

IN THE SUPREME COURT OF THE STATE OF NEVADA

MIGUEL ANGEL CASTRO,

No. 38301

Appellant,

vs.

EDUCATION DEPARTMENT OF ELY
STATE PRISON, NEVADA
DEPARTMENT OF PRISONS AND
WARDEN, ELY STATE PRISON, E.K.
MCDANIEL,

Respondents.

FILED

JAN 23 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is a proper person appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus. This court's preliminary review of this appeal revealed a potential jurisdictional defect. Although appellant's notice of appeal was not filed in the district court until July 26, 2001, two days beyond the statutory time period,¹ it appeared that appellant may have delivered his notice of appeal to a prison official for mailing on July 23, 2001.² Accordingly, because the documents necessary to verify the actual date of delivery are in the sole

¹See NRS 34.575; NRAP 26(a), (c).

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

custody and control of State prison officials and because appellant is not represented by counsel in this matter, this court entered an order on September 26, 2001, directing the attorney general, as counsel for the State, to obtain and transmit to this court certified copies of any available prison records indicating the actual date upon which appellant delivered his notice of appeal to a prison official. Further, if available prison records did not indicate that appellant delivered his notice of appeal to a prison official, this court's order instructed the attorney general to inform this court of that fact. On October 30, 2001, this court received and filed the attorney general's response. Although the response included a copy of the prison's legal postage log for July 23, 2001 through July 26, 2001, indicating that appellant did not use a "brass slip" for postage, this postage log does not establish whether or when appellant may have delivered his notice of appeal to a prison official.

Nevada Department of Prisons Administrative Regulation 749 §IV(A) (1993) provides that "Each institution/facility will maintain a permanent Notice of Appeals Log." Therefore, this court determined that a copy of the entries in the notice of appeal log for July 23, 2001 and July 26, 2001 was essential to establish whether appellant timely invoked this court's jurisdiction to consider this appeal. On November 19, 2001, this court ordered the attorney general to obtain and transmit to the clerk of this court certified copies of the prison notice of appeal log for July 23, 2001 through July 26, 2001. If the notice of appeal log did not indicate that appellant delivered his notice of appeal to a prison official, the attorney general was instructed to inform this court of that fact.

On December 19, 2001, the attorney general filed a response in this court indicating that appellant did not utilize the notice of appeal


log maintained by the prison. In support, the attorney general attached a copy of the notice of appeal log for the relevant period in question. The attorney general further informed this court that the law librarian represented that it was common for prisoners to use their own postage and not to utilize the notice of appeal log maintained by the prison.

Appellant's notice of appeal is not recorded in the notice of appeal log or the legal postage 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. Here, there is no record of the date appellant delivered his notice of appeal to a prison official pursuant to Kellogg. Therefore, the untimely July 26, 2001 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.


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Dan L. Papez, District Judge
Attorney General/Ely
Miguel Angel Castro
White Pine County Clerk