

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELWOOD N. BROWN,	§
	§ No. 620, 2009
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID Nos. 0309008355
	§ 0805039373
Plaintiff Below-	§
Appellee.	§

Submitted: December 2, 2009

Decided: December 8, 2009

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices

**ORDER**

This 8<sup>th</sup> day of December 2009, upon consideration of the appellant's response to the notice to show cause, the appellant's attorney's reply, and the State's reply, it appears to the Court that:

(1) In July 2009, the defendant-appellant, Elwood N. Brown, was serving probationary sentences on convictions of Failure to Register as a Sex Offender and Robbery in the First Degree. After being charged with several new felony offenses, Brown was found to have committed a violation of probation at a VOP hearing on September 23, 2009 and was immediately sentenced. The record reflects that Brown was represented by court-

appointed counsel at the VOP hearing. Brown, acting *pro se*, filed an untimely notice of appeal on October 26, 2009.<sup>1</sup>

(2) On October 27, 2009, the Clerk of the Court issued a notice to Brown to show cause why his appeal should not be dismissed as untimely filed. Brown filed a response on November 6, 2009. In the response, he states that he told his court-appointed counsel that he wanted to file an appeal of the VOP sentence, but, believing that his counsel was not going to do so, he attempted to file the appeal himself. Brown further states that he attempted to mail his notice of appeal to the Court on October 21, 2009, but that the notice was returned to him by the prison mailroom and was re-sent two days later, resulting in the untimely filing.

(3) On November 6, 2009, the Court directed Brown's counsel to file a reply to Brown's response to the notice to show cause. In his reply filed on November 19, 2009, Brown's counsel does not address the issue of whether Brown instructed him to file an appeal, but states only that he informed Brown "that he felt there was no basis for the appeal" and that Brown's sentence actually provided him a benefit by shortening his sentences for his new felony convictions. In its reply filed on December 2, 2009, the State also does not address the issue of whether Brown instructed

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<sup>1</sup> Supr. Ct. R. 6(a)(ii); Del. Code Ann. tit. 10, §147.

his attorney to file an appeal but, instead, argues that Brown's untimely *pro se* appeal must be dismissed.

(4) After careful consideration of the submissions in this matter, we conclude that this matter must be remanded to the Superior Court. Because the record is unclear with respect to the communication that took place between Brown and his counsel regarding the appeal from the VOP sentence, the Superior Court should take whatever action it deems necessary to determine the relevant facts and, if warranted, re-sentence Brown so that a timely notice of appeal may be filed.<sup>2</sup>

NOW, THEREFORE, IT IS ORDERED that this matter is REMANDED to the Superior Court for further proceedings in accordance with this Order. Jurisdiction is not retained.

BY THE COURT:

/s/ Myron T. Steele  
Chief Justice

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<sup>2</sup> *Harris v. State*, Del. Supr., No. 451, 2006, Holland, J. (July 5, 2007).