

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWN RUSSELL HARTE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43877

FILED

APR 07 2005

ORDER DISMISSING APPEAL

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *Richard*
CHIEF DEPUTY CLERK

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus in a death penalty case. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On March 19, 2004, the district court entered its order denying appellant Shawn Harte's habeas petition and served notice of entry of that order on Harte. Harte did not file his notice of appeal until August 25, 2004, well after the expiration of the 30-day appeal period prescribed by NRS 34.575. "[A]n untimely notice of appeal fails to vest jurisdiction in this court."¹ Accordingly, we ordered Harte's post-

¹See Lozada v. State, 110 Nev. 349, 352, 871 P.2d 944, 946 (1994).

conviction counsel to show cause why this appeal should not be dismissed for lack of jurisdiction.

In response to our order to show cause, post-conviction counsel claims that Harte's March 26, 2004, motion for relief or, in the alternative, reconsideration of the district court's order tolled the time for appeal. Counsel contends that Harte's case is "virtually identical" to Matter of Application of Duong,² a case in which we concluded that appellant's post-judgment motions were tolling motions under the provisions of NRAP 4(a)(2).


We conclude that post-conviction counsel's reliance on Duong is misplaced. The appeal in Duong involved a civil proceeding in which the appellant petitioned the district court under NRS 179.245 to seal criminal records,³ whereas Harte's appeal involves post-conviction habeas corpus litigation. We have "consistently and repeatedly held that the rules of civil appellate procedure are not applicable to appeals from statutory post-conviction habeas corpus proceedings," and we have expressly held "that the civil tolling provisions of NRAP 4(a)(2) are inconsistent with and inapplicable to the statutory procedures governing

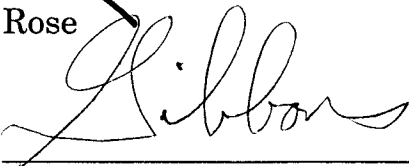
²118 Nev. 920, 59 P.3d 1210 (2002).

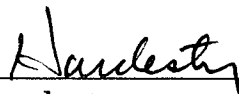
³Id. at 921-22, 59 P.3d at 1211.

the litigation of post-conviction habeas corpus petitions."⁴ Accordingly, we conclude that we lack jurisdiction to consider this appeal, and we

ORDER this appeal DISMISSED.⁵


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

⁴Klein v. Warden, 118 Nev. 305, 310, 43 P.3d 1029, 1033 (2002).

⁵We note that counsel was appointed to represent Harte in this proceeding pursuant to statutory mandate and that we have previously held "that a petitioner who has counsel appointed by statutory mandate is entitled to effective assistance of that counsel." Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997); see also NRS 34.820(1). Further, under such circumstances, ineffective assistance of post-conviction counsel may be a cognizable claim in a second petition for a writ of habeas corpus. Crump, 113 Nev. at 303, 934 P.2d at 253.

cc: Hon. Connie J. Steinheimer, District Judge
Donald York Evans
Thomas L. Qualls
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk