

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDGAR GUSTAVO RUIZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45821

FILED

MAR 24 2006

ORDER DISMISSING APPEAL

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

This is a direct appeal initiated by a proper person notice of appeal. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

This court's preliminary review of this appeal revealed a potential jurisdictional defect. Specifically, the district court entered the judgment of conviction on July 13, 2005. Appellant's notice of appeal, however, was not filed in the district court until August 16, 2005, four days beyond the relevant appeal period.¹ An untimely notice of appeal fails to vest jurisdiction in this court.²

Appellant signed his notice of appeal on August 10, 2005. Because a notice of appeal properly delivered to prison officials in a timely fashion is sufficient to invoke this court's jurisdiction, this court directed the attorney general to obtain and transmit to this court a copy of any documents in the prison indicating the date upon which appellant

¹See NRAP 4(b).

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

delivered his notice of appeal to prison officials.³ This order was entered on September 20, 2005, and provided the attorney general thirty days within which to obtain the requested documents and file a response in this court.

No timely response was submitted by the attorney general. Thus, on November 16, 2005, this court entered a second order directing the attorney general to comply with this court's prior order of September 20, 2005, within thirty days.

On December 16, 2005, the attorney general filed a motion for an extension of time within which to comply with this court's orders. On January 5, 2006, this court entered an order granting the motion and instructing the attorney general to file its response and the requested documents on or before January 17, 2006.

On January 17, 2006, the attorney general filed a second motion for extension of time. On February 3, 2006, this court entered an order granting the motion and instructing the attorney general to file its response and the requested documents on or before February 16, 2006. This court informed the attorney general that no further extensions would be granted absent extraordinary circumstances.

On February 14, 2006, the attorney general filed a third motion for extension of time. Although the motion represented that the request was made in good faith and not for purposes of delay, the attorney general made no attempt to demonstrate an extraordinary circumstance requiring an extension of time. On February 27, 2006, this court granted

³See Kellogg v. Journal Communications, 108 Nev. 474, 835 P.2d 12 (1992).

the motion in part and directed the attorney general to file a response on or before March 10, 2006. In the February 27, 2006 order, this court noted that its first order in this matter was entered in September 2005 and that five months later, this court remained unable to determine its jurisdiction to consider this direct appeal from a judgment of conviction because of the attorney general's dilatory response to this court's previous orders.

On March 8, 2006, the attorney general filed a response to this court's February 27, 2006 order. The attorney general indicates that appellant did not use the notice of appeal log during the time in question.

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 log.⁴ Here, there is no record of the date appellant delivered his notice of appeal to a prison official pursuant to Kellogg. Therefore, the August 16, 2005 filing date of the notice of appeal in the district court controls. Because appellant's notice of appeal was untimely filed, we conclude that we lack jurisdiction to consider this appeal.

This court is deeply disturbed by the length of time that has passed from the filing of the notice of appeal in this case. Because a post-conviction petition for a writ of habeas corpus must be filed within one year of entry of the judgment of conviction if no timely direct appeal is taken, appellant may potentially be prevented from meeting the procedural deadlines of NRS chapter 34.⁵ However, the failure to file a timely habeas corpus petition may be overcome by establishing good cause

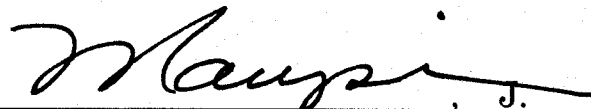
⁴Id. at 476-77, 835 P.2d at 13.

⁵See Dickerson v. State, 114 Nev. 1084, 967 P.2d 1132 (1998); see also NRS 34.726(1).

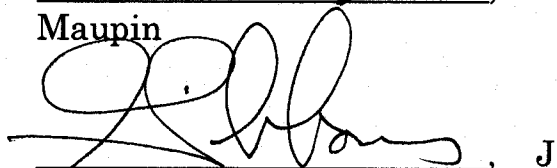
for a late petition.⁶ Given the attorney general's dilatory response to this court's prior orders and given the fact that a petitioner will naturally not file a post-conviction petition for a writ of habeas corpus while he believes his direct appeal is pending, we conclude that an impediment external to the defense exists which may interfere with appellant's ability to file a timely habeas corpus petition in the district court.⁷ Consequently, we conclude that appellant has good cause to file a post-conviction petition for a writ of habeas corpus within one year from the date of this order.

Accordingly, we

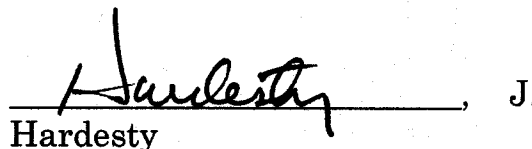
ORDER this appeal DISMISSED.⁸



Maupin



Gibbons



Hardesty

⁶See NRS 34.726(1); Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003); Lozada, 110 Nev. 349, 871 P.2d 944.

⁷See Hathaway, 119 Nev. at 252, 254, 71 P.3d at 506-07.

⁸We have received all proper person documents submitted in this matter, and we conclude that no relief is warranted.

cc: Hon. Jerome Polaha, District Judge
Edgar Gustavo Ruiz
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk