

**FILED**

**United States Court of Appeals  
Tenth Circuit**

**UNITED STATES COURT OF APPEALS**

**January 26, 2012**

**FOR THE TENTH CIRCUIT**

**Elisabeth A. Shumaker  
Clerk of Court**

ERNEST T. STANTON,

Plaintiff - Appellant,

v.

WAYNE COUNTY FOC,

Defendant - Appellee.

No. 11-1563  
(D.C. No. 1:11-CV-01821-LTB)

**ORDER**

Before **LUCERO, HARTZ, and GORSUCH**, Circuit Judges.

*Pro se* plaintiff Earnest Stanton appeals the district court’s order and final judgment dismissing his civil rights case without prejudice. This court entered an order to show cause as to why the appeal should not be dismissed because the notice of appeal appeared to have been filed late. Mr. Stanton filed a response. Upon consideration, we now dismiss the appeal.

“A timely notice of appeal is both mandatory and jurisdictional.” *Allender v. Raytheon Aircraft Co.*, 439 F.3d 1236, 1239 (10th Cir. 2006) (quotation omitted); *see also Bowles v. Russell*, 551 U.S. 205, 213-15 (2007). In a civil case, a notice of appeal

“must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.” Fed. R. App. P. 4(a)(1)(A). Although Mr. Stanton is proceeding *pro se*, he still must comply with the same procedural requirements that govern other litigants. *Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007); *Ogden v. San Juan County*, 32 F.3d 452, 455 (10th Cir. 1994).

In this case, the district court’s order and final judgment were entered November 15, 2011. To be timely, the notice of appeal must have been filed by December 15, 2011. The district court did not file the notice of appeal until December 16, 2011, one day after the deadline passed. Neither a motion seeking an extension of time to file a notice of appeal nor a motion to reopen the time to appeal was filed in the district court. *See* Fed. R. App. P. 4(a)(5), (6).

Mr. Stanton argued in his response to the court’s order to show cause that his notice of appeal was timely filed because it was mailed to the district court clerk with first-class postage before the deadline expired. For two reasons, Mr. Stanton’s argument fails. First, to the extent that Mr. Stanton invokes the prison mailbox rule, this rule does not apply here. Mr. Stanton is not a prisoner in custody at a state or federal prison. The prison mailbox rule, which deems a document filed as of the date the document is placed in the prison mail system, applies only to prisoners and then only if the prisoner complies with the requirements for invoking the rule. Fed. R. App. P. 4(c); *Price v. Philpot*, 420 F.3d 1158, 1166 (10th Cir. 2005) (citing *United States v. Ceballos-Martinez*, 387 F.3d 1140, 1144-45 (10th Cir. 2004)).

Second, our rules make clear that a document “is not timely unless the clerk *receives* the papers within the time fixed for filing.” Fed. R. App. P. 25(a)(2)(A) (emphasis added). A notice of appeal is “filed” within the meaning of Rule 25 “when the clerk of a district court receives actual custody of the notice.” *Graves v. Gen. Ins. Corp.*, 381 F.2d 517, 519 (10th Cir. 1967). Thus, the clerk must receive physical custody of the notice of appeal within the period stated in Rule 4 to be timely filed. In this case, the district court clerk did not receive physical custody of Mr. Stanton’s notice of appeal until one day after the deadline expired. As a result, the notice of appeal was not timely filed, and this court is without jurisdiction to consider the appeal.

APPEAL DISMISSED.

Entered for the Court,  
ELISABETH A. SHUMAKER, Clerk

by: Lara Smith  
Counsel to the Clerk