


IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIE T. SMITH A/K/A WILLIAM T.  
SMITH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 47846

**FILED**

**FEB 28 2007**

JANETTE M BLOOM  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of attempted murder with the use of a deadly weapon, discharging a firearm at or into a structure, and possession of a firearm by an ex-felon. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Our preliminary review of this appeal revealed a potential jurisdictional defect. Specifically, it appeared that the notice of appeal had not been timely filed in the district court. The judgment was entered by the district court on June 23, 2006. The notice of appeal was filed on August 9, 2006, after the 30-day appeal period prescribed by NRAP 4(b). Although it appeared unlikely that the proper person notice of appeal had been delivered to a prison official within the 30-day appeal period because appellant appeared to have signed the notice after expiration of the appeal period, we nonetheless provided appellant an opportunity to demonstrate that the notice of appeal had been delivered to a prison official within the

30-day appeal period.<sup>1</sup> After appellant's counsel experienced difficulty obtaining the necessary records from the facility where appellant is incarcerated, we directed the Attorney General's Office to assist counsel.

Based on the documents provided by the Attorney General's Office, it appears that appellant did not deliver his notice of appeal to a prison official for mailing within the 30-day appeal period. This conclusion is further confirmed by the date that appears above appellant's signature on the notice of appeal—August 4, 2006. We therefore conclude that the notice of appeal was not timely filed in the district court.

In an earlier response to our order to show cause why this appeal should not be dismissed for lack of jurisdiction, counsel for appellant asked that this court "remand this matter for entry of a new judgment of conviction so that a timely notice of appeal may be filed." In that response, appellant challenges the sufficiency of the remedy that this court established in Lozada v. State<sup>2</sup> for the denial of the right to a direct appeal due to ineffective assistance of counsel and argues that this court should overrule Lozada and instead adopt a procedure by which the district court enters an amended judgment of conviction from which the defendant may then file a timely notice of appeal. We reject those arguments and decline to overrule Lozada. If appellant has been deprived of his right to a direct appeal due to the ineffective assistance of counsel, he must raise that claim in a timely filed post-conviction petition for a writ

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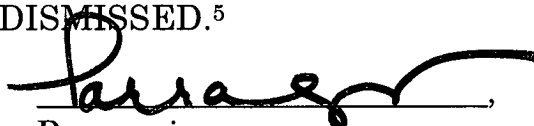
<sup>1</sup>See Kellogg v. Journal Communications, 108 Nev. 474, 835 P.2d 12 (1992) (providing that prisoner's proper person notice of appeal shall be deemed filed on the date it is delivered to a prison official).

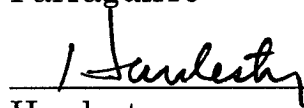
<sup>2</sup>110 Nev. 349, 871 P.2d 944 (1994).

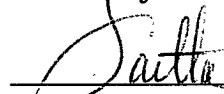
of habeas corpus.<sup>3</sup> If appellant successfully establishes that claim, then he would be entitled to the remedy provided in Lozada—the opportunity to raise, with the assistance of counsel, any issues that could have been asserted in a direct appeal.

Because the notice of appeal was not timely filed in the district court, we lack jurisdiction to consider this appeal.<sup>4</sup> Accordingly, we

ORDER this appeal DISMISSED.<sup>5</sup>

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

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Saitta

cc: Hon. Stewart L. Bell, District Judge  
JoNell Thomas  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Willie T. Smith  
Eighth District Court Clerk

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<sup>3</sup>We note that the one-year period for filing a post-conviction habeas corpus petition begins to run from the issuance of the remittitur from a timely direct appeal or the entry of the judgment of conviction if no timely direct appeal is taken. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

<sup>4</sup>Lozada, 110 Nev. 349, 871 P.2d 944.

<sup>5</sup>Although appellant has not been granted permission to file documents with this court in proper person, see NRAP 46(b), we have considered the proper person documents received on December 5 and 12, 2006, and deny the relief requested as moot.