

Judge Whitmer

No. 91-5010

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Eastern District of Kentucky
FILED

APR - 4 1991

HENRY WILEY,
Petitioner-Appellant,

MAY 13 1991

AT PIKEVILLE
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

RONARD GREEN, Clerk

v.

ORDER

Frankfort

CORRECTIONS CABINET OF KENTUCKY;
ATTORNEY GENERAL OF KENTUCKY,

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see
Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If
cited, a copy must be served on other parties and the Court.
88-19
This notice is to be prominently displayed if this decision is reproduced.

Respondents-Appellees.

BEFORE: KENNEDY and RYAN, Circuit Judges; and FEIKENS, Senior
District Judge*.

This matter is before the court upon consideration of the appellant's response to this court's February 4, 1991, order directing him to show cause why his appeal should not be dismissed for lack of jurisdiction. Appellant alleges that he was prepared to file a new notice of appeal as required by Fed. R. App. P. 4(a)(4) after the district court ruled upon his Fed. R. Civ. P. 59(e) motion but failed to do so because this court held appeal No. 90-6088 in abeyance.

It appears from the documents before the court that the judgment was entered February 1, 1989. A Fed. R. Civ. P. 60 motion was filed on April 2, 1990, and denied on June 29, 1990. A time-tolling Fed. R. Civ. P. 59(e) motion for reconsideration was served on July 13, 1990, and a notice of appeal was filed on August 10, 1990 (appeal No. 90-6088). Reconsideration was denied on August 20, 1990. Appeal No. 90-6088 was dismissed by this court for lack of jurisdiction on December 11, 1990. The notice of appeal filed on December 26, 1990, was ninety-eight days late (appeal No. 91-5010). Fed. R. App. P. 4(a) and 26(a).

The failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction. Compliance with Fed. R. App. P. 4(a) is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend. *Baker v. Raulie*, 879 F.2d 1396,

* The Honorable John Feikens, Senior District Judge for the Eastern District of Michigan, sitting by designation.

1398 (6th Cir. 1989) (per curiam); *McMillan v. Barksdale*, 823 F.2d 981, 982 (6th Cir. 1987); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985); *Denley v. Shearson/American Express, Inc.*, 733 F.2d 39, 41 (6th Cir. 1984) (per curiam); *Peake v. First Nat'l Bank & Trust Co.*, 717 F.2d 1016, 1018 (6th Cir. 1983). Fed. R. App. P. 26(b) specifically provides that this court cannot enlarge the time for filing a notice of appeal. A court does not have a duty to notify an appellant of potential jurisdictional problems. See *Pryor v. Marshall*, 711 F.2d 63, 65 n.4 (6th Cir. 1983).

Accordingly, it is ORDERED that appeal No. 91-5010 be, and it hereby is, dismissed for lack of jurisdiction. Rule 9(b)(1), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Leonard Green, Jr.
Clerk

Cir. 1990); United States v. Cooper, 876 F.2d 1192, 1195 (5th Cir. 1989) (per curiam). A notice of appeal from the June 29, 1990, order was filed August 10, 1990. Fed. R. App. P. 4(a)(4) provides that a notice of appeal filed before the disposition of a timely Fed. R. Civ. P. 59 motion shall have no effect. A timely notice of appeal is mandatory and jurisdictional. Osterneck v. Ernst & Whinney, 489 U.S. 169, 173-74 (1989); Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61 (1982) (per curiam). The district court denied reconsideration on August 20, 1990. No new notice of appeal was filed.

It is ORDERED that the appeal be, and it hereby is, dismissed for lack of jurisdiction. Rule 9(b)(1), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Leonard Green, Jr.
Clerk

MANDATE ISSUED: 2/6/91

COSTS TAXED: NONE

A TRUE COPY
Attest:
LEONARD GREEN, Clerk
By Robert [unclear]
Deputy Clerk