

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANGEL RAUL PEREZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53158

FILED

JUN 03 2009

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

ORDER DISMISSING APPEAL

This is a proper person appeal from an order of the district court denying a motion for sentence modification. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

This court's preliminary review of this appeal revealed a potential jurisdictional defect. Specifically, the district court entered the order denying appellant's motion on December 17, 2008. Appellant's notice of appeal was due on January 16, 2009 (a Friday). See NRAP 4(b); Edwards v. State, 112 Nev. 704, 918 P.2d 321 (1996). Appellant's notice of appeal, however, was not filed in the district court until January 23, 2009, six days beyond the relevant appeal period. "[A]n untimely notice of appeal fails to vest jurisdiction in this court." Lozada v. State, 110 Nev. 349, 352, 871 P.2d 944, 946 (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 January 16, 2009, his notice of appeal

would be deemed timely filed. 108 Nev. 474, 477, 835 P.2d 12, 13 (1992) (holding that a notice of appeal is deemed “filed” when it is delivered to a prison official). Because appellant dated his notice of appeal “January 12, 2009,” 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 May 20, 2009, the attorney general filed a response. The attorney general indicates that appellant did not utilize the notice of appeal/legal mail logs and that there was no record of appellant submitting any appellate pleadings or pieces of outgoing legal mail from January 12, 2009, through January 16, 2009. However, there was a mail log entry that appellant submitted mail to the clerk of the district court and the clerk of this court on January 12, 2009, and that appellant sent another piece of mail to the “clerk of the court” on January 14, 2009.

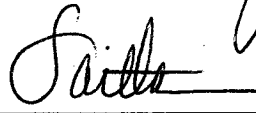
This court’s decision in Kellogg contemplates that the date of delivery of the notice of appeal to a prison official will be determined by the date recorded in the notice of appeal log. Id. at 476-77, 835 P.2d at 13. Here, there is no record of the date appellant delivered his notice of appeal in the instant case to a prison official pursuant to Kellogg. The clerk of this court received mail from appellant on January 15, 2009, in a pending appeal in Docket No. 53023, an appeal involving another district court case. There is no indication that the clerk of the district court received any mail from appellant in the instant case on or about January 16, 2009, although it appears that the clerk of the district court received mail from appellant on January 13, 2009, in the other district court case. Therefore,

the January 23, 2009 filing date of the notice of appeal in the district court controls. Because appellant's notice of appeal was untimely filed, we

ORDER this appeal DISMISSED.

 _____ J.

Cherry

 _____ J.

Saitta

 _____ J.

Gibbons

cc: Hon. Jennifer Togliatti, District Judge
Angel Raul Perez
Attorney General Catherine Cortez Masto/Carson City
Attorney General Catherine Cortez Masto/Reno
Clark County District Attorney David J. Roger
Eighth District Court Clerk