

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANKLIN DALE HEATH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51744

**FILED**

JUL 15 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of burglary and possession of stolen property. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Our preliminary review of the documents submitted to this court pursuant to NRAP 3(e) revealed a potential jurisdictional defect. Specifically, it appeared that the notice of appeal was not timely filed in the district court. The district court entered the judgment of conviction on January 15, 2008. Appellant did not file the notice of appeal in the district court until May 23, 2008, well after expiration of the 30-day appeal period provided in NRAP 4(b)(1). Because “an untimely notice of appeal fails to vest jurisdiction in this court,”<sup>1</sup> we ordered counsel for appellant to show cause why this appeal should not be dismissed for lack of jurisdiction.

In response, counsel explains that he was appointed as appellate counsel on May 15, 2008, and filed the notice of appeal shortly

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<sup>1</sup>Lozada v. State, 110 Nev. 349, 352, 871 P.2d 944, 946 (1994).

thereafter. Counsel argues that because he filed the notice of appeal shortly after being appointed as appellate counsel, “jurisdiction should vest” and this court should allow the appeal to proceed. He further argues that it would be a “manifest injustice” for appellant to lose his appellate rights “upon these procedural grounds.”

Despite the circumstances presented by counsel for appellant, the notice of appeal did not vest jurisdiction in this court. Regardless of the timing of counsel’s motion to be appointed as appellate counsel, there was no impediment to appellant or counsel filing a timely notice of appeal.<sup>2</sup> And, more importantly, the timing requirement for filing a notice of appeal is jurisdictional<sup>3</sup> and cannot be enlarged by this court.<sup>4</sup> There is no good cause or manifest injustice exception to this jurisdictional requirement.<sup>5</sup> To the extent that appellant may have been deprived of his

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<sup>2</sup>We note that counsel for appellant was appointed to represent appellant before sentencing.

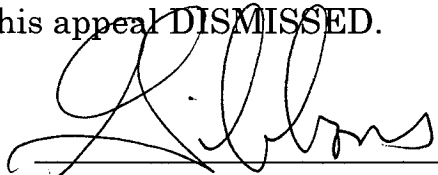
<sup>3</sup>Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1134 (1998) (“The filing of a timely notice of appeal is a fundamental jurisdictional requirement; without it, this court never obtains jurisdiction over an appeal and has no power to consider the issues raised, no matter how much merit they may have.”); see also NRAP 3(a) (“Except for automatic appeals from a judgment of death pursuant to NRS 177.055, an appeal permitted by law from a district court to the Supreme Court shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4.” (emphasis added)).

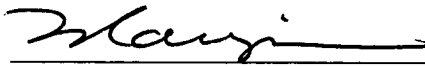
<sup>4</sup>NRAP 26(b).

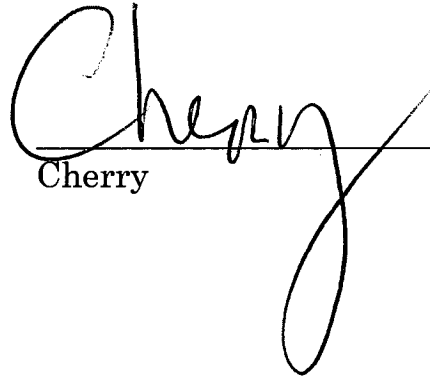
<sup>5</sup>See Gonzales v. State, 118 Nev. 590, 595, 53 P.3d 901, 903-04 (2002) (declining to apply the prison mailbox rule to the filing of a post-conviction habeas petition and observing that “unlike the strict  
*continued on next page . . .*”

right to a direct appeal due to ineffective assistance of counsel, he must pursue that claim in a timely filed post-conviction petition for a writ of habeas corpus as provided in Lozada v. State.<sup>6</sup> Accordingly, because the notice of appeal was not timely filed in the district court, we conclude that this court lacks jurisdiction over this appeal. We therefore

ORDER this appeal DISMISSED.

  
\_\_\_\_\_, C.J.  
Gibbons

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

  
\_\_\_\_\_, J.  
Cherry

... continued

jurisdictional time limits for filing a notice of appeal,” the untimely filing of a post-conviction petition may be excused upon a showing of good cause).

<sup>6</sup>110 Nev. 349, 871 P.2d 944 (1994). We express no opinion on the merits of any appeal deprivation claim that appellant may raise in post-conviction proceedings. Moreover, we note that because appellant failed to file a timely notice of appeal, a post-conviction petition must be filed within one year after entry of the judgment of conviction. See NRS 34.726(1) (providing that, unless good cause is shown, a post-conviction petition for a writ of habeas corpus that challenges the validity of a judgment of conviction “must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur”); Dickerson, 114 Nev. at 1087-88, 967 P.2d at 1133-34 (interpreting the one-year period in NRS 34.726(1) as running from the issuance of a remittitur from a timely appeal from a judgment of conviction).

cc: Hon. Stewart L. Bell, District Judge  
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Clark County District Attorney David J. Roger  
Eighth District Court Clerk  
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