

RENDERED: DECEMBER 8, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001298-MR

DEMETRIUS DAVIS

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 04-CR-002371

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER
DISMISSING

** ** *

BEFORE: JOHNSON AND WINE, JUDGES; MILLER,¹ SPECIAL JUDGE.

JOHNSON, JUDGE: Demetrius Davis has appealed from the May 2, 2005, order of the Jefferson Circuit Court which dismissed his motion for reconsideration of a bond assignment. Having determined that Davis's notice of appeal was untimely filed, we must dismiss his appeal.

Davis was indicted by a Jefferson County grand jury on

¹ Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

August 19, 2004, for murder,² assault in the first degree,³ and burglary in the first degree.⁴ His bond was originally set as a cash bond in the amount of \$250,000.00. Davis filed a motion on September 3, 2004, requesting a reduction of his bond. The trial court entered an order on September 16, 2004, amending the bond to a \$250,000.00 cash bond or a \$350,000.00 property bond.

On January 4, 2005, Davis's sister posted a cash bond in the amount of \$250,000.00 and Davis was released from custody. Davis's private attorney moved to withdraw from the case because he had not been paid, and because he needed to hire an additional attorney since Davis's case was eligible for the death penalty. A hearing was held in which the trial court questioned Davis, his sister, and counsel as to the source of the cash bond and whether the trial court should assign a portion of Davis's \$250,000.00 cash bond to his attorney. The trial court was informed that the cash came from various individuals and held a hearing on February 11, 2005, in order to allow any party who had an interest in the cash that had been posted for the bond to contest the assignment. When no one appeared, the trial court entered an order on February 11, 2005,

² Kentucky Revised Statutes (KRS) 507.020.

³ KRS 508.010.

⁴ KRS 511.020.

changing Davis's bond to a \$200,000.00 cash bond and releasing \$50,000.00 of the bond to his attorney.⁵

On March 7, 2005, Davis entered into a plea agreement with the Commonwealth under which he pled guilty to manslaughter in the second degree,⁶ assault in the second degree,⁷ and burglary in the second degree.⁸ He was sentenced on April 13, 2005, to ten years' imprisonment. On April 21, 2005, Davis filed a motion for reconsideration of the bond assignment. The trial court denied the motion on May 2, 2005.⁹ Davis tendered a notice of appeal to this Court on June 3, 2005; however, the notice of appeal was not filed until June 17, 2005, when Davis paid the \$125.00 filing fee.

Pursuant to RCr¹⁰ 12.04, "[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, subject

⁵ After Davis was sentenced, the remaining \$200,000.00 was seized pursuant to a warrant from the United States District Court for the Western District of Kentucky.

⁶ KRS 507.040.

⁷ KRS 508.020.

⁸ KRS 511.030.

⁹ There are actually two motions for reconsideration and two orders filed in the record on appeal. On their face, each motion and order are exactly the same. The first motion was filed April 21, 2005, and the order denying was entered May 2, 2005. The subsequent motion was filed and denied on May 5, 2005.

¹⁰ Kentucky Rules of Criminal Procedure.

to Rule 12.06[.]” CR¹¹ 73.02(2), which is applicable in criminal actions pursuant to RCr 12.02, provides that “[t]he failure of a party to file timely a notice of appeal . . . shall result in a dismissal[.]”¹² The filing fee for an appeal must be paid to the clerk of the circuit court at the time the notice of appeal is filed.¹³

In this case, the order denying the motion for reconsideration of the bond assignment was entered by the court on May 2, 2005. While the Commonwealth states that Davis filed his notice of appeal from the final judgment and sentence entered on April 13, 2005, Davis’s notice of appeal states he is appealing the “final judgment . . . which assigned the bond without his, or the surety’s consent[,],” and was entered on May 2, 2005. Therefore, the notice of appeal in this case was from the order entered on May 2, 2005, and should have been filed no later than June 1, 2005. While Davis tendered his notice on June 3, 2005, it was not filed until the filing fee of \$125.00 was paid on June 17, 2005, which is well outside the time for filing the appeal. The failure to timely file a notice of

¹¹ Kentucky Rules of Civil Procedure.

¹² See Stewart v. Kentucky Lottery Corp., 986 S.W.2d 918 (Ky.App. 1998); and Burchell v. Burchell, 684 S.W.2d 296 (Ky.App. 1984).

¹³ CR 73.02(1)(b). (No motion was filed to allow the appeal to proceed without payment of costs. CR 5.05(4).)

appeal deprives this Court of jurisdiction and leaves us with no choice but to dismiss the appeal.¹⁴

For the foregoing reasons, the motion of the Commonwealth to dismiss the above-styled appeal is GRANTED and this appeal is ORDERED dismissed as untimely filed.

ALL CONCUR.

ENTERED: December 8, 2006

/s/ Rick A. Johnson
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

William Ayers
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky

¹⁴ See Rainwater v. Jasper & Jasper Mobile Homes, Inc., 810 S.W.3d 63 (Ky.App. 1991) (citing CR 73.02(2); and Burchell, 684 S.W.2d at 296).