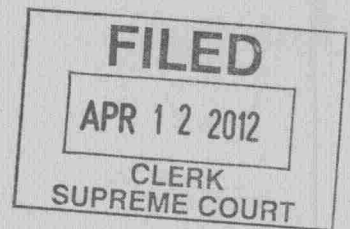


**SUPREME COURT OF KENTUCKY
2010-SC-000326-DG
2011-SC-00508-DG**



COMMONWEALTH OF KENTUCKY

APPELLANT/CROSS-APPELLEE

V.

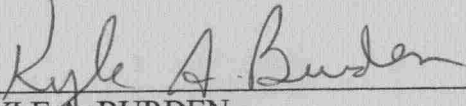
ON REVIEW FROM COURT OF APPEAL
NOS. 2007-CA-01264 AND 2008-CA-002376
LOGAN CIRCUIT COURT NO. 00-CR-00126

JAMES W. STEADMAN

CROSS-APPELLANT/APPELLEE

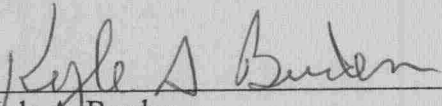
**BRIEF FOR CROSS-APPELLANT/APPELLEE
JAMES W. STEADMAN**

Submitted by,


KYLE A. BURDEN
436 SOUTH SEVENTH STREET, 1ST FLOOR
LOUISVILLE, KENTUCKY 40203
PHONE: 502-583-2687
FAX: 502-584-4621

CERTIFICATION OF SERVICE

I hereby certify that the record on appeal has been returned to the Clerk of the Court and that a copy of Brief for the Cross-Appellant/Appellee has been re-mailed this 11th day of April 2012, to Hon. Tyler Gill, Judge Logan Circuit Court, Courthouse, 200 West 4th Street, P.O. Box 667, Russellville, Kentucky 42276-0667, and to Assistant Attorney General, Office of Criminal Appeals, Office of the Attorney General 1024 Capital Center Drive, Frankfort, Kentucky 40601.


Kyle A. Burden
Counsel for Cross-Appellant/Appellee

INTRODUCTION

This is a criminal case wherein the Cross-Appellant/Appellee filed a CR 60.02 after discovering the Commonwealth had in its possession exculpatory evidence that it had repeatedly denied having in its possession for seven years, the CR 60.02 was denied with no hearing being conducted. A CR 59.05 was filed which was denied, the Court of Appeals dismissed the subsequent Appeal based upon the untimeliness of the filing of the CR 59.05. It is the dismissal of his Appeal, for being untimely filed, that he seeks to have vacated and remanded.

STATEMENT CONCERNING ORAL ARGUMENT

The Cross-Appellant/Appellee requests oral arguments be heard.

STANDARD OF REVIEW

The trial judge's findings of fact will only be overturned if clearly erroneous. Finally, the Appellate Court must conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law. Drake v. Commonwealth, 222 S.W. 3D 254, 256 (Ky. App. 2007).

TABLE OF CONTENTS

Introduction, Statement Concerning Oral Argument and Standard of Review.....	i
Statement of Points and Authorities.....	iii
Appendix Index.....	iv
Statement of Case.....	1
ARGUMENTS.....	2-4
I. <u>HUDDLESTON HOLDS THAT THE DATE THE CR 59.05 IS MAILED IT IS DEEMED SERVED</u>	2
II. <u>CR 6.05 AFFORDED MR STEADMAN THREE ADDITIONAL DAYS FOR THE FILING OF HIS CR 59.05 MOTION.</u>	3
CONCLUSION.....	4
APPELLEE RESPONSE.....	5
STATEMENT CONCERNING ORAL ARGUMENT.....	5
COUNTERSTATEMENT OF THE CASE.....	6
ARGUMENTS	
I. <u>THE NOTICE OF APPEAL DELIVERED TO THE TRIAL COURT ON MAY 29, 2007, DIVESTED THE TRIAL COURT OF JURISDICTION</u>	7-8
II. <u>THE FINAL JUDGMENT SENTENCE OF IMPRISONMENT MADE NO REFERENCE TO RESTITUTION</u>	8
CONCLUSION.....	9

STATEMENT OF POINTS AND AUTHORITIES

STANDARD OF REVIEW

Drake v. Commonwealth, 222 S.W.3d 254, 256 (Ky. App. 2007).....i

STATEMENT OF THE CASE

Commonwealth v. Gaddie, 239 S.W.3d 59, 62 (Ky.2007).....1

I. HUDDLESTON HOLDS THAT THE DATE THE CR 59.05 IS MAILED IT IS DEEMED SERVED.

CIVIL RULES

Civil Rule 5.02.....2

Civil Rule 59.05.....i,1-3

Civil Rule 60.02.....i,1-3

CASES

Huddleston v. Murlev, 757 S.W.2d 216, 217 (Ky. App. 1988).....2

II. CR 6.05 AFFORDED MR STEADMAN THREE ADDITIONAL DAYS FOR THE FILING OF HIS CR 59.05 MOTION.

CIVIL RULES

Civil Rule. 6.05.....3

Civil Rule 59.05.....3

CASES

Arnett v. Kennard, 580 S.W.2d 495 (Ky. 1979).....3

Commonwealth of Kentucky Court of Appeals NO. 2009-CA-000227-ME, TRAVIS JOHN NORMILE APPELLANT v. HONORABLE JASON S. FLEMING, JUDGE ACTION NO. 06-CI-00322 BOBBIE MARIE WILSON.....3

CROSS-APPELLANT APPENDIX INDEX

EXHIBIT ONE Assistant Commonwealth Attorney Vaughn Wallace letter.....	1
EXHIBIT TWO Appellants CR 60.02 Motion denial entered on July 22, 2008.....	1
EXHIBIT THREE CR 59.05 Motion to Reconsider the denial of his CR 60.02 Motion with the supplemental pleadings.....	1
EXHIBIT FOUR Denial of the Motion for Reconsideration entered on October 6, 2008.....	1
EXHIBIT FIVE Court of Appeals Opinion rendered on April 16, 2010	1
EXHIBIT SIX Copy of the Kentucky Corrections Policies and Procedures, Policy 16.2 Inmate Correspondence.....	2
EXHIBIT SEVEN Kentucky Court of Appeals NO. 2009-CA-000227-ME, TRAVIS JOHN NORMILE APPELLANT v. HONORABLE JASON S. FLEMING, JUDGE ACTION NO. 06-CI-00322 BOBBIE MARIE WILSON.....	3

APPELLEE INDEX

EXHIBIT EIGHT Final Judgment.....	6,7
EXHIBIT NINE May 29, 2007, Notice of Appeal.....	6,7
EXHIBIT TEN May 29, 2007, Order Granting In Forma Pauperis.....	6,7
EXHIBIT ELEVEN Restitution Order.....	6-8

STATEMENT OF THE CASE

Appellant filed a CR 60.02 Motion to Vacate the Conviction and Sentence of Imprisonment. The CR 60.02 Motion was based upon the failure of the Commonwealth to produce exculpatory evidence from the Barren Circuit Court case 00-CR-00176, which was exculpatory in this case *sub judice*, despite the Appellant's repeated Motions to both courts, Logan County and Barren County, to produce such. The Commonwealth denied the existence of said documents until, approximately a year later, when Assistant Commonwealth Attorney Vaughn Wallace sent a letter on April 29, 2008. (See Exhibit One)

The Logan Circuit Court overruled the Appellants CR 60.02 Motion by order entered on July 22, 2008. (See Exhibit Two)

On or before August 1, 2008, (August 1, 2008, was a Friday) Appellant served a CR 59.05 Motion to Reconsider the denial of his CR 60.02 Motion with the supplemental pleadings, including the letter from the Special Barren Commonwealth Attorney, for Barren Circuit Court case, 00-CR-00176, Honorable Vaughn Wallace. (See Exhibit three and one)

On October 6, 2008, the trial court overruled the Motion for Reconsideration. (See Exhibit four)

On April 16, 2010, the Court of Appeals dismissed Steadman's Appeal, which stated,

We agree with Commonwealth that Steadman's notice of appeal was untimely filed and such is dispositive of the issues brought forth by Steadman's CR 60.02 motions.

On July 22, 2008, the court entered an order denying Steadman's CR 60.02 motions. Thirteen days later on August 4, 2008, Steadman filed an untimely motion for reconsideration. CR 59.05 only permits such motions to be filed within ten days of the entry of the final judgment; thereafter the trial court loses jurisdiction to proceed with a case. *See Commonwealth v. Gaddie*, 239 S.W.3d 59, 62 (Ky. 2007).

It is from this April 16, 2010, Opinion that the Appellant, James W. Steadman, appeals. (Exhibit Five)

ARGUMENTS

I. HUDDLESTON HOLDS THAT THE DATE THE CR 59.05 IS MAILED IT IS DEEMED SERVED.

The Commonwealth sought to have the Movant's appeal, addressing Steadman's CR 60.02/CR 59.05, dismissed on the grounds of untimeliness of the filing of the notice of appeal based upon the untimeliness of the filing of the CR 59.05. The theory promulgated by the Commonwealth was that Steadman's CR 59.05 was untimely and that the subsequent motions and eventual Notice of Appeal should have been based upon the denial of the CR 60.02 date rather than the CR 59.05 and the appropriate motions filed thereafter. The Court of Appeals, in its Opinion dismissed Mr. Steadman's second appeal as untimely. This ruling is incorrect. One must bear in mind Mr. Steadman was an indigent inmate with the Kentucky Department of Corrections in the Nursing Care Facility at the time of the filing of his CR 59.05 motion and was incapable of personally clocking and dropping his Motion at the Courthouse. Mr. Steadman was wholly reliant upon the Department of Corrections for the postage and mailing of his CR 59.05 as he had no access to the general population mailbox and was indigent. Steadman's CR 59.05 Motion was served and mailed before or on Friday, August 1, 2008, it was received and filed on Monday, August 4, 2008 at 2:34 p.m. by the Logan Circuit Court Clerk.

The CR 59.05 Motion was filed on or before August 1, 2008, as the Department of Corrections does not perform mail services on weekends or holidays. To establish such, Steadman attaches a copy of the Kentucky Corrections Policies and Procedures, Policy 16.2 Inmate Correspondence as Exhibit Six. The Motion was deemed served at the time it was delivered to the jailers as they were the only mail handlers. "The requirements for timeliness of a motion for new trial under CR 59.02, and to alter, amend, or vacate a judgment under CR 59.05, is [sic] that they be *served* not later than ten days from the entry of the final judgment." (Emphasis added). Huddleston v. Murlev. 757 S.W.2d 216, 217 (Ky. App. 1988). Service by mail is complete upon mailing. CR 5.02, Huddleston. 757 S.W.2d at 217. The date on which the motion is received and clocked by the court clerk is not the determinative issue, it is the date on which it is served, in this case it was Friday August 1, 2008 or earlier.

Mr. Steadman's CR 59.05 was timely filed, hence the Court of Appeals dismissal was clearly erroneous. Wherefore, the dismissal of Steadman's Appeal must be vacated and remanded for its due consideration.

II. CR 6.05 AFFORDED MR STEADMAN THREE ADDITIONAL DAYS FOR THE FILING OF HIS CR 59.05 MOTION.

The Court of Appeals cited Arnett v. Kennard, 580 S.W.2d 495 (Ky. 1979) as the basis for dismissing the CR 59.05 as being untimely thus rendering Mr. Steadman's appeal following the CR 60.02 Motion as untimely. The Court of Appeal's reliance on this case is in direct contradiction of its more recent ruling issued in 2009 addressing the same exact issue. (See provided copy of Commonwealth of Kentucky Court of Appeals NO. 2009-CA-000227-ME, TRAVIS JOHN NORMILE APPELLANT v. HONORABLE JASON S. FLEMING, JUDGE ACTION NO. 06-CI-00322 BOBBIE MARIE WILSON, exhibit seven) Although an unpublished opinion, it is clear that there is an uncertainty as to the application of CR 6.05 and the three days afforded due to mailing for a CR 59.05 Motion.

In the unpublished Normile Opinion, the Court of Appeals stated the following:

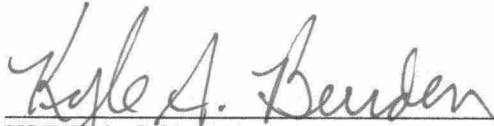
"Rule 59.05 of the Kentucky Civil Rules of Procedure (CR 59.05) mandates that a motion to alter, amend, or vacate must be *served not* later than ten days after the entry of the final judgment. (Emphasis added). In the instant case, the final amended order was entered on November 7, 2008. Since the copy of the final order was mailed to Normile, three additional days should be added to the time frame allotted in CR 59.05 pursuant to CR 6.05. Thus, Normile's motion had to be served by November 20, 2008."

Either CR 6.05 applies to a CR 59.05 motion or it does not. The recent unpublished Opinion stated that CR 6.05 DOES apply to CR 59.05. The law cannot be vague or ambiguous or selective as to its application. In the recent case addressing CR 6.05 and CR 59.05, the Court of Appeals stated that CR 6.05 had application for a CR 59.05 Motion, however, in Mr. Steadman's case, the Court of Appeals said it does not. In light of the more recent case, although unpublished, the case is directly on point as to this limited narrow issue of CR 6.05's application to CR 59.05 Motions. For this and the above cited reason, Mr. Steadman's CR 59.05 was timely filed. The Court of Appeals dismissal of this portion of his Appeal was erroneous and must be vacated and remanded back for further review by the Court of Appeals.

CONCLUSION

As Steadman's CR 59.05 was not untimely, the dismissal of his Appeal must be vacated and the matter remanded back to the Court of Appeals for proper and appropriate consideration.

Respectfully submitted,

A handwritten signature in cursive script, reading "Kyle A. Burden", written over a horizontal line.

KYLE A. BURDEN
436 SOUTH SEVENTH STREET, 1ST FLOOR
LOUISVILLE, KENTUCKY 40203
PHONE: 502-583-2687
FAX: 502-584-4621
COUNSEL FOR CROSS-APPELLANT

**APPELLEE'S (STEADMAN'S) RESPONSE TO
APPELLANT'S (COMMONWEALTH'S) BRIEF**

STATEMENT CONCERNING ORAL ARGUMENT

The Appellee/Cross-Appellant requests oral arguments be heard.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

<u>City of Devondale v. Stallings</u> , 795 S.W.2d 954, 957 (Ky. 1990).....	7
<u>Nelson County Board of Education v. Forte</u> , 337 S.W.3d 617, 626 (Ky. 2011).....	7
<u>Rollins v. Commonwealth</u> , 294 S.W.3d 463 (Ky. App. 2009).....	8

COUNTERSTATEMENT OF THE CASE

The Appellee, Steadman, asserts the following as his Counterstatement of the case. The trial court entered its Final Sentence on May 29, 2007. (See Appellee's exhibit one) The Department of Public Advocacy on May 29, 2007, tendered to the trial court its Notice of Appeal and the Order Granting in Forma Pauperis Status, Appointing Counsel and Ordering Clerk to Prepare Video Record, which was signed by Judge Gill on the very same day, May 29, 2007. (See Appellee's Exhibit two, and three) The Restitution Order was entered on June 13, 2007. (See Appellee's Exhibit four)

The Commonwealth either intentionally or carelessly disregards the simple unadulterated fact that both the Notice of Appeal and the In Forma Pauperis notices were tendered to the trial court on May 29, 2007. The Certificate of Service signed by the Hon. Leilani K. M. Krashin, on the Notice of Appeal, specifically states that it was propounded to the trial court on May 29, 2007. To further corroborate this issue is the simple fact that the trial court signed and dated the In Forma Pauperis form on May 29, 2007. And lastly, to further drum home this highly relevant and crucial fact is the fact that both documents were entered by the clerk on June 20, 2007, despite the trial court having already signed the In Forma Pauperis form on May 29, 2007.

The Commonwealth's Statement Of The Case mischaracterized when the Notice of Appeal was filed with the trial Court. The Commonwealth on page two states, "The notice of appeal for Steadman was filed of record on June 20, 2007." which is wholly misleading. June 20, 2007, is the date the clerk entered said Notice, but it is not when the trial court received it. This is crucial and an important issue as further expounded upon in one the Appellee's arguments.

ARGUMENTS

I. THE NOTICE OF APPEAL DELIVERED TO THE TRIAL COURT ON MAY 29, 2007, DIVESTED THE TRIAL COURT OF JURISDICTION.

The Hon. Leilani K. M. Krashin of the Department of Public Advocacy tendered to the trial court on May 29, 2007, its Notice of Appeal and the Order Granting In Forma Pauperis Status Appointing Counsel, and Ordering Clerk to Prepare Video Record. (See Exhibit). The Order Granting In Forma Pauperis was signed by Judge Gill on May 29th, 2007, but not entered by the clerk until June 20, 2007. Simultaneous with the tendering and signing of this motion was the Notice of Appeal, which was also entered on June 20, 2007, by the clerk. The Certification prepared by Hon. Krashin states that it was tendered on May 29, 2007, to the trial judge and others. At the point Judge Gill received the Notice of Appeal, on May 29, 2007, the trial court no longer retained jurisdiction. It matters not when the Notice was stamped by the clerk. The determinative issue is when the trial court was aware that it no longer had jurisdiction to rule upon any other matters concerning the case *sub judice*. In this case it was May 29, 2007, once the Notice of Appeal was tendered, after entry of the Final Judgment Sentence of Imprisonment.

“In an appeal, the notice of appeal is the means by which an appellant invokes the appellate court’s jurisdiction.” *Nelson County Board of Education v. Forte*, 337 S.W.3d 617, 626 (Ky. 2011). “A notice of appeal, when filed, transfers jurisdiction of the case from the circuit court to the appellate court. It places the named parties in the jurisdiction of the appellate court.” *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990).

The law is clear. The trial court no longer retained jurisdiction to rule upon any matters pertaining to the modification of the Final Judgment Sentence of Imprisonment entered on May 29, 2007, once it received the Notice of Appeal on May 29, 2007. The trial court is without the ability to snatch back jurisdiction from the appellate courts once the Notice of Appeal is filed. The June 13, 2007, Restitution Order was inappropriately entered as the trial court knew jurisdiction of the case had been

transferred to the Court of Appeals. Steadman's case was no longer under the jurisdiction of the trial court but rather was under the jurisdiction of the Court of Appeals. For this reason, the Order of Restitution entered on June 13, 2007, without appropriate jurisdiction of the trial court, is void and the Court of Appeals' decision pertaining to this matter must be affirmed.

II. THE FINAL JUDGMENT SENTENCE OF IMPRISONMENT MADE NO REFERENCE TO RESTITUTION.

The Final Sentence is what it purports be, namely the Final Sentence. In the Final Sentence entered on May 29, 2007, there is no reservation language as to the issue of restitution. In Rollins v. Commonwealth, 294 S.W.3d 463 (Ky. App. 2009), there was an open-ended restitution order, which left “the amount of full restitution to be determined” at a future date. Id. at 464 This “reservation” did not extend jurisdiction to the trial court to later resolve the issue of restitution. . Even more compelling to refute the Commonwealth's assertion is the fact that no such reservation was contained within the written Final Sentence in the case *sub judice*. The trial court entered the Final Sentence on May 29, 2007, it entered the Restitution Order on June 13, 2007. More than ten days had lapsed from May 29, 2007, to June 13, 2007, the trial court lacked any jurisdiction on June 13, 2007.

The trial court made no indication on the written Final Sentence order that it would reserve the issue of restitution. After the expiration of the tenth day, the trial court could not proceed to enter any Orders affecting the Final Sentence as it no longer had jurisdiction. The Commonwealth, one could suppose, could have filed a CR 59.05 to alter, amend or vacate the judgment, which would have extended the trial court's jurisdiction to enter the appropriate and timely modification, but alas it did not. Because the trial court did not have jurisdiction on June 13, 2007, to enter the Restitution Order, the Court of Appeals' Opinion must be affirmed as to the issue pertaining to the restitution.

CONCLUSION

Under both arguments raised by the Appellee, Steadman, it has been unequivocally established that the trial court had no jurisdiction to enter the Restitution Order entered on June 13, 2007. The Court of Appeals properly reached its conclusion and its Opinion affecting the issue of restitution must be affirmed and the Restitution Order entered on June 13, 2007, be vacated.

Respectfully submitted,



KYLE A. BURDEN
436 SOUTH SEVENTH STREET, 1ST FLOOR
LOUISVILLE, KENTUCKY 40203
PHONE: 502-583-2687
FAX: 502-584-4621
COUNSEL FOR APPELLEE