

MISSOURI COURT OF APPEALS

Olds v. State

532 S.W.2d 518 (Mo. App. 1975) · Decided December 30, 1975

SUMMARY

The court dismissed an appeal from the denial of a motion under Missouri Rule 27.26 to vacate a sentence for robbery and murder. It held that the notice of appeal was filed after the applicable deadline, depriving the court of jurisdiction, and noted that no special order permitting a late appeal had been obtained.

CASE DETAILS

COURT	Missouri Court of Appeals
WRITING FOR THE COURT	Per Curiam
JURISDICTION	Missouri
DECIDED	December 30, 1975
DISPOSITION	dismissed
PROCEDURAL POSTURE	Appeal from the circuit court's denial of an amended motion to vacate sentence filed under Missouri Rule 27.26.
STANDARD OF REVIEW	The court reviewed its own appellate jurisdiction de novo based on the timeliness of the notice of appeal.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Olds v. State

TOPICS

- appellate jurisdiction
- final judgment rule
- appellate procedure
- post-conviction relief
- civil procedure

PRACTICE AREAS

- appellate procedure
- criminal procedure
- post-conviction relief
- civil procedure

QUESTIONS PRESENTED

- Whether the court had jurisdiction to entertain an appeal from the denial of a Rule 27.26 motion when the notice of appeal was filed more than ten days after the judgment became final.
- Whether the absence of a timely notice of appeal required dismissal of the appeal.

HOLDINGS

1. A Rule 27.26 motion is an independent civil action governed, so far as applicable, by the Rules of Civil Procedure; an order overruling the motion is a final judgment for purposes of appeal, becomes final thirty days after entry, and triggers the ten-day period for filing a notice of appeal.
2. The failure to file a timely notice of appeal from a final judgment or order in a Rule 27.26 proceeding deprives the Missouri Court of Appeals of jurisdiction, requiring dismissal of the appeal.

KEY QUOTATIONS

“The failure to file a timely notice of appeal from a final judgment or order in a 27.26 proceeding deprives this court of jurisdiction to entertain this appeal.” (519)

“The failure of appellant’s original counsel to file a timely notice of appeal has deprived this court of jurisdiction.” (519)

FACTUAL BACKGROUND

Olds was serving concurrent life sentences for robbery and murder. He filed a motion and amended motion under Rule 27.26 seeking to vacate the judgment and sentence. The circuit court overruled the motion on July 12, 1974, but the notice of appeal was not filed until at least August 26, 1974.

PROCEDURAL HISTORY

Olds filed a Rule 27.26 motion to vacate a life sentence imposed for robbery and murder, later filing an amended motion. After a hearing, the circuit court overruled the motion in a written opinion entered July 12, 1974. The Missouri Court of Appeals dismissed the appeal because the notice of appeal was filed after the applicable deadline and no special order permitting an untimely appeal had been obtained.

DISPOSITION

dismissed

CASES CITED

- Lahmann v. State, 509 S.W.2d 791, 794 (Mo. App. 1974)
- State v. Gullett, 411 S.W.2d 227, 228 (Mo. 1967)
- Johnson v. State, 521 S.W.2d 479, 480 (Mo. App. 1975)
- Griffin v. State, 529 S.W.2d 665 (Mo. App. 1975)

OPINION

PER CURIAM.

PER CURIAM. This is an appeal from a judgment of the circuit court of the City of St. Louis denying appellant’s amended motion to vacate sentence filed pursuant to Rule 27.26, V.A. M.R.

Because a timely notice of appeal was not filed in this cause, we are without jurisdiction and accordingly dismiss the appeal.

On February 28, 1974, appellant filed his motion to vacate and set aside a judgment sentencing appellant to life imprisonment for the offenses of robbery and murder to run concurrently. Later an amended motion was filed on May 13, 1974.

On July 2, 1974, a hearing was held on the post conviction motion. On July 12, 1974, the court in a written opinion overruled the motion. The record is unclear as to the exact date a notice of appeal was filed by appellant's counsel. One paper (not a notice) is dated August 26, 1974, but filed September 10, *5191974, and the "notice of appeal" is dated September 10, 1974.

In either case the notice was not timely filed, and we are without jurisdiction to entertain the appeal. A motion filed under Rule 27.26 is an independent civil action which is governed, so far as applicable, by the Rules of Civil Procedure. Rule 27.26(a); *Lahmann v. State*, 509 S.W.2d 791, 794 (Mo.App.1974). An order overruling a 27.26 motion is deemed a final judgment for purposes of appeal.

Rule 27.26(j); *State v. Gullett*, 411 S.W.2d 227, 228 (Mo.1967). A judgment becomes final thirty days after its entry. Rule 81.05. A notice of appeal must be filed within ten days after the judgment or order becomes final. Rule 81.04. If no notice is filed within the time authorized, no appeal shall be "effective." Rule 81.04.

The order of the circuit court entered on July 12, 1974 denying appellant's motion became final August 12, 1974. Taking the earliest date — August 26, 1974 — as the date of filing the notice of appeal, the appeal is out of time.

The failure to file a timely notice of appeal from a final judgment or order in a 27.26 proceeding deprives this court of jurisdiction to entertain this appeal. *State v. Gullett*, supra, 411 S.W.2d at 228; *Johnson v. State*, 521 S.W.2d 479, 480 (Mo.App.1975); *Griffin v. State*, 529 S.W.2d 665 (Mo.App.1975). Nothing in the record indicates that an application was made to the appropriate appellate court to obtain a special order to appeal.

Rule 81.07. The failure of appellant's original counsel to file a timely notice of appeal has deprived this court of jurisdiction. Hence, the appeal must be and is dismissed. The appeal is dismissed. All the Judges concur.