

2018 IL App (2d) 180017-U
No. 2-18-0017
Order filed May 1, 2018

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

| | | |
|--------------------------|---|-------------------------------|
| <i>In re</i> MARRIAGE OF |) | Appeal from the Circuit Court |
| DENNIS BORDYN, |) | of Du Page County. |
| |) | |
| Petitioner-Appellant, |) | |
| |) | |
| and |) | No. 13-D-1112 |
| |) | |
| JUDITH BORDYN, |) | Honorable |
| |) | Neal W. Cerne, |
| Respondent-Appellee. |) | Judge, Presiding. |

JUSTICE JORGENSEN delivered the judgment of the court.
Justice Birkett concurred in the judgment.
Presiding Justice Hudson specially concurred.

ORDER

- ¶ 1 *Held:* Petitioner’s notice of appeal was untimely. His ability to seek relief under Illinois Supreme Court Rule 303(d) has expired. Therefore, petitioner’s motion to vacate the dismissal of his appeal and to recall the mandate must be denied. Only supervisory relief remains.
- ¶ 2 In 2017, a panel of this court dismissed petitioner’s appeal No. 2-15-0301 because claims remained pending before the trial court.
- ¶ 3 Thereafter, on December 5, 2017, the trial court entered an order resolving the remaining claims. On January 4, 2018 (*i.e.*, day 30), petitioner electronically transmitted a notice of appeal

and notice of filing to the circuit court. The electronic filing system issued a transaction confirmation, listing the “transaction type” as “document filing,” and reflecting receipt of the documents by the clerk’s office at 2:37 p.m.

¶ 4 However, the next day (*i.e.*, day 31), at 9:40 a.m. (*i.e.*, approximately 18 hours after receipt by the clerk’s office), petitioner received a transaction review result, reflecting that his upload was rejected because the notice of appeal and notice of filing had been sent as one document. The notice instructed petitioner to upload the two notices as separate documents and to put his Du Page County attorney number (instead of his ARDC number) on them. Petitioner asserts that, immediately upon receipt of the rejection notice, he made the changes and re-sent the documents, with receipt acknowledged by the system. As a result of the foregoing, petitioner’s notice of appeal contains a January 5, 2018, file-stamp date (*i.e.*, day 31).

¶ 5 On March 1, 2018, this court granted respondent’s motion to dismiss petitioner’s appeal as untimely. The mandate also issued that day.

¶ 6 On March 12, 2018, petitioner moved this court to vacate the order granting the motion to dismiss (relief which inherently also includes recalling the mandate). He argues that he clearly timely filed his notice of appeal on January 4, 2018, and that the circuit court should have accepted the notice of *appeal* as filed that day, even if it later required that the notice of *filing* be re-submitted as a separate document. Petitioner asserts that it was unreasonable for the system to wait until the next day to decline to file *both* documents and, had he been advised on January 4, 2018, that the documents needed to be separated, he could have timely corrected the alleged deficiency. Petitioner alternatively requests that, if we do not find his notice of appeal timely, we extend by one day the period during which the notice must be filed under Illinois Supreme Court Rule 303(d) (eff. July 1, 2017) (allowing extensions of time to file a notice of appeal in

certain circumstances).¹ Respondent objects and, for the following reasons, we are compelled to reject petitioner's motion.

¶ 7 As we recently recounted in *Peraino v. County of Winnebago*, 2018 IL App (2d) 170368, ¶ 12, a timely-filed notice of appeal is a jurisdictional requirement, and we do not have authority to excuse non-compliance with the filing requirements set forth by supreme court rules. As relevant here, Illinois Supreme Court Rule 303(a)(1) (eff. Jan. 1, 2015) requires that a notice of appeal be filed within 30 days after entry of the judgment. Illinois Supreme Court order M.R. 18368 authorized Illinois circuit courts to accept the electronic filing of documents in civil cases, and it further approved filing standards “to maintain uniformity of electronic filing practices and procedures” throughout the State. Ill. S. Ct., M.R. 18368 (eff. Jan. 1, 2013). The supreme court has additionally stated that “[i]n all Circuit Courts operating an approved local e-filing program by the filing date of this Order, e-filing of civil cases shall occur per the applicable policies, guidelines and/or standards authorized by the Supreme Court.” Ill. S. Ct., M.R. 18368 (eff. Jan. 1, 2018) (filed Jan. 22, 2016). Those filing standards reflect that petitioner's notice of appeal here was simply not *filed* until day 31. Specifically, filing standard number three provides that a clerk must record the dates and times that documents are transmitted, received, accepted, or rejected and “[a]ny electronic document or record submitted to the clerk of the court for filing shall be deemed filed *if not rejected* by the clerk.” (Emphasis added.) Illinois Supreme Court, Electronic Filing Standards and Principles (amended Sept. 16, 2014), http://www.illinoiscourts.gov/SupremeCourt/Policies/Pdf/Electronic_Filing_Standards.pdf.

¹ Petitioner also asks that we grant relief pursuant to Illinois Supreme Court Rule 606(c) (eff. July 1, 2017); however, Rule 606(c) concerns criminal appeals and, therefore, is inapplicable here.

Moreover, the supreme court's Electronic Filing Procedures and User Manual reflects in sections 7(d) and (f) that "[a]n e-filed document submitted to the Clerk for filing shall be deemed filed upon review *and acceptance* by the Clerk" and, "[i]n the event the Clerk *rejects* a submitted document, the document *will not be filed* ***." (Emphases added.) We finally note that the filing standards also provide at section 9(d) that multiple documents combined into one PDF document shall not be accepted.

¶ 8 We recognize that this result is harsh, and we are not without empathy for petitioner's circumstances. His arguments hold emotional appeal. Indeed, there appear to be no deadlines with which the clerk's office must comply in the process of accepting or rejecting submitted jurisdictional documents. Here, (unlike the plaintiff in *Peraino*), petitioner did not submit his documents at the proverbial "11th hour," resulting in *receipt* on day 31. Clearly, the documents were received on day 30, early-to-mid afternoon. However, petitioner did not receive from the clerk's office a rejection until the next day, a response time that had jurisdictional implications. One might imagine scenarios wherein a litigant submits his or her documents even *earlier* than day 30, but a combination of weekends, court holidays, or even a busy or short-staffed clerk's office nevertheless operate to delay a rejection notice of rejection until after the jurisdictional period has expired. Here, petitioner was not alerted to his mistake until 18 hours after his submission was received by the clerk, and he could not timely correct the basis for the rejection and preserve his jurisdiction. While petitioner's suggestion— that we should treat at least the jurisdictional portion of his submission (the notice of appeal) as filed when it was received into the custody of the clerk's office—is tempting, we have no authority to do so. It is simply not for this court to make exceptions to jurisdictional requirements, re-write supreme court rules, or create new rules in this situation.

¶ 9 Critically, we emphasize that, upon learning that his notice of appeal was not filed until day 31, petitioner was *not* left without recourse. We encourage all litigants to pay heed to Rule 303(d) which permits, in certain circumstances, an extension of time to file a notice of appeal. Specifically, Rule 303(d) provides:

“On motion supported by a showing of reasonable excuse for failure to file a notice of appeal on time, accompanied by the proposed notice of appeal and the filing fee, filed in the reviewing court within 30 days after expiration of the time for filing a notice of appeal, the reviewing court may grant leave to appeal and order the clerk to transmit the notice of appeal to the trial court for filing.” Ill. S. Ct. R. 303(d) (eff. July 1, 2017).

Unfortunately, as noted, the rule requires that the motion be filed “within 30 days after expiration of the time for filing a notice of appeal[.]” Here, petitioner’s period for filing a notice of appeal expired on January 4, 2018. Thus, his Rule 303(d) motion needed to be filed with this court by February 5, 2018. We received no such motion. Even if we treat the present motion as one under Rule 303(d), it was filed on March 12, 2018, and, thus, is late.

¶ 10 Nevertheless, petitioner is *still* not left without potential recourse. Petitioner may request supervisory or other relief from the supreme court. In sum, we must deny petitioner’s motion to vacate the dismissal order and recall the mandate.

¶ 11 Motion denied.

¶ 12 PRESIDING JUSTICE HUDSON, specially concurring:

¶ 13 I am compelled to concur in the majority’s decision. I do so primarily on the basis that the petitioner failed to avail himself of Rule 303(d) in this case. However, I write separately to highlight the problematic implications this decision portends. As the majority observes, the

supreme court's e-filing standards dictate that an electronically submitted document is not actually "filed" until the clerk accepts it. Thus, here, because the clerk rejected petitioner's document, that document was not actually "filed." If the case had been in a prejudgment posture—and if petitioner's document had been, say, a motion or a response to one—this likely would have caused no problem; petitioner could have simply resubmitted the document correctly. I suspect that, when the supreme court gave the clerk this power of rejection, the court did so in anticipation of only those minimal consequences. But petitioner's document was a notice of appeal, and petitioner submitted it on day 30, and the clerk rejected it on day 31. When the clerk did so, petitioner could not resubmit his notice of appeal. He was simply out of time. And because he was apparently unaware of the avenue of moving to file a late notice of appeal under Rule 303(d), he lost his right to appeal.

¶ 14 Like most technological innovations, e-filing was supposed to make things easier and more efficient. Yet in this case the opposite seems to have occurred. Before e-filing, had petitioner submitted two documents that were improperly stapled together, the clerk would likely have simply removed the staple and filed the documents.

¶ 15 It might be advisable to clarify the scope of the clerk's power of rejection. Perhaps, the filing date of a document that is rejected under the circumstances that exist in this case and then correctly resubmitted should automatically relate back to the date of its original submission.

¶ 16 But one way or another, what happened here is likely to happen again.