

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-128

NOVEMBER TERM, 2004

Tyron Roy	}	APPEALED FROM:
	}	
	}	
v.	}	Orleans Superior Court
	}	
John Gorczyk	}	DOCKET NO. 211-9-02 Oscv
	}	
		Trial Judge: Dennis R. Pearson

In the above-entitled cause, the Clerk will enter:

Plaintiff Tyron Roy appeals from a judgment of the Orleans Superior Court in favor of the State. We conclude that the appeal was not timely filed, and therefore dismiss it.

Plaintiff is a Vermont inmate incarcerated in a correctional facility in the State of Virginia. In September 2002, he filed a complaint under V.R.C.P. 75, alleging that he had been erroneously denied 88 days of credit against his sentence for earned reduction of term between March and November 2002. In July 2003, the Department of Corrections moved for summary judgment, asserting that plaintiff was properly denied ERT credit for failure to participate in a prison work program or to demonstrate that he was on a waiting list in four specified work-program categories, as required by the Department's regulations. In August, plaintiff moved for an extension of time to October 17, 2003, to file an opposition to the summary judgment motion. The court granted the extension. In early November, two weeks after the due date, plaintiff moved for a second extension of time to January 2004, to file an opposition. On November 17, 2003, the court denied the motion to extend time, granted the State's motion for summary judgment, ruling that the pleadings demonstrated unequivocally that plaintiff was not on the requisite work-program waiting lists, as required by the departmental regulations, and entered final judgment in favor of the State.

On December 4, 2003, plaintiff filed a motion to amend the judgment and a cross-motion for summary judgment. On January 6, 2004, the court denied the motion to amend as untimely, and denied the cross-motion for summary judgment, noting that the case had been terminated by final judgment. One week later, plaintiff filed a motion to enlarge time to file the motion to amend the judgment. The trial court denied the motion on February 2, 2004. Plaintiff filed a notice of appeal on February 27, 2004.

The State argues that the appeal should be dismissed as untimely. We agree. It is undisputed that final judgment was entered on November 17, 2003, that any motion to amend the judgment had to be filed by December 2, and that plaintiff filed an untimely motion to amend the judgment on December 4. See V.R.C.P. 59(e) (requiring parties to file a motion to amend judgment no later than 10 days after entry of judgment); V.R.C.P. 6(a) (excluding intermediate Saturdays, Sundays, and holidays when filing time is less than 11 days). An untimely motion to amend the judgment does not toll the time for filing a notice of appeal. See V.R.A.P. 4 (running of time for filing notice of appeal is tolled only by timely motion to amend); Turner v. Turner, 160 Vt. 646, 646-47 (1993) (mem.) (“The time for filing the notice of appeal was not tolled by defendant’s untimely motion to amend.”). Plaintiff’s motion to extend time to file the motion to amend, and the court’s subsequent denial of the motion on February 2, 2004, did not toll the notice of appeal period. See id. at 647 (holding V.R.C.P. 60(b) motion to extend time to file motion to amend could not be treated as V.R.A.P. 4 motion for additional time to appeal).

Plaintiff was therefore required to file a notice of appeal not later than thirty days from the November 17, 2003, judgment. The notice of appeal, filed on February 27, 2004, was untimely. This Court lacks jurisdiction to consider an untimely appeal. Turner, 160 Vt. at 647. Accordingly, the appeal must be dismissed.

Appeal dismissed.

BY THE COURT:

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Frederic W. Allen, Chief Justice (Ret.),
Specially Assigned