

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002071-MR

COREY JOHN RICHARDSON

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JOSEPH O'REILLY, JUDGE
ACTION NO. 00-FC-003026

CHRISTINA LYNN NICHOLS

APPELLEE

OPINION AND ORDER
DISMISSING

** ** * * *

BEFORE: BARBER, MINTON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: This appeal was originally dismissed by Opinion and Order rendered November 18, 2005. By order entered February 21, 2006, and by a divided panel, the appeal was returned to the docket for a decision on the merits. Upon review of the entire record, we are of the opinion that we erred by reconsidering our earlier opinion and thus now dismiss this appeal again for the reasons discussed below.

This Court previously dismissed this appeal on the ground that appellant's notice of appeal was not timely filed in

accordance with Ky. R. Civ. P. (CR) 73.02. Upon reconsideration, the following relevant facts are noted. Appellant is a prisoner at the Kentucky State Reformatory proceeding *pro se* in this appeal. In June 2004, appellant filed a motion for genetic testing pursuant to Kentucky Revised Statutes (KRS) 406.081 and KRS 406.091. On September 3, 2004, the Jefferson Family Court entered an order denying appellant's motion requesting genetic testing. Appellant filed a notice of appeal with the clerk of the Jefferson Family Court, with the required fee, on October 7, 2004. This notice of appeal was filed more than thirty days after entry of the final order by the Jefferson Family Court. However, appellant alleges that he previously mailed the notice of appeal on September 20, 2005, but it was not accompanied by the required fee. The clerk refused to file the notice of appeal without the fee and confirmed this in writing to appellant. Appellant further alleges that prison officials were slow in processing his request to pay the fee from his prison account. On September 30, 2004, appellant requested the prison authorities to immediately process his payment. The payment was issued on October 6, 2004.

The time for filing a notice of appeal pursuant to CR 73.02(2) is both mandatory and subject to strict compliance. Fox v. House, 912 S.W.2d 450 (Ky.App. 1995). Appellant alleges

he filed his notice of appeal in September 2004, but it was returned by the clerk for failure to include the required filing fee. In this case, the Clerk of the Jefferson Family Court did not file the notice of appeal and required appellant to pay the required fee before filing. If the Clerk had filed the notice of appeal without receipt of the filing fee, automatic dismissal would not have been required under Foxworthy v. Veneers, 816 S.W. 2d 907 (Ky. 1991). However, in situations such as the case at bar, where an appellant attempts to file the notice of appeal in timely fashion without the required filing fee and later tenders payment after the filing deadline (wherein the notice is then filed by the clerk), dismissal of the case is automatic. See Excel Energy, Inc. v. Commonwealth Institutional Securities, Inc., 37 S.W.3d 713 (Ky. 2001).

Appellant argued in his motion to reconsider that he had tendered his notice of appeal and payment in timely fashion to prison authorities and that delivery of the same to prison authorities was within the time for filing the notice of appeal and thus satisfied the requirement of CR 73.02. In granting the motion to reconsider, this panel effectively endorsed what is commonly referred to as the "prison mailbox rule." However, upon closer scrutiny, we note that Kentucky has not adopted the prison mailbox rule. In fact, the Kentucky Supreme Court expressly declined to adopt this rule in Robertson v.

Commonwealth, 177 S.W.3d 789 (Ky. 2005). Therein, the Kentucky Supreme Court made the following observation:

Perceiving the possibility of unforeseen mischief fostered by otherwise good intentions, we decline to adopt the fiction that "filing" means delivery to prison authorities.

Id. at 791. Thus, under Excel, the filing of appellant's notice of appeal is clearly untimely.

Additionally, there is a practical reason why we should dismiss this appeal. This is a civil domestic case from the Jefferson Family Court. As to the filing of a civil appeal, a *pro se* litigant is held to the same standard as a litigant who has counsel.¹ If appellant were not in prison, there would have been no argument that the appeal should have been dismissed under Excel. By permitting this appeal to go forward, we would essentially be holding that a *pro se* litigant in a domestic action who is in jail or prison has expanded or greater rights than a *pro se* litigant who is not imprisoned as concerns the pursuit of an appeal under applicable Civil Rules. Absent express authority from the Kentucky Supreme Court, there exists

¹ In Robertson v. Commonwealth, 177 S.W.3d 789 (Ky. 2005), the Kentucky Supreme Court did adopt an "equitable tolling remedy" for *pro se* prisoners who file untimely motions under Ky. R. Crim. P. 11.42. However, the Court did not apply this remedy to the late filing of appeals under Ky. R. Civ. P. 73 and thus, Excel Energy, Inc. v. Commonwealth Institutional Securities, Inc., 37 S.W.3d 713 (Ky. 2001) is controlling.

no basis to give a *pro se* litigant in prison greater or expanded rights over other *pro se* litigants in civil appeals.

For the foregoing reasons, it is ORDERED that Appeal No. 2004-CA-002071-MR be and is hereby DISMISSED as untimely.

MINTON, JUDGE, CONCURS.

BARBER, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

ENTERED: April 21, 2006

/s/ Jeff S. Taylor
JUDGE, COURT OF APPEALS

BARBER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I respectfully dissent. My review of the record revealed considerable confusion concerning the circumstances of the clerk's receipt of a filing fee. Given the confusion, I would err on the side of allowing an appeal to go forward whether or not the Appellant was represented by counsel. I agree with the majority that Kentucky has not adopted the "prison mailbox rule," but believe that there are situations, as here, where equitable principles should apply in allowing an appeal to proceed.

Finally, I agree with the majority that the Appellant should not prevail, but I reach that conclusion on the merits of his appeal.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

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