

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BENJAMIN McMILLAN,	§	
	§	No. 575, 2013
Defendant Below,	§	
Appellant,	§	Court Below–Superior Court of
	§	the State of Delaware in and
v.	§	for Kent County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0608002639
Appellee.	§	

Submitted: November 4, 2013

Decided: November 7, 2013

Before **HOLLAND, BERGER** and **RIDGELY**, Justices.

ORDER

This 7th day of November 2013, upon consideration of the notice to show cause issued to the appellant, Benjamin McMillan, McMillan’s response to the notice, and the answer filed by the appellee, State of Delaware, it appears to the Court that:

(1) On October 22, 2013, the Court received Benjamin McMillan’s untimely notice of appeal from the Superior Court’s order, docketed on September 3, 2013, denying his motion for correction of sentence. Pursuant

to Supreme Court Rule 6(a)(iii), McMillan’s notice of appeal should have been filed on or before October 3, 2013.¹

(2) On October 22, 2013, the Clerk issued a notice pursuant to Supreme Court Rule 29(b), directing that McMillan show cause why the appeal should not be dismissed as untimely filed.² In his response to the notice, McMillan asserts that the appeal should not be dismissed because he filed the notice of appeal on October 22, 2013, within thirty days of September 25, 2013, the “approximate[.]” date he received the September 3, 2013 order, and because his receipt of the order was delayed “due to the misspelling of [his first] name.”

(3) Time is a jurisdictional requirement.³ To be effective, a notice of appeal *must* be received by the Office of the Clerk of this Court within thirty days *after entry upon the docket* of the order from which the appeal is taken.⁴ Unless an appellant can demonstrate that the failure to file a timely

¹ See Del. Supr. Ct. R. 6(a)(iii) (providing that a notice of appeal in any proceeding for postconviction relief shall be filed in the office of the Clerk within thirty days after entry upon the docket of the order from which the appeal is taken).

² See Del. Supr. Ct. R. 29(b) (governing involuntary dismissal upon notice of the Court).

³ *Carr v. State*, 554 A.2d 778, 779 (Del. 1989), cert. denied, 493 U.S. 829 (1989).

⁴ Del. Supr. Ct. R. 10(a).

notice of appeal is attributable to court-related personnel, an untimely appeal cannot be considered.⁵

(4) In this case, McMillan’s notice of appeal was not received by the Clerk within thirty days after entry upon the docket of the September 3, 2013 order. Therefore, the Court has considered whether the jurisdictional defect can be excused on the basis that the delay is attributable to court-related personnel.

(5) Having carefully considered the parties’ positions, the Court has concluded that the Superior Court’s typographical error in the spelling of McMillan’s first name in the caption of the September 3, 2013 order, does not, without more, suggest that the delay in filing the appeal is attributable to court-related personnel. Assuming, as McMillan contends, that he did not receive the September 3, 2013 order until “approximately September 25, 2013,” McMillan does not explain why it took him another twenty-seven days, until October 22, 2013, to file the notice of appeal.

NOW, THEREFORE, IT IS ORDERED, pursuant to Supreme Court Rules 6 and 29(b), that the appeal is DISMISSED.

BY THE COURT:

/s/ Randy J. Holland
Justice

⁵ *Bey v. State*, 402 A.2d 362, 363 (Del. 1979).