

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARK RIVERA,	§	
	§	No. 386, 2012
Defendant-Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware, in
v.	§	and for Kent County
	§	
STATE OF DELAWARE,	§	Cr. ID No. 0710015083
	§	
Plaintiff-Below,	§	
Appellee.	§	

Submitted: September 20, 2012
Decided: December 18, 2012

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

ORDER

This 18th day of December 2012, upon consideration of the appellant’s opening brief and the appellee’s motion to affirm, it appears to the Court that:

(1) In December 2009, after a Superior Court jury trial, the appellant, Mark Rivera, was convicted of Murder in the First Degree. On February 17, 2010, Rivera was sentenced to a mandatory life term. On direct appeal, we affirmed the Superior Court’s judgment of conviction.¹

¹ *Rivera v. State*, 7 A.3d 961 (Del. 2010).

(2) On July 21, 2011, Rivera moved for correction of sentence under Superior Court Criminal Rule 35(a). By order dated August 15, 2011, the Superior Court denied that motion. On March 30, 2012, Rivera moved again for a correction of sentence under Rule 35(a). By order dated June 7, 2012, the Superior Court denied that motion on the basis that “the issue raised . . . is essentially the same issued denied by this court on Aug. 15, 2011.”

(3) On June 1, 2012, Rivera requested the Superior Court to conduct an evidentiary hearing or, alternatively, to reissue its August 15, 2011 order denying his first Rule 35(a) motion (the “Motion”). In support of the Motion, Rivera claimed that the Superior Court had neglected to send him a copy of the August 15, 2011 order, and that he was not informed of the August 15, 2011 order until May 2012, when the Prothonotary at Rivera’s request sent him a copy of the docket sheet. According to Rivera, upon learning of the August 15, 2011 order, he promptly filed the Motion on June 1, 2012.

(4) By order dated July 5, 2012, the Superior Court denied the Motion.² The court held:

[P]ostconviction appeals must be initiated in the Supreme Court within thirty days after the order challenged has been entered into the docket. As an

² *State v. Rivera*, 2012 WL 3549306 (Del. Super. July 5, 2012).

exception to the general rule that timely filing is absolutely mandatory, the Supreme Court has accepted late appeals when failure to perfect a timely appeal is attributable to error by Court personnel.

Whether an exception to the thirty-day appeal period exists in this case is not a determination for this Court. Rather, it is an issue that rests in the discretion of the Supreme Court. This Court has done nothing to prevent Rivera from appealing [the August 15, 2011 order denying his first Rule 35(a) motion]. If Rivera wishes to pursue an appeal, arguing to the Supreme Court that he should be exempt from the time limitation, he may do so.³

(5) Thereafter, on July 13, 2012, Rivera appealed from the Superior Court August 15, 2011 order. Upon receipt of Rivera's appeal, the Clerk issued a letter advising Rivera that the appeal "appear[ed] to be untimely" but that it also appeared from the docket that the Superior Court had issued an appealable order on July 5, 2012. The Clerk further advised Rivera that:

The Supreme Court may not assume that you intend to take an appeal from the July 5 order without a notice of appeal stating that. If you wish to appeal from the Superior Court's July 5, 2012, order . . . please file an amended notice of appeal correcting the date of the order being appealed . . .

[I]f you wish to appeal the Superior Court's order dated August 15, 2011, this appears to be untimely and a notice to show cause will issue.

³ *Id.* (footnotes omitted).

In response to the Clerk's letter, Rivera filed an amended notice of appeal changing the order being appealed from August 15, 2011 to July 5, 2012. Rivera, therefore, appeals only from the July 5, 2012 Superior Court order.

(6) In his opening brief on appeal, Rivera claims that the Superior Court's July 5, 2012 denial of his Motion effectively denied him his right to appeal from the August 15, 2011 order. Rivera also claims that the Motion's denial effectively denied him the right to stay the time for filing a postconviction motion under Superior Court Criminal Rule 61.

(7) The July 5, 2012 Superior Court order did not rule on Rivera's claim that he is entitled to a stay for filing a postconviction motion. The Superior Court ruled that the claim was "not ripe for determination." In the absence of a ruling on that claim, we decline to consider that claim on appeal.⁴

(8) We determine that the Superior Court did not abuse its discretion in ruling that Rivera could have appealed the August 15, 2011 order on the ground that the delay in filing his appeal was caused by "court related personnel" and was therefore excusable.⁵ We, therefore, affirm the July 5, 2012 Superior Court order.

⁴ DEL. SUPR. CT. R. 8.

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

NOW, THEREFORE, IT IS ORDERED that the motion to affirm is GRANTED. The Superior Court order of July 5, 2012 is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice