[Cite as *State v. Spencer*, 2003-Ohio-287.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 81035

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	and
vs.	:	OPINION
	:	
DAVID S. SPENCER, JR.,	:	
	:	
Defendant-Appellant	:	
DATE OF ANNOUNCEMENT OF DECISION	:	JANUARY 23, 2003
CHARACTER OF PROCEEDING:	:	Criminal appeal from
	:	Common Pleas Court
	:	Case No. CR-321838
JUDGMENT	:	DISMISSED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee:

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Cuyahoga County Prosecutor
BY: Renee L. Snow, Esq.
Assistant County Prosecutor
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For defendant-appellant:

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P.O. Box 788
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MICHAEL J. CORRIGAN, P.J.:

{¶1} In 1996, petitioner David Spencer filed a petition for postconviction relief that he claims the court denied without notice to him. Five years later, Spencer asked the court for relief from judgment so that he could file a direct appeal from the order denying postconviction relief. The motion for relief from judgment referenced Civ.R. 60(B)(5) and Crim.R. 36. In that motion, Spencer asked the court to correct the record of the postconviction proceeding to show that he had not been given proper notice of the court's order denying relief under the petition.

{¶2} We lack a final appealable order because the court failed to issue findings of fact and conclusions of law when it denied the 1996 petition for postconviction relief. When a trial court dismisses a postconviction petition, regardless whether or not it holds a hearing, it must issue and file findings of fact and conclusions of law. R.C. 2953.21(C) and (G). If the court fails to fulfill that obligation, the judgment entry is "incomplete and, thus, does not commence the running of the period for filing an appeal therefrom." *State v. Mapson* (1982), 1 Ohio St.3d 217, 218. See, also, *State ex rel. Konoff v. Moon* (1997),79 Ohio St.3d 211.

{¶3} Since the ruling on the motion for relief from judgment was not a final order or judgment, it follows that Spencer's Civ.R. 60(B) motion "was improperly labeled a Civ.R. 60(B) motion because it did not seek relief from a final judgment." *Jarrett v. Dayton Osteopathic Hosp., Inc.* (1985), 20 Ohio St.3d 77, 78. That being the case, any ruling on a motion for relief from judgment on a non-

final order would likewise be non-final. *Vanest v. Pillsbury Co.* (1997), 124 Ohio App.3d 525, 533; *Wolf v. Associated Materials* (Aug. 15, 2000), Ashland App. No. 00C0A01350; *Safe Auto Ins. Co. v. Perry* (Jan. 25, 2001), Franklin App. No. 00AP-722.

Dismissed.

MICHAEL J. CORRIGAN
PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS.

COLLEEN CONWAY COONEY, J., DISSENTS WITH SEPARATE OPINION.

COLLEEN CONWAY COONEY, J., DISSENTING:

{¶4} I must respectfully dissent from the majority's disposition of this appeal because I disagree with their conclusion that the appeal should be dismissed for lack of a final appealable order.

{¶5} As the majority properly finds, the trial court failed to issue findings of fact and conclusions of law in denying Spencer's petition for postconviction relief ("PCR"), rendering that decision not final and appealable. However, Spencer is not appealing the denial of his PCR, and I do not agree with the majority's characterization of Spencer's motion as a motion for relief from judgment under Civ.R. 60(B).

{¶6} Although the caption of the pro se motion states that it is a "motion to correct/modify journal entry * * * pursuant to Crim.R. 36 and Civil Rule 60(B)(5)," a review of the substance of the motion reveals that it is not a motion to vacate the trial

court's order denying the PCR. The contents of the motion indicate that Spencer was merely requesting that the trial court correct the journal entry to reflect that notice of the denial of his PCR had not been sent to Spencer on the date indicated in the journal entry. Therefore, Spencer, regardless of what the caption states, was not seeking to vacate the judgment, but simply to correct the entry. It is the substance of a motion, not the caption, which determines the nature of the motion. *Lungard v. Bertram* (1949), 86 Ohio App. 392, 395; *In the Matter of the Adoption of Goldberg* (Sept. 17, 2001), Warren App. No. CA2001-04-026, CA2001-05-047.

{¶7} Therefore, instead of dismissing Spencer's appeal, I would affirm the trial court's denial of the motion to correct the journal entry.