

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD R. ASHMORE,

No. 37230

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

**FILED**

MAR 15 2001

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is a proper person appeal from an order of the district court denying appellant's motion to modify his sentence.

Our preliminary review of this appeal revealed a potential jurisdictional defect. Specifically, the district court entered the order denying appellant's motion on November 22, 2000. Appellant's notice of appeal was due on December 22, 2000, thirty days after entry of the order.<sup>1</sup> Appellant did not file the notice of appeal, however, until December 27, 2000, five days late. An untimely notice of appeal fails to vest jurisdiction in this court.<sup>2</sup>

Appellant dated his notice of appeal on December 19, 2000. If appellant delivered his notice of appeal to a prison official for mailing on December 19, 2000, his notice of appeal would be timely filed.<sup>3</sup> Accordingly, we directed the attorney general to provide this court with copies of any available prison records indicating the actual date upon which appellant delivered his notice of appeal to a prison official.

In response, the attorney general indicated that the Nevada Department of Prisons has no record regarding when appellant delivered his notice of appeal to a prison official. The response includes an affidavit from the custodian of the

<sup>1</sup>See NRAP 4(b); *Edwards v. State*, 112 Nev. 704, 918 P.2d 321 (1996).

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

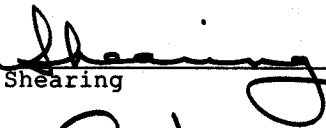
<sup>3</sup>See *Kellogg v. Journal Communications*, 108 Nev. 474, 477, 835 P.2d 12, 13 (1992) (holding that a notice of appeal is deemed "filed" when it is delivered to a prison official).

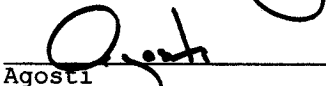
"Notice of Appeal Log" and "Outgoing Legal Mail Log," the law library supervisor at the High Desert State Prison. The affiant stated that he was not able to find any entries made for or on behalf of appellant and that the affiant had no personal knowledge of any pleadings delivered by appellant for mailing during the month of December 2000. The affiant further stated that inmates were instructed, on the folder in the law library containing form notices of appeal, to notify the affiant when mailing a notice of appeal so as to make an entry in the "Notice of Appeal Log."

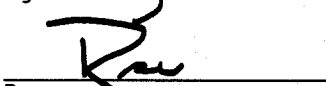
Appellant's notice of appeal is not recorded in the notice of appeal log or the outgoing legal mail log. This court's decision in Kellogg contemplates that the date of delivery of the notice of appeal to a prison official will be determined by the date recorded in the prison mail log.<sup>4</sup> Here, there is no record of the date appellant delivered his notice of appeal to a prison official pursuant to Kellogg. Therefore, the December 27, 2000 filing date of the notice of appeal in the district court controls.

Because appellant's notice of appeal was untimely filed, we conclude that we lack jurisdiction to consider this appeal, and we

ORDER this appeal DISMISSED.

  
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Shearing, J.

  
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Agosti, J.

  
\_\_\_\_\_  
Rose, J.

cc: Hon. Lee A. Gates, District Judge  
Attorney General  
Clark County District Attorney  
Donald R. Ashmore  
Clark County Clerk

<sup>4</sup>Id. at 476-77, 835 P.2d at 13.