

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH HENDERSON

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
CASE NO: 62629 Dec 26 2013 02:58 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

**STATE'S REPLY TO DEFENDANT'S OPPOSITION TO STATE'S
MOTION TO DISMISS APPEAL AND REQUEST FOR STAY OF
BRIEFING SCHEDULE**

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, STEVEN S. OWENS, and submits this State's Reply to Defendant's Opposition to State's Motion to Dismiss Appeal and Request for Stay of Briefing Schedule.

This Reply is based on the following memorandum and all papers and pleadings on file herein.

Dated this 26th day of December, 2013.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Steven S. Owens*

STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Attorney for Respondent

MEMORANDUM

The State hereby incorporates by reference its Motion to Dismiss Appeal and Request for Stay of Briefing Schedule filed December 16, 2013, as though the same were set forth in its entirety herein.

This Court has consistently held that an untimely Notice of Appeal fails to vest jurisdiction in this Court. Lozada v. State, 110 Nev. 349, 352, 871 P.2d 944, 946 (1994) (citing Jordon, 101 Nev. 146, 696 P.2d 998). See also Washington v. State, 104 Nev. 309, 756 P.2d 1191 (1988); Klein v. Warden, 118 Nev. 305, 308-11, 43 P.3d 1029, 1032-33 (2002).

In this case, the Findings of Fact and Conclusions of Law was filed on November 21, 2012. 2 AA 130. Notice of Entry of Decision and Order was filed and served on both defendant and his appointed post-conviction counsel by mail on December 3, 2012. 2 AA 153. Defendant's pro per notice of appeal was not received and filed until February 12, 2013, well outside the thirty (30) day time limit prescribed by NRAP 4(b) and NRS 34.575. 2 AA 146. The State further notes that the Notice of Appeal was not even signed by the Defendant until January 29, 2013. Id.

Defendant's opposition does not change the circumstances of this case. Defendant cites to Lemmond v. State, 114 Nev. 219, 954 P. 2d 1179 (1998) to excuse his failures to (1) file a Notice of Appeal and (2) to file a Notice of Appeal

with the correct court.¹ In Lemmond, the defendant filed a Notice of Appeal but did so late because he was never served with the order denying his petition; his Notice of Appeal also identified the Notice of Entry, rather than the order as the document appealed from. Id., 114 Nev. at 219-221, 954 P.2d 1179-1180. This Court made an exception for those deficiencies because the defendant filed the Notice of Appeal within the proper time period after he was served and because the intent to appeal the order could be reasonably inferred from the Notice of Appeal itself. Id. In Collins v. Union Fed. Sav. & Loan Ass'n, this Court stated:

It is the general rule that a judgment or order which is not included in the notice of appeal will not be considered on appeal. See NRAP 3(c); Reno Newspapers v. Bibb, 76 Nev. 332, 353 P.2d 458 (1960). However, a notice of appeal which does not designate the correct judgment does not warrant dismissal where the intention to appeal from a specific judgment may be reasonably inferred from the text of the notice and where the defect has not materially misled the respondent. Forman v. Eagle Thrifty Drugs & Markets, 89 Nev. 533, 516 P.2d 1234 (1973). See also Grouse Cr. Ranches v. Budget Financial Corp., 87 Nev. 419, 488 P.2d 917 (1971); Casino Operations, Inc. v. Graham, 86 Nev. 764, 476 P.2d 953 (1970).

Here, appellant's intention to appeal from the order entered August 27, 1980 can be reasonably inferred from the date of the filing of the notice of appeal (September 29, 1980) as well as the text of the notice.

97 Nev. 88, 89-90, 624 P.2d 496, 497 (1981). Here, Defendant did not file a

¹ Defendant also cites to Jordon v. Housewright, 101 Nev. 146, 147, 696 P.2d 998 (1985) which is inapplicable as it concerns whether the date for filing a Notice of Appeal ran from Notice of Entry and has since been overruled by statute. See NRS 34.575.

Notice of Appeal with the district court identifying the wrong order. Instead, he sent a letter to the Nevada Supreme Court presumably on November 17, 2012, which was returned to him with instructions on the proper procedure on December 5, 2012. 2 AA 150-151. Next, although there is no stamp indicating the letter was ever received, Defendant may have sent a letter to the district court on December 27, 2012. 2 AA 152. In it, he requests that the District Court Court Clerk file a Notice of Appeal on his behalf regarding the habeas hearing held on September 22, 2012, when he states “I [request] that you please acknowledge my request to the notice of appeal on my habe corpus hearing I had in 9-22-12.” Id. (errors in original). However, the district court and its clerk are prohibited from taking such action:

The district court clerk is authorized to prepare and file a notice of appeal on a criminal defendant's behalf in two specific situations: (1) when a defendant “who has not pleaded guilty or guilty but mentally ill and who is without counsel” has been informed at sentencing of his right to appeal and requests an appeal, NRS 177.075(2); and (2) when the district court finds that a post-conviction petitioner has demonstrated that he was deprived of his right to appeal from a judgment of conviction and orders the clerk to prepare and file a notice of appeal from the judgment of conviction as provided in NRAP 4(c)(1)(B)(i), (iii).

These provisions ensure that a notice of appeal from a judgment of conviction is prepared and filed on behalf of a defendant in two circumstances in which there is a significant risk that the right to appeal otherwise will be lost. In both instances in which the clerk has authority to prepare and file a notice of appeal from a judgment of conviction on a defendant's behalf, the defendant has asserted his right to appeal from the judgment of conviction. These provisions therefore

are consistent with the notion that the defendant has the ultimate authority to decide whether to take such an appeal. **No statute or court rule permits the district court clerk to prepare and file a notice of appeal on a defendant's behalf in any other circumstance. In particular, NRS Chapter 34, which governs post-conviction habeas petitions and appeals therefrom, has no provision directing the court or clerk to prepare and file a notice of appeal on an aggrieved litigant's behalf.**

Abdullah v. State, 129 Nev. Adv. Op. ____, 294 P.3d 419, 421 (2013). (emphasis added). As such, Defendant's letter of December 27, 2012, is insufficient to be construed as a Notice of Appeal and thus does not entitle him to the exceptions to the procedural rules set forth in Lemmond and Collins. His Opposition asks this Court to go well beyond its prior exceptions which allow for interpreting the contents of a Pro Per Notice of Appeal to determine which order is being appealed. As such, the first Notice of Appeal which could be considered was submitted to district court was not received and filed until February 12, 2013, well outside the thirty (30) day time limit prescribed by NRAP 4(b) and NRS 34.575. 2 AA 146. The State further notes that the Notice of Appeal was not even signed by the Defendant until January 29, 2013. Id.

Furthermore, Defendant was represented by counsel, Stephanie B. Kice, Esq., upon whom the Findings of Fact, Conclusions of Law, and Order and Notice of Entry of that Order were served. 2 AA 144, 153. Defendant was not compelled to file a Pro Per Notice of Appeal, rather he could have requested that counsel file an appeal on his behalf. The fact that counsel did not file a Notice of Appeal

suggests that such a request was not made and Defendant's representations to the contrary are self-serving allegations. 2 AA 146-156.

Finally, unlike Lemmond and Collins where a Notice of Appeal was filed but identified the wrong order, here the State was unaware of Defendant's intention to appeal until the untimely February 2013 Notice of Appeal was filed because he sent a letter rather than a Notice of Appeal as described above. 2 AA 173. As such, the letter was not filed by the Clerk's Office and failed to put the State on notice. 2 AA 152.

Accordingly, this Court lacks jurisdiction over this appeal. On this basis, Defendant's appeal should be dismissed. Inasmuch as the State's Answering Brief was due on December 18, 2013, the State requests a stay of the briefing schedule pending the resolution of this motion.

Dated this 26th day of December, 2013.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ Steven S. Owens

STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 26, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
Nevada Attorney General

JULIAN GREGORY, ESQ.
Counsel for Appellant

STEVEN S. OWENS
Chief Deputy District Attorney

BY /s/ eileen davis
Employee, District Attorney's Office

SSO/Sarah Killer/ed