

IN THE SUPREME COURT OF THE STATE OF NEVADA

LEONARD ARTHUR WINFREY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74463

FILED

APR 16 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER DISMISSING APPEAL

This is a pro se appeal from an order denying appellant's postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

This court's preliminary review of this appeal revealed a potential jurisdictional defect. Specifically, appellant's notice of appeal was due on October 16, 2017. *See* NRS 34.575 (providing that an appeal may be filed from an order denying a petition for a writ of habeas corpus within 30 days after service by the district court of written notice of entry of the order); NRAP 26(a); NRAP 26(c). Appellant's notice of appeal, however, was not filed in the district court until November 9, 2017, well beyond the relevant appeal period. "[A]n untimely notice of appeal fails to vest jurisdiction in this court." *Lozada v. State*, 110 Nev. 349, 332, 871 P.2d 944, 946 (1994).

Because appellant dated his notice of appeal October 10, 2017, which is within the prescribed appeal period, this court entered an order directing the attorney general to obtain and transmit to the clerk of this court a certified copy of the notice of appeal log maintained at the prison indicating the actual date upon which appellant delivered to a prison official his notice of appeal. *See Kellogg v. Journal Communications*, 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). The attorney general has responded

and provided the declaration of the employee who maintains the notice of appeal log attesting that the notice of appeal log contains no record of when appellant mailed his notice of appeal. The attorney general has also provided records of appellant's requests for postage, and his incoming mail. Because there is no record that appellant timely delivered his notice of appeal to a prison official, the November 9, 2017, date controls.

Appellant has filed a "motion for reconsideration pursuant to NRCPC 60(b)" in which he asserts that he filed a "motion for reconsideration and rehearing" of the petition on September 7, 2017, in the district court. The motion for reconsideration and rehearing was then heard and denied on October 2, 2017, and the district court entered the written order on October 10, 2017. Appellant argues that therefore, his notice of appeal, filed on November 9, 2017, is timely.

Appellant's motion for reconsideration did not toll the 30-day appeal period. *See Phelps v. State*, 111 Nev. 1021, 900 P.2d 344 (1995). Appellant's notice of appeal was untimely filed, we conclude that we lack jurisdiction, and we

ORDER this appeal DISMISSED.

Cherry, J.
Cherry

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

cc: Hon. Kathleen E. Delaney, District Judge
Leonard Arthur Winfrey
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk