

RENDERED: MAY 26, 2006; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-001205-MR

JIMMIE RAY WHITEHEAD

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT  
HONORABLE D. JEFF CHOATE, SPECIAL JUDGE  
INDICTMENT NO. 04-CR-00097

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER  
DISMISSING APPEAL

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BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; AND HUDDLESTON,  
SENIOR JUDGE.<sup>1</sup>

MINTON, JUDGE: Jimmie<sup>2</sup> Ray Whitehead appeals an order of the  
Harlan Circuit Court denying his motion to alter, amend, or  
vacate the order that set aside the order quashing his

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by  
assignment of the Chief Justice pursuant to Section 110(5)(b) of the  
Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

<sup>2</sup> Whitehead's first name is alternately spelled "Jimmy" at various  
places in the record, including the indictment.

indictment. Because Whitehead appeals from an interlocutory order, we must dismiss the appeal even though the Commonwealth did not question the order's appealability.

The Harlan County Grand Jury indicted Whitehead on three counts of trafficking in a controlled substance. Five months later, the trial court entered an agreed order quashing Whitehead's indictment because one of the officers purportedly involved in investigating Whitehead's case had, himself, become ensnared in a criminal investigation. Approximately three weeks later, however, the trial court, acting on its own motion, issued an order setting aside its previous order quashing Whitehead's indictment. According to the order setting aside the previous order, the trial court reinstated the indictment because the trial court had discovered that the officer in question had not been the primary officer who had worked on Whitehead's case.

Whitehead then filed a motion under Kentucky Rules of Civil Procedure (CR) 59.05<sup>3</sup> to alter, amend, or vacate the order setting aside the order quashing the indictment. After a hearing, the trial court denied Whitehead's motion to alter, amend, or vacate. The circuit court judge then recused himself, and a special judge was appointed. The special judge then

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<sup>3</sup> CR 59.05 is applicable to criminal proceedings. Crane v. Commonwealth, 833 S.W.2d 813, 818 (Ky. 1992).

denied Whitehead's second motion to alter, amend, or vacate, in an order reciting that it was "final and appealable[.]"

Whitehead then filed this appeal. According to Whitehead's notice of appeal, he appeals only from the trial court's denial of his second motion to alter, amend, or vacate.

Whitehead's appeal is doomed from the outset because it was not taken from a final and appealable order, the trial court's benediction notwithstanding. We have jurisdiction only over appeals from final judgments or orders.<sup>4</sup> Indeed, we are obligated to determine if the order appealed from is final and appealable, regardless of whether the parties question the order's appealability.<sup>5</sup>

In order to be final and appealable, an order must decide all of the rights of all of the parties in the proceeding.<sup>6</sup> The order from which Whitehead attempts to appeal does not finally adjudicate the rights of either the Commonwealth or Whitehead as to the criminal charges against Whitehead. It is well settled that an order denying a motion brought under CR 59.05 is not a final and appealable order.<sup>7</sup>

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<sup>4</sup> KRS 22A.020.

<sup>5</sup> Francis v. Crouse Corp., 98 S.W.3d 62, 64 (Ky.App. 2002).

<sup>6</sup> *See, e.g.,* Commonwealth v. Harrelson, 14 S.W.3d 541, 545 (Ky. 2000).

<sup>7</sup> *See, e.g.,* Marshall v. City of Paducah, 618 S.W.2d 433 (Ky.App. 1981).

Finally, the fact that the trial judge's last order has concluding language purporting to make it final and appealable is of no consequence because an interlocutory order is not converted into a final and appealable order by this incantation.<sup>8</sup>

We also note with disapproval that Whitehead's counsel failed to attach a copy of the order from which this appeal was taken as an appendix, as is required by CR 76.12(4)(c)(vii), which is made applicable to criminal cases by Kentucky Rules of Criminal Procedure (RCr) 12.02. Since this appeal is being dismissed on other grounds, this omission is not fatal and does not merit sanctions. But we remind counsel to comply fully with all applicable appellate rules and procedures in the future.

For the foregoing reasons, we order that this appeal is dismissed as being an effort to appeal a non-final order. If necessary, the issues contained in this appeal may be raised afresh in any timely appeal that may arise upon resolution of the underlying criminal charges.

ALL CONCUR.

ENTERED: May 26, 2006 \_

/s/ John D. Minton, Jr.  
JUDGE, COURT OF APPEALS

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<sup>8</sup> See, e.g., Hook v. Hook, 563 S.W.2d 716, 717 (Ky. 1978).

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