notice does not affect the validity of the judgment or the running of the time for appeal. *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, 523 N.E.2d 851, paragraph 2(c) of the syllabus. On the other hand, if notice is not served or noted on the docket, the time for appeal does not begin to run. *In re Anderson*, 92 Ohio St.3d 63, 67, 2001-Ohio-131, 748 N.E.2d 67.

{¶ 8} App.R. 4(A) establishes the time period within which an appeal must be filed in a civil case. Under App.R. 4(A), a notice of appeal is timely if it is filed "within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure." The tolling provision of App.R. 4(A) applies whenever a party has not been properly served under Civ.R. 58. *In re Anderson*, 92 Ohio St.3d 63, 2001-Ohio-131, 748 N.E.2d 67.

{¶ 9} In this case, appellant claims he was never served with notice of the judgment on his petition for postconviction relief. The judgment entry does not contain a notation directing the clerk to serve him and appellee with notice of the judgment. Therefore, the time for appeal never commenced

pursuant to App.R. 4(A). Nothing precluded appellant — then or now — from filing a notice of appeal from the denial of his petition for postconviction relief despite the lack of notice. Cf. *Frazier v. Cincinnati School of Med. Massage*, Hamilton App. Nos. C-060359 and A-0400551, 2007-Ohio-2390, ¶43; *DeFini v. Broadview Hts.* (1991), 76 Ohio App.3d 209, 601 N.E.2d 199 ("on authority of *Atkinson v. Grumman Ohio Corp., supra* [sic], the interest of judicial economy and on the authority of App.R. 4(A), it was not necessary to file a Civ.R. 60(B) motion. Appellant could have filed his notice of appeal within thirty days from the date the notice of the trial court's judgment was served on him").

{¶ 10} Under Civ.R. 60(B), a court may relieve a party from a final judgment for, e.g., mistake, inadvertence, surprise, or excusable neglect. Appellant here did not demonstrate that the judgment was the result of any mistake, inadvertence, surprise or excusable neglect. Rather, he sought to have the court reenter the judgment so that he might pursue a timely appeal. As noted above, appellant may timely appeal without reentering the judgment because the clerk has not noted on the docket that notice of the judgment was sent. Therefore, the court did not abuse its discretion by denying appellant's motion for relief from judgment. Cf. *DeFini*, supra, at 214 (affirming grant of Civ.R. 60(B) motion for relief from judgment, but noting that it was not necessary because the appellant could appeal anyway).

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
ANN DYKE, J., CONCUR