

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES KEVIN MACK, SR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 45290

**FILED**

AUG 23 2005

ORDER DISMISSING APPEAL

CLERK OF THE SUPREME COURT  
J. Richards  
THE CLERK

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

This court's preliminary review of this appeal revealed a potential jurisdictional defect. Specifically, the district court entered the order denying appellant's petition on April 5, 2005, and the clerk of the district court served notice of entry of that order on April 6, 2005. Appellant's notice of appeal was due on May 9, 2005.<sup>1</sup> Appellant's notice of appeal, however, was not filed in the district court until May 12, 2005, three days beyond the relevant appeal period. An untimely notice of appeal fails to vest jurisdiction in this court.<sup>2</sup>

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<sup>1</sup>See NRS 34.575 (providing that an appeal may be filed from an order denying a petition for a writ of habeas corpus within 30 days after service by the district court of written notice of entry of the order); NRAP 26(c) ("Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon him and the paper is served by mail, three (3) days shall be added to the prescribed period.").

<sup>2</sup>Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

Under this court's holding in Kellogg v. Journal Communications, if appellant delivered his notice of appeal to a prison official for mailing on or before May 9, 2005, his notice of appeal would be deemed timely filed.<sup>3</sup> Because appellant signed his notice of appeal on May 9, 2005, this court directed the attorney general to obtain and transmit a copy of the notice of appeal. If appellant did not use the notice of appeal log, the attorney general was to inform this court whether appellant used any other logs.

On July 12, 2005, the attorney general submitted a timely response. The attorney general indicates that there is no record of when appellant mailed his notice of appeal. In support, the attorney general attaches an affidavit from William T. Curry, a law library supervisor at the Northern Nevada Correctional Center, stating that there is no record of appellant submitting any pieces of outgoing legal mail from April 12, 2005, through May 12, 2005.

This court's decision in Kellogg contemplates that the date of delivery of the notice of appeal to a prison official will be determined by the date recorded in the prison mail log.<sup>4</sup> Here, there is no record of the date appellant delivered his notice of appeal to a prison official pursuant to Kellogg. Therefore, the May 12, 2005 filing date of the notice of appeal

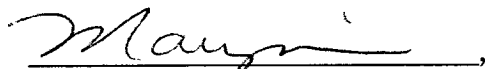
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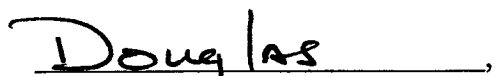
<sup>3</sup>See 108 Nev. 474, 835 P.2d 12 (1992) (holding that a notice of appeal is deemed "filed" when it is delivered to a prison official).


<sup>4</sup>Id. at 476-77, 835 P.2d at 13.

in the district court controls. Because appellant's notice of appeal was untimely filed, we

ORDER this appeal DISMISSED.

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Steven R. Kosach, District Judge  
James Kevin Mack Sr.  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk