SUMMARY
April 29, 2021

2021COA61

No. 21CA0428, *People v. Parks* — Criminal Procedure — Termination of Representation — Service and Filing of Papers — Notice of Orders; Appellate Procedure — Computation and Extension of Time

A division of the court of appeals concludes that there is good cause to accept a late appeal because the trial court served the order resolving the case on the defendant's prior counsel of record, who no longer represented the defendant.

COLORADO COURT OF APPEALS **2021COA61**

Court of Appeals No. 21CA0428
City and County of Denver District Court No. 10CR1863
Honorable Andrew P. McCallin, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Timothy Parks,

Defendant-Appellant.

MOTION GRANTED

Division A
Opinion by JUDGE TOW
Terry and Yun, JJ., concur

Announced April 29, 2021

No Appearance for Plaintiff-Appellee

Timothy Parks, Pro Se

¶ 1 Defendant, Timothy Parks, appeals the denial of his petition for postconviction relief pursuant to Crim. P. 35(c). He filed his notice of appeal 197 days after the court denied his petition — well after the due date for appeal. Nevertheless, for the reasons stated below, we find good cause to accept the appeal as timely. And we do so in a published order so that we may address a recurring problem with how trial courts throughout the state process such postconviction matters filed by pro se defendants long after the initial prosecution has ended — specifically, the failure of the trial courts to properly serve the pro se defendant with the order denying the petition.

I. Procedural Background[1]

¶ 2 Following a jury trial in February 2013, Parks was convicted of multiple charges involving possession with the intent to distribute drugs. After being adjudicated a habitual offender, Parks was sentenced to sixty-four years in the custody of the Colorado

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[1] Because of the procedural posture of this case, we do not yet have a record on appeal. Our recitation of the background of the case is taken from the register of actions in Denver case number 10CR1863, of which we take judicial notice. *See People v. Sa'ra*, 117 P.3d 51, 55-56 (Colo. App. 2004) ("A court may take judicial notice of the contents of court records in a related proceeding.").

Department of Corrections, with all sentences running concurrently. On direct appeal, a division of this court partially reversed, concluding that some of Parks's convictions should be merged. *People v. Parks*, (Colo. App. No. 13CA0822, Mar. 24, 2016) (not published pursuant to C.A.R. 35(f)). Because his sentences were concurrent, however, the merger had no impact on the length of his incarceration.

¶ 3 Parks later filed a pro se petition for postconviction relief pursuant to Crim. P. 35(c) challenging the proportionality of his sentence. On August 31, 2020, the district court denied the petition without a hearing. When issuing the order, however, the district court did not serve Parks with a copy of the order; instead — despite the fact that Parks had filed the petition pro se — the order was sent to two attorneys whom the district court file still reflected as counsel of record: Esteban Martinez and Laura Schwartz.[2]

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[2] Martinez and Schwartz entered their appearances by filing a motion to reconsider Parks's sentence pursuant to Crim. P. 35(b). They should have been removed as counsel of record once that motion was ruled on. Crim. P. 44(e)(1)(III). That motion was denied seven months before Parks filed his pro se petition.

¶ 4 On February 5, 2021, the district court received a letter from Parks inquiring as to the status of the petition. That same day the district court entered an order noting "NO ACTION TAKEN" and explaining that it had entered a written ruling denying the petition several months earlier. Again, however, this order was sent not to Parks, but to Martinez and Schwartz. Shortly thereafter, Martinez filed a motion requesting that he be removed as counsel of record and forwarded a copy of each of the district court's orders to Parks.[3] Five weeks later, Parks filed his notice of appeal and a request that we accept the appeal out of time.

II. Applicable Law

¶ 5 The deadline for a defendant to appeal a final judgment or order in a criminal case is forty-nine days after entry of the judgment or order. C.A.R. 4(b)(1). This court may extend that time by up to thirty-five days upon a finding of excusable neglect. *Id.* "Additionally, C.A.R. 26(b) allows the appellate court to enlarge the time for filing or permit an act to be done after the expiration of a

[3] Parks provided as an attachment to his motion for extension of time to file his appeal a copy of the letter he received from Martinez.

deadline for good cause shown." *People v. Baker*, 104 P.3d 893, 896 (Colo. 2005).

¶ 6 When a court enters an order out of the presence of the parties, "the clerk shall mail to each party affected a notice of the order and shall note the mailing in the docket." Crim. P. 49(c). The failure of the trial court to perform its duties can be a factor in determining whether there is good cause to permit an appeal to be filed after the expiration of the deadline. *See Baker*, 104 P.3d at 896.

III. Analysis

¶ 7 Parks filed his postconviction petition pro se. But the trial court, in derogation of Crim. P. 49(c), sent a copy of the order denying the petition to two individuals who had ceased to represent him as a matter of law. Trial counsel's representation terminates automatically "when trial court proceedings have concluded." Crim. P. 44(e)(1). The conclusion of such proceedings occurs when restitution, if any, has been determined and either (1) the matter is dismissed and no timely appeal is filed; (2) the parties agree to pretrial diversion or the court enters an order granting a deferred sentence; (3) a sentence to incarceration is imposed and either the

period for reconsideration pursuant to Crim. P. 35(b) has passed or any such motion is resolved; or (4) a timely notice of appeal is filed. *Id.*[4] Unless appellate counsel also represented the defendant at trial, the representation terminates at the conclusion of the proceedings in the appellate court in which the attorney has appeared. C.A.R. 5(f). Significantly, neither the criminal rules nor the appellate rules require the attorney to take any steps to withdraw from representation after the proceedings have concluded.

¶ 8 The trial court proceedings had concluded, since there had been a direct appeal. Thus, Schwartz should have no longer been listed as counsel of record.[5] Appellate proceedings had also concluded. Thus, Martinez should also have been removed as counsel of record.

¶ 9 Despite the termination of both Schwartz's and Martinez's representation by operation of law, they were not removed as counsel of record by the trial court. As a result, when serving the

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[4] Crim. P. 44 provides that the representation can be extended by the trial court or by agreement of the parties. The record does not reflect that either of these circumstances existed here.

[5] Notably, as of the writing of this order, Schwartz remains listed as counsel of record in the trial court's file.

order denying the petition, the trial court's case management system automatically emailed the order to counsel instead of mailing it to Parks directly. Thus, the trial court failed to discharge its obligation to serve Parks, a pro se party, with the order denying his postconviction petition. Thus, Parks could not have known that the appellate clock had begun to tick. Once he discovered his petition had been denied, he filed an appeal within a reasonable time. Under these circumstances, there is ample good cause to accept the late filing.

¶ 10 We understand the volume of cases district court judges handle. But that cannot excuse courts from establishing procedures to remove counsel from a file once representation terminates or, at the very least, taking steps to ensure that postconviction orders are not served on counsel who is no longer representing the defendant.

¶ 11 Moreover, we do not intend to single out this particular trial court. Rather, we have elected to publish this order because divisions of the court of appeals are frequently faced with requests from pro se defendants throughout the state to accept untimely appeals after they failed to receive notice that their postconviction

petitions had been denied because the orders resolving their petitions were erroneously served on prior counsel. The delays created by this recurring mistake — not to mention the drain on this court's resources from having to repeatedly remedy this problem — are unnecessary and avoidable. We respectfully urge trial courts and the State Court Administrator's Office to develop protocols to ensure the routine and timely removal of counsel of record consistent with Crim. P. 44(e) and C.A.R. 5(f).

IV. Conclusion

¶ 12 The motion for extension of time to file is GRANTED. The notice of appeal received by this court on March 19, 2021, is accepted as timely filed.

JUDGE TERRY and JUDGE YUN concur.