IN THE SUPREME COURT OF THE STATE OF NEVADA

KIRSTIN BLAISE LOBATO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59147

FILED

JAN 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a district court order denying a post-conviction petition requesting genetic marker testing pursuant to NRS 176.0918. Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge. We ordered appellant to show cause why this appeal should not be dismissed based on two potential jurisdictional defects. See Moran v. Bonneville Square Assocs., 117 Nev. 525, 527, 25 P.3d 898, 899 (2001) ("[T]he burden rests squarely upon the shoulders of a party seeking to invoke our jurisdiction to establish, to our satisfaction, that this court does in fact have jurisdiction."). First, no right to appeal exists unless a statute or court rule provides for an appeal, Castillo v. State, 106 Nev. 349, 353, 792 P.2d 1133, 1135 (1990), and NRS 176.0918 does not provide for an appeal. Second, the notice of appeal was filed in district court after expiration of the 30-day appeal period provided by NRAP 4(b), which applies where, as here, "no other specific appeal period has been provided by statute." Edwards v. State, 112 Nev. 704, 709, 918 P.2d 321, 325 (1996).

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Appellant first argues that NRS 176.0918 is ambiguous because it is silent as to the right to appeal. Based on that asserted ambiguity, appellant urges us to turn to the legislative history, which appellant argues demonstrates a clear legislative intent to allow for appellate review of an order under NRS 176.0918. We are not convinced, however, that the statute is ambiguous merely because it is silent as to appellate review. We have consistently held that "where no statutory authority to appeal is granted, no right to appeal exists." Castillo, 106 Nev. at 353, 792 P.2d at 1135. NRS 176.0918 does not include an express grant of authority to appeal, and no such grant of authority appears in any other statute (such as NRS 177.015, which provides the statutory authority for most appeals in criminal proceedings). Although the Legislature may have intended to allow for an appeal, its failure to include a specific grant of statutory authority to appeal is determinative. See Mazzan v. State, 109 Nev. 1067, 1075, 863 P.2d 1035, 1039-40 (1993) (indicating that specific legislative authority is required); cf. NRS 34.575 (providing statutory authority to appeal order granting or denying post-conviction habeas petition); NRS 177.015 (providing statutory authority to appeal specific decisions in a criminal action). The statute is clear and we therefore cannot turn to legislative history to imply a grant of statutory authority to appeal. See State v. Lucero, 127 Nev. ___, ___, 249 P.3d 1226, 1228 (2011) (explaining that statute's plain meaning is starting point for determining legislative intent and that court cannot go beyond clear statutory language to determine legislative intent).

Appellant alternatively argues that her genetic marker petition is based on a civil right and remedy and therefore is appealable

under NRAP 3A(b) as a final judgment in a civil action. Appellant relies on Supreme Court authority as to whether a state prisoner may file a complaint in federal court under 42 U.S.C. § 1983 to obtain DNA testing or whether a habeas corpus petition under 28 U.S.C. § 2254 is the sole remedy available in federal court. E.g., Skinner v. Switzer, 562 U.S. ___, 131 S. Ct. 1289 (2011). The available remedy in federal court is irrelevant. Appellant filed her petition in state court consistent with NRS 176.0918; she did not try to obtain relief in a civil action under § 1983. And NRS 176.0918 is located in Title 14, which "governs the procedure in the courts [of this state] in all criminal proceedings," NRS 169.025(1), and "is intended to provide for the just determination of every criminal proceeding," NRS 169.035. The statutory provision explaining that a petition under NRS 176.0918 is not an exclusive remedy (NRS 176.0918(14)) merely ensures that other remedies remain available for a criminal defendant to seek genetic marker testing; it does not set the petition apart from the criminal proceedings as commencing a separate civil action. Given the statutory scheme, we conclude that the district court's decision cannot be treated as a final judgment in a civil action that is appealable under NRAP 3A(b). See generally Washington v. State, 104 Nev. 309, 311, 756 P.2d 1191, 1193 (1988) (rejecting argument that timeliness of notice of appeal in post-conviction relief proceedings pursuant to former provisions in NRS Chapter 177 should be determined by civil rather than criminal rules, specifically explaining that manner in which federal courts treat appeals is not determinative and observing that "appellant pursued relief under NRS Chapter 177, a chapter organized

with the other statutes of this state which govern matters of criminal, and not civil, procedure").

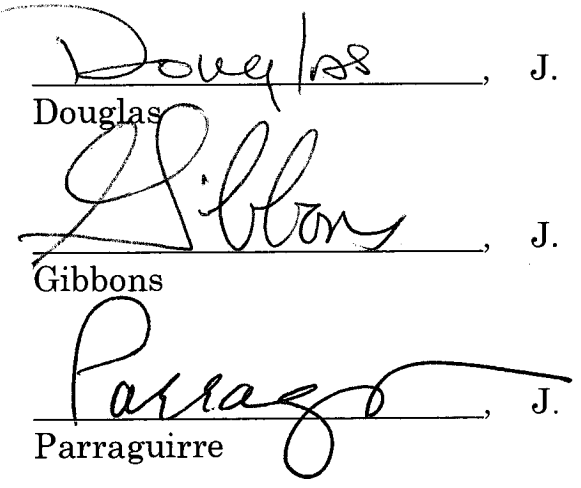
The genetic marker petition filed under NRS 176.0918 is part of the criminal proceedings. Although the district court's order finally resolves the genetic marker petition, it is not the final judgment in the criminal proceedings. NRS 176.0918 does not expressly provide authority to appeal, and appellant has not identified any other statute or court rule that does so. Because the order is not appealable, we lack jurisdiction to entertain this appeal.

Even if the order were appealable (either based on a silent legislative intent or as a second final judgment in a criminal proceeding), the notice of appeal was not timely filed. Appellant suggests that the notice of appeal was timely filed, referring primarily to NRAP 4(a). Having determined that this matter does not involve a civil action, NRAP 4(a) is inapplicable. In the absence of a specific statute setting an appeal period from an order in a criminal action, the 30-day appeal period set forth in NRAP 4(b)(1) applies. Edwards v. State, 112 Nev. 704, 709, 918 P.2d 321, 325 (1996). That appeal period commences from entry of the written order, not from service of notice of entry. NRAP 4(b)(1); NRS 178.586 ("Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed."); see Mazzan, 109 Nev. at 1075, 863 P.2d at 1039-40 (holding that order denying motion to change venue is post-conviction proceeding is not appealable, explaining that "in the absence of specific legislative authority," this court cannot exercise jurisdiction over a matter by "selectively grafting civil rules onto rules governing

appealability in post-conviction habeas proceedings"). As such, the notice of appeal in this matter was not timely filed. We therefore lack jurisdiction for this reason as well as the lack of statutory authority for an appeal.

Appellant has not carried her burden to establish our jurisdiction. Accordingly, we

ORDER this appeal DISMISSED.



_____, J.
Douglas

_____, J.
Gibbons

_____, J.
Parraguirre

cc: Hon. Valorie J. Vega, District Judge
Gallian Wilcox Welker Olson & Beckstrom, LC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk