

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).

NO. 4-09-0951

Filed 1/18/11

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from
Plaintiff-Appellee,) Circuit Court
v.) Morgan County
ENOCH WILDER,) No. 95CM416
Defendant-Appellant.)
) Honorable
) Richard T. Mitchell,
) Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Appleton and McCullough concurred in the judgment.

ORDER

Held: The office of the State Appellate Defender's motion to withdraw as counsel on appeal is granted and defendant's appeal dismissed. Defendant's late filing of the notice of appeal deprived this court of jurisdiction.

This appeal comes to us on the motion of the Office of the State Appellate Defender (OSAD) to withdraw as counsel an appeal on the ground that no meritorious issue can be raised in this case. For the reasons that follow, we agree and dismiss the appeal.

I. BACKGROUND

In August 1995, defendant, Enoch Wilder, was charged with seven misdemeanor counts of deceptive practices (720 ILCS 5/17-1(B)(d) (West 1994)). Summons was issued in August 1995 and filed with the handwritten notation "subject moved to Chicago."

In September 1995, defendant failed to appear and a warrant was issued.

In October 1995, defendant was arrested in Lake County. Defendant posted bond. Defendant listed a Chicago address on the bond paperwork. Defendant paid \$500 on a 10% bond. Defendant was not tried on the deceptive-practices charges.

The record shows no action on this case until August 2004, when the trial court issued notice of bond forfeiture. The notice, sent to defendant's Chicago address, informed defendant if he did not appear within 30 days, the court would enter judgment in the full amount for the State. The notice informed defendant of an October 2004 forfeiture hearing.

In October 2004, defendant failed to appear at the forfeiture hearing. The trial court awarded the State \$5,000 and costs. A notice of judgment was sent to defendant's Chicago address.

Almost five years later, in May 2009, defendant filed a demand for the dismissal of the deceptive-practices charges, to quash the warrant, "and/or" for speedy trial. In his demand, defendant stated he was sentenced in 1999 in Cook County to 45 years' imprisonment for first degree murder and was still imprisoned. Defendant maintained the statute of limitations expired on the deceptive-practices charges and he had no knowledge of having been arrested on those charges. In July 2009, the trial court

dismissed the deceptive-practices charges.

On September 28, 2009, defendant filed a motion for return of his bond. In his motion, defendant alleged he was incarcerated and did not receive notice of the forfeiture hearing. On September 30, 2009, the trial court denied defendant's motion.

On November 2, 2009, defendant filed a notice of appeal. The trial court appointed OSAD to serve as his attorney. In September 2010, OSAD moved to withdraw, attaching to its motion a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1982). The record shows service on defendant. On its own motion, this court granted defendant through October 8, 2010, to file additional points and authorities. He filed none. After examining the record and executing our duties in accordance with *Finley*, we concur.

II. ANALYSIS

The office of the State Appellate Defender (OSAD) raises jurisdiction as a potential issue for review and properly notes our duty to consider jurisdictional issues. See *People v. Smith*, 228 Ill. 2d 95, 104, 885 N.E.2d 1053, 1058 (2008). OSAD highlights the trial court's order was entered September 30, 2009, but notice of appeal was not filed until November 2, 2009-- after it was due Friday, October 30, 2009.

Our analysis must begin with the question of juris-

diction. See *Smith*, 228 Ill. 2d at 103-04, 885 N.E.2d at 1058. The notice of appeal is the first jurisdictional step for appellate review. *Smith*, 228 Ill. 2d at 104, 885 N.E.2d at 1058. Absent a properly filed notice of appeal, this court lacks jurisdiction over an appeal and must dismiss it. *Smith*, 228 Ill. 2d at 104, 885 N.E.2d at 1058. Illinois Supreme Court Rule 303(a)(1) (eff. May 30, 2008) mandates "notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from." In this case, the final judgment was entered on September 30, 2009. Notice of appeal was due Friday, October 30, 2009. Defendant's notice of appeal, however, was filed Monday, November 2, 2009.

An untimely filing is not always fatal. If notice of appeal is "received after the due date, the time of mailing shall be deemed the time of filing." Ill. S. Ct. R. 373 (eff. Feb. 1, 1994). Proof of the mailing, however, must comply with Illinois Supreme Court Rule 12(b)(3) (eff. Nov. 15, 1992). See Ill. S. Ct. R. 373 (eff. Feb. 1, 1994). Under Rule 12(b)(3), service by mail is proved "by certificate of the attorney, or affidavit of a person other than the attorney, who deposited the paper in the mail, stating the time and place of mailing, the complete address which appeared on the envelope, and the fact that proper postage was prepaid." Ill. S. Ct. R. 12(b)(3) (eff. Nov. 15, 1992).

Here, defendant's notice of appeal does not establish

timely service. Defendant's attached proof of service is dated October 29, 2009. The proof of service is not an "affidavit" as required by Rule 12(b)(3). The proof of service is not notarized or witnessed, and it does not contain an explanation for this failure. "[A]n affidavit must be sworn to, and statements in a writing not sworn to before an authorized person cannot be considered affidavits." *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 494, 782 N.E.2d 212, 214 (2002). Defendant's proof of service is insufficient to establish his notice of appeal was mailed on a timely date. See generally *People v. Tlatenchi*, 391 Ill. App. 3d 705, 716, 909 N.E.2d 198, 209 (2009) (holding a defendant's proof of service was insufficient to establish a timely mailing as it was not notarized). We note our holding does not affect previous decisions establishing an inmates' documents are considered mailed the date the inmate places such documents in the prison mail system. See *People v. Jennings*, 279 Ill. App. 3d 406, 413, 664 N.E.2d 699, 705 (1996); *People v. Johnson*, 232 Ill. App. 3d 882, 884, 598 N.E.2d 276-77 (1992).

Given the insufficient proof of service and the filing date of November 2, 2009, we find defendant's notice of appeal is untimely and we lack jurisdiction over defendant's appeal.

III. CONCLUSION

We grant OSAD's motion to withdraw as counsel and

dismiss defendant's appeal.

Appeal dismissed.