RENDERED: AUGUST 3, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000633-DG

RICHARD LUKE DEVASIER — APPELLANT

v.

ON DISCRETIONARY REVIEW FROM McCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 05-XX-00010

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: HOWARD AND STUMBO, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Richard Luke Devasier appeals from an order of the McCracken Circuit Court that vacated and remanded a post-judgment order of the McCracken District Court that had acquitted Devasier of the charge of alcohol intoxication. The district court had previously found Devasier guilty of the charge following a bench trial. Upon appeal by the Commonwealth, the circuit court remanded

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the case to the district court for clarification of its basis for entering the judgment of acquittal. Because we conclude that the Commonwealth's appeal from the district court's post-judgment order of acquittal was untimely, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On May 8, 2005, Devasier, along with his roommate, was arrested for alcohol intoxication. A bench trial was held on August 16, 2005. At the conclusion of the trial, the district court found Devasier guilty of alcohol intoxication.

On August 22, 2005, citing Kentucky Rule of Criminal Procedure (RCr) 10.24, Devasier filed a motion captioned “Motion to Reconsider.” He argued in the motion that the evidence submitted at trial was insufficient to support a verdict of guilty, and he requested that the judgment of guilty be set aside and that the district court enter a judgment of acquittal. The motion was noticed for hearing on September 6, 2005, and was served upon the county attorney. On August 24, 2005, the county attorney filed a response to the the motion stating that the testimony of the arresting officers was sufficient to support the conviction and requesting that the motion be denied.

Despite the pending hearing scheduled to hear arguments on Devasier's post-judgment motion, on August 25, 2005, the district court entered an order captioned “Order for Judgment of Acquittal.” The court therein stated that “the evidence presented at trial was insufficient to support a verdict of guilty against the Defendant”, and it ordered that the previously entered judgment of guilty be reversed and that a judgment of acquittal be entered.

For reasons unclear from the record, the scheduled September 6, 2005, hearing was not held. For reasons also unclear, the matter was placed on the district court's October 4, 2005, motion hour docket and was briefly addressed at that time.[2] However, arguments on the merits were not held at that hearing. Rather, upon determining that the Commonwealth had filed a response prior to the entry of the order of acquittal, the district court indicated that it would let the order stand. The Commonwealth then stated to the effect that it was now moving for reconsideration of the ruling, but the district court indicated that it was not going to reverse itself again.

On October 14, 2005, 50 days after the order of acquittal had been entered (10 days after the October 4, 2005, hearing), the Commonwealth filed its notice of appeal to the McCracken Circuit Court challenging the district court's order of acquittal.[3]

Upon the Commonwealth's appeal before the circuit court, Devasier challenged the Commonwealth's appeal as untimely because it had been filed more than 30 days subsequent to the entry of the order of acquittal in violation of the 30-day limitations period contained in RCr 12.04(3). In turn, the Commonwealth argued that Devasier was not entitled to have moved for a judgment of acquittal under RCr 10.24

---

[2] For a possible explanation for the October 4, 2005, docketing of the case see page 4, *infra*.

[3] The Commonwealth's notice of appeal stated that it was appealing from "the Order entered by the McCracken District Court granting defendant's motion to reconsider, the court's subsequent Order of Acquittal, and the court's denial of the Commonwealth['s] response and motion to reconsider or reinstate the original conviction." The record does not contain a written "motion to reconsider or reinstate the original conviction" or a written order denying same.

because he had failed to move for a directed verdict of acquittal[4] at the close of all the evidence.

During oral argument before the circuit court, considerable discussion was given to whether the Commonwealth's appeal was timely. The Commonwealth argued that its August 24, 2005, response to Devasier's RCr 10.24 motion, which was filed prior to the order of acquittal, was "treated" by the district court as a "motion to reconsider" the entry of the order of acquittal and that it thereby tolled the running of the 30-day period for filing an appeal. In support of its position the Commonwealth relied upon the district court's case history sheet entry for October 4, 2005, which contained the entry "Motion to Reconsider" and "CA - [County Attorney's] Response to [Defendant's] motion to reconsider." To clarify the meaning of the entry, the district court clerk was called to testify at the oral argument. Although she did not specifically recall the relevant events, her testimony was that the likely explanation for the docketing of the case on October 4, 2005, was to the effect that the Commonwealth's August 24, 2005, response had likely been misplaced, and upon discovering it, she had placed the matter on the docket. However, no evidence was adduced that the district court judge had independently purported to "treat" the Commonwealth's August 24, 2005, response as a "motion to reconsider."

---

[4] We note that, as a general proposition, in a bench trial "directed verdicts" are not rendered midtrial as they are pursuant to CR 50.01 in a jury trial; rather, the case is involuntarily dismissed pursuant to CR 41.02(2). *See Brown v. Shelton,* 156 S.W.3d 319, 320 (Ky.App. 2004).

By order entered February 23, 2006, the circuit court determined that the Commonwealth's notice of appeal was timely, that the district court erred by entering the order of acquittal without a hearing, and that Devasier was not entitled to file an RCr 10.24 motion because he had not moved for a directed verdict at the close of the evidence. The circuit court further determined, however, that the district court may have relied upon some basis other than Devasier's RCr 10.24 motion in entering the order of acquittal and that remand was therefore necessary for the district court to clarify what that basis, if something other than RCr 10.24, was. As such, the circuit court remanded the case to the district court with the following instructions: "If the[district court] reversed itself based on RCr 10.24, the [district court] is to set aside its order of acquittal and reinstate its judgment of guilt. However, if the trial court's reversal was not based upon RCr 10.24, then the case is remanded for the trial court to enter findings of fact and conclusions of law supporting its acquittal order so that the parties and this court may properly and accurately address the matter." Following the entry of the circuit court's order, this court granted discretionary review.

TIMELINESS OF NOTICE OF APPEAL

RCr 12.04(3) provides that "[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[.]" Because the district court's order of acquittal was entered on August 25, 2005, and the Commonwealth's notice of appeal was not filed until October 14, 2005, Devasier contends that the appeal to the circuit court was not timely. We agree.

The filing of a notice of appeal within the prescribed time limit is mandatory. *United Bonding Ins. Co., Don Rigazio, Agent v. Commonwealth*, 461 S.W.2d 535, 536 (Ky. 1970). Failure to comply with the applicable time limit prescribed for the filing of a notice of appeal is fatal to an attempted appeal. *Manly v. Manly*, 669 S.W.2d 537, 539 (Ky. 1984). The running of the appeal period, however, may be tolled upon the filing of a proper motion to alter, amend, or vacate the challenged order or judgment. *See* Kentucky Rule of Civil Procedure (CR) 73.02(1)(e). The appeal period then begins to run again after the motion to alter, amend, or vacate is ruled upon. *Id.*[5]

It is undisputed that the Commonwealth did not file its notice of appeal within 30 days of the entry of the order of acquittal, and it is also undisputed that the Commonwealth did not file a post-order of acquittal motion to alter, amend, or vacate the judgment as, for example, by way of CR 59.05. In the normal course events, it follows, the Commonwealth's October 14, 2005, notice of appeal was not timely.

Our first consideration, therefore, is whether, as argued by the Commonwealth, its August 24, 2005, response to Devasier's RCr 10.24 motion - which was filed before entry of the final judgment - was treated, or could be treated, as a

---

[5] We note that in *Mills v. Commonwealth,* 170 S.W.3d 310 (Ky. 2005), which became final on September 22, 2005, the Supreme Court ruled for the first time that the filing of a CR 59.05 motion in a criminal case does not toll the running of the appeal period. However, as the decision became final in the midst of the relevant proceedings below, we do not construe the *Mills* rule as applicable to the case at bar. *Id.* at 323 (rule applicable only to cases following finality). We further note that effective January 1, 2007, the pre-*Mills* rule was reinstated such that the filing of a CR 59.05 motion in a criminal case again tolled the running of the appeal period. RCr 12.02.

"motion for reconsideration"[6] of the district court's subsequently entered order of acquittal, and, if so, whether that tolled the running of the appeals period. For the reasons stated below, we conclude that the response was not, and could not, be considered a post-judgment motion that would toll the appeals period.

First, there is no convincing evidentiary support contained in the district court record for the proposition that the Commonwealth's response to Devasier's RCr 10.24 motion was "treated" by the district court as a motion to reconsider its subsequently entered order of acquittal. In fact, this proposition is wholly inconsistent with the order of events. The response was filed before entry of the order of acquittal, and thus it would be incongruent to treat it as a motion to reconsider an event that occurred subsequent to its filing.

Further, the only portion of the district court record relied upon by the Commonwealth in support of its position that the response was treated as a motion to reconsider is the entry on the district court's case history sheet for October 4, 2005, which contains the entries: "Motion to Reconsider" and "CA - [County Attorney's] Response to [Defendant's] motion to reconsider." This entry, standing alone or in combination with any other evidence contained in the district court record, simply does not support the conclusion that the Commonwealth's August 24, 2005, response was "treated" by the district court as a motion to reconsider the order of acquittal. In short, there is nothing in

[6] Following the practice of the parties, in the present discussion we use the terms "motion to reconsider" and "motion for reconsideration" as the equivalent of a CR 59.05 motion to alter, amend, or vacate.

the record evidencing that the district court independently made a judgment that it intended to "treat" the response as a motion to reconsider.

At the oral argument upon appeal before the circuit court, the circuit court, with the acquiescence of the parties, went outside of the district court record and called the district court clerk to testify concerning the significance of the October 4, 2005, case history entry.[7] As previously noted, although she did not specifically recall the relevant events, her testimony was that the likely explanation for the docketing of the case on October 4, 2005, was to the effect that the Commonwealth's August 24, 2005, response had likely been misplaced, and upon discovering it, she had placed the matter on the docket. This explanation does not suggest that the district court itself intended to "treat" the response as a "motion to reconsider." It was only upon leading questioning that the clerk agreed that the entry may have reflected that the response was treated as a motion to reconsider.

Hence, we conclude that the record does not support the proposition that the district court intended to treat the Commonwealth's August 24, 2005, response as a motion to reconsider its August 25, 2005, order.

In any event, even if the district court did unequivocally intend to treat the response as a motion to reconsider, we do not believe that it would have been proper to

[7] "It is a fundamental rule of appellate practice that after a final judgment has been rendered in the [lower] court no additions to the record can be made of matters which were not before the trial court when the judgment was rendered." *Fortney v. Elliott's Adm'r*, 273 S.W.2d 51, 52 (Ky. 1954). As such, we believe that the testimony of the district court clerk is not properly before us. However, we refer to the testimony because it was relied upon by the circuit court in reaching its decision and is part of the underpinning for the Commonwealth's argument that its notice of appeal was timely filed.

do so. First, the Commonwealth does not cite any supporting authority that holds a trial court may "treat" a response to a post-judgment motion as a motion to reconsider the subsequent granting of the motion. Further, the dangers of such a practice are significant. One of the purposes of the criminal and civil rules is to assure order and predictability to litigation. The treating of a pre-judgment response to a motion as a post-judgment motion to alter, amend, or vacate undermines this purpose. Even more so if, as would be the case here, the trial court were to do so without notifying the parties. In short, we hold that a trial court may not treat the Commonwealth's response to an RCr 10.24 motion as a motion to alter, amend, or vacate the subsequent granting of the motion.

Finally, we note that the Commonwealth had well-defined remedies available to challenge the entry of the August 25, 2005, order of acquittal. It could have either filed a CR 59.05 motion to alter, amend, or vacate and thereby have tolled the running of the appeals period, or it could have immediately appealed the district court's order to circuit court. Having done neither, we are constrained to hold that the Commonwealth's October 14, 2005, notice of appeal of the district court's August 25, 2005, order of acquittal was untimely.[8]

---

[8] We have reviewed the reasons given by the circuit court for holding that the Commonwealth's appeal was timely, but we disagree with those reasons. The circuit court stated that cumulative facts call for the conclusion that the appeal was timely. For example, the circuit court noted that the district court's order of acquittal did not contain finality language. However, as the order disposed of all matters relating to the case, finality language was not necessary. Further, the circuit court noted that the district court order was entered prior to the date set for a hearing on Devasier's motion. That fact does not render interlocutory what would otherwise be a final judgment. Also, the hearing was never held. In addition, the circuit court states the fact that there was a question whether the district court entered its order without considering the Commonwealth's response. Likewise, that fact does not render interlocutory what would otherwise be a final judgment. Finally, the circuit court states that the Commonwealth's appeal

OTHER ISSUES

Because of our disposition of the notice of appeal issue, the remaining arguments raised by Devasier are moot and need not be discussed on the merits.

CONCLUSION

For the foregoing reasons, the order of the McCracken Circuit Court is reversed, and this case is remanded for entry of an order dismissing the Commonwealth's appeal as untimely.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Boone Reed
Paducah, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

David B. Wrinkle
Assistant County Attorney
Special Assistant Attorney General
Paducah, Kentucky

---

was also from the district court's order denying the Commonwealth's motion to reinstate the original conviction. In fact, the Commonwealth never made a timely motion, written or otherwise, to reinstate the original conviction. It was only when the case reappeared on the district court's docket on October 4, 2005, after the time to file a notice of appeal had passed, did the Commonwealth orally ask the district court to reconsider its August 25, 2005, order of acquittal. The fact that the court refused to again reconsider the case following an oral motion does not mean that the time to appeal the final judgment begins to run once again.