

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD JOHNSTON A/K/A RICHARD
THOMAS JOHNSTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47616

FILED

AUG 10 2006

ORDER DISMISSING APPEAL

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

This is an appeal from a judgment of conviction pursuant to a jury verdict. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

This court's preliminary review of this appeal reveals a jurisdictional defect. Specifically, the district court entered the judgment of conviction on May 23, 2006. Appellant did not file the notice of appeal until June 29, 2006, six days beyond the relevant appeal period.¹ An untimely notice of appeal fails to vest jurisdiction in this court.²

Appellant has filed an "Application for Relief From Default in Failing to Timely File Notice of Appeal" in which he concedes that the notice of appeal was not timely filed but argues that his untimeliness should be excused.³ According to appellant, his appellate counsel, who is a

¹NRAP 4(b).

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

³Appellant failed to provide proof of service of his application. Generally, we will not take any action on papers requesting relief until an acknowledgment or proof of service is filed. NRAP 27(1)(d). On July 6, 2006, this court issued a notice to appellant to provide proof of service

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California attorney,⁴ deposited the notice of appeal and related documents with United Parcel Service of America (UPS) on Tuesday, June 20, 2006—two days before expiration of the 30-day appeal period—for next-day delivery to a Nevada attorney who was then supposed to file the documents in the district court. Appellant represents, however, that UPS

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within 10 days. To date, appellant has not responded. We nonetheless have considered the application because it relates to a jurisdictional defect that must be resolved regardless of any request for relief submitted by appellant. Because we deny the requested relief, respondent has not been prejudiced by appellant's apparent failure to serve the application.

⁴The documents before this court show that attorney Aron Laub is licensed to practice law in California but not in Nevada. Mr. Laub represents that, pursuant to SCR 42, he has requested permission from the district court to proceed pro hac vice on appellant's behalf in this appeal. According to the documents submitted, Sean P. Sullivan will be acting as local counsel.

SCR 42(5) provides that an out-of-state attorney "shall not appear in a proceeding" until the court enters an order granting the motion to associate, and SCR 42(14) provides that the Nevada attorney is responsible for and must actively participate in the representation. However, Mr. Laub has nonetheless appeared in this matter before entry of an order granting his motion to associate, and Mr. Sullivan has not appeared or actively participated in this appeal. Additionally, NRAP 25(1)(e) requires that all documents submitted to this court for filing by a represented party must be signed by an active member of the Nevada State Bar. None of the documents submitted thus far by attorney Laub have been signed by a Nevada-licensed attorney. We caution Mr. Laub that local counsel must be properly associated under SCR 42 before he can make an appearance in a Nevada court and that failure to comply with SCR 42 or NRAP 25 in the future may result in the imposition of sanctions. See SCR 42(13).

lost the documents and, as a result, his notice of appeal was not timely filed in the district court.


Appellant argues that this situation is akin to a notice of appeal properly delivered to prison officials within the applicable appeal period under Kellogg v. Journal Communications.⁵ More specifically, appellant contends that since he is a prisoner and has no control over when his notice of appeal is actually filed, his notice of appeal should be deemed "filed" for the purpose of timeliness on the date that his California attorney tendered the notice of appeal documents to UPS for delivery to his Nevada attorney. We are not persuaded by appellant's contention.⁶


⁵108 Nev. 474, 835 P.2d 12 (1992).

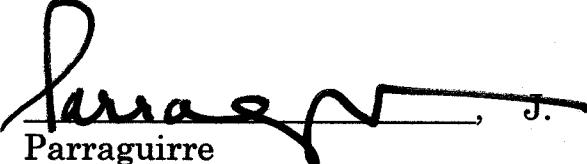
⁶Appellant alternatively asks that this court permit him to "proceed to litigate his direct appeal claims on habeas corpus." Appellant may only raise direct appeal claims in a post-conviction habeas proceeding if he successfully demonstrates that he was deprived of his right to a direct appeal due to ineffective assistance of counsel. See Lozada, 110 Nev. at 359, 871 P.2d at 950 (providing that remedy for deprivation of right to appeal due to ineffective assistance of counsel is to raise direct appeal issues in post-conviction petition for writ of habeas corpus). Such a claim of ineffective assistance of appellate counsel must be raised in a timely filed post-conviction petition. See NRS 34.726; Harris v. Warden, 114 Nev. 956, 964 P.2d 785 (1998) (holding that appeal-deprivation claim must be raised in a timely filed post-conviction petition). We further note that, because appellant's direct appeal was not timely filed, he must file a post-conviction petition for a writ of habeas corpus within 1 year after entry of the judgment of conviction. See NRS 34.726(1); Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998) (holding that the 1-year period for filing a timely petition "begins to run from the issuance of the remittitur from a timely direct appeal to this court from the judgment of conviction or from the entry of the judgment of conviction if no direct appeal is taken"). We express no opinion as to the substantive merits of any claims that appellant might raise in a post-conviction petition.

This court's decision in Kellogg provides that a notice of appeal submitted by a prisoner acting in proper person is deemed filed on the date that it is delivered into the hands of a prison official.⁷ Here, while appellant may be a prisoner, he is represented by counsel and his notice of appeal was submitted by that counsel; the notice of appeal was not submitted to a prison official by appellant acting in proper person. Counsel tendering notice of appeal documents to a delivery service is quite different from a prisoner delivering a notice of appeal to a prison official. We decline to extend Kellogg to this situation. Because appellant's notice of appeal was untimely filed, we conclude that we lack jurisdiction to consider this appeal, and we

ORDER this appeal DISMISSED.


_____, J.
Douglas


_____, J.
Becker


_____, J.
Parraguirre

cc: Hon. Stewart L. Bell, District Judge
Aron Laub
Robert L. Langford & Associates
Sean P. Sullivan
Richard Johnston
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁷Id. at 476-77, 835 P.2d at 13.