

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RAPHUS ELEY,

Defendant Below,
Appellant,

v.

STATE OF DELAWARE,

Plaintiff Below,
Appellee.

No. 42, 2000

Court Below: Superior Court
of the State of Delaware in and
for Sussex County

Cr. A. Nos. 99-07-0027, 0028,
0031 through 0033.

Cr. ID No. 9906016291

Submitted: February 11, 2000

Decided: February 29, 2000

Before **VEASEY**, Chief Justice, **WALSH** and **HOLLAND**, Justices.

ORDER

This 29th day of February 2000, it appears to the Court that:

(1) On October 27, 1999, after a jury trial in the Superior Court, the appellant, Raphus Eley (“Eley”), was found guilty of two counts of third degree burglary, one count of third degree assault, and two counts of misdemeanor theft. On December 10, 1999, the Superior Court sentenced Eley on one burglary count to three years at Level V, suspended after the successful completion of a Level V program and a Level IV program, for

Level III probation. Eley received suspended sentences and probation on the remaining counts.

(2) On January 28, 2000, Eley's trial counsel, E. Stephen Callaway, Esquire ("Callaway"), filed an untimely notice of appeal from Eley's October 27 conviction and December 10 sentencing. A timely notice of appeal should have been filed within 30 days of Eley's December 10 sentencing, i.e., no later than January 10, 2000.¹

(3) On January 31, 2000, the Clerk issued a notice directing Callaway to show cause why the appeal should not be dismissed as untimely filed. Callaway filed his response on February 3, 2000. Thereafter, the State file a response on February 11, 2000.

(4) In his response to the notice to show cause, Callaway states that Eley "informed Counsel at sentencing that he wanted to appeal his conviction and sentencing." Callaway, however, advised Eley that he "was unaware of any grounds for an appeal." By letter dated December 13, 1999, Callaway asked Eley to write to Callaway "within the next week" with Eley's basis for

¹ 10 *Del. C.* § 147; *Supr. Ct. R.* 6(a)(ii).

an appeal. Callaway represents that Eley responded and directed again that an appeal be filed.

(5) In his response to the notice to show cause, Callaway argues that “the filing of an appeal to this Court by Counsel would be a violation of Rule 3.1 of the Delaware Lawyers’ Rules of Professional Conduct in that there is no basis for the filing of an [a]ppel in this [c]ase.”² Callaway’s argument is specious, at best.

(6) Under well-settled Delaware law and the Rules of this Court, it is beyond dispute that a defendant’s trial attorney has a duty to take appropriate steps to perfect a direct appeal if the defendant wants to appeal.³ The attorney is required to file the appeal whether or not the attorney believes

² Rule 3.1 of the Delaware Lawyers’ Rules of Professional Conduct provides as follows:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, when the lawyer knows or it is obvious that there is no non-frivolous basis for doing so; however, this does not preclude a lawyer from making a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

³ *Dixon v. State*, Del. Supr., 581 A.2d 1115, 1116 (1990) (citing *Erb v. State*, Del. Supr., 332 A.2d 137, 139 (1974)).

the appeal to be meritorious.⁴ In the event the attorney finds that the appeal clearly presents only frivolous claims, the attorney may file a brief under Supreme Court Rule 26(c).⁵

(7) According to Callaway, Eley’s notice of appeal was “drafted” on January 19, 2000, and was inadvertently filed in the Superior Court on that date. Callaway realized the error and then filed the notice of appeal in this Court on January 28, 2000.

(8) Callaway gives no explanation why the notice of appeal, which was due to be filed no later than January 10, 2000, was not “drafted” until January 19, 2000. Moreover, Callaway does not acknowledge that, even if the notice of appeal had been properly filed in this Court on January 19, 2000, the appeal would have still been untimely because more than 30 days had elapsed since Eley’s December 10 sentencing.

(9) “Time is a jurisdictional requirement.”⁶ This Court cannot waive jurisdictional defects.⁷ A notice of appeal must be received by the Office of

⁴ Supr. Ct. R. 26(a)(ii).

⁵ *See Anders v. California*, 386 U.S. 738 (1967).

⁶ *Carr v. State*, Del. Supr., 554 A.2d 778, 779 (1989).

⁷ *Eller v. State*, Del. Supr., 531 A.2d 951, 953 (1987).

the Clerk of this Court within the applicable time period.⁸ Because Callaway filed Eley's notice of appeal outside of the applicable time period, the Court lacks jurisdiction to entertain the untimely appeal, and it must be dismissed.

(10) This Court has held that where a criminal defendant's trial attorney, against the wishes of his client, fails to perfect a direct appeal, the attorney's representation is ineffective.⁹ In this case, it is clear that Callaway was ineffective and that, because of Callaway's ineffectiveness, Eley has been deprived of his right to appeal. The remedy for Callaway's dereliction is to remand this case to the Superior Court for resentencing to renew the time to file a direct appeal.

NOW, THEREFORE, IT IS ORDERED that:

(A) This appeal is DISMISSED and REMANDED to the Superior Court for the purpose of resentencing Eley.

(B) While on remand, the Superior Court shall appoint new counsel to represent Eley in any new direct appeal that is filed with this Court.

⁸ *Id.*; Supr. Ct. R. 10(a).

⁹ *Dixon v. State*, Del. Supr., 581 A.2d 1115, 1117 (1990) (citing *Braxton v. State*, Del. Supr., 479 A.2d 831, 834 (1984)).

(C) This matter is hereby referred to the Office of Disciplinary Counsel for an investigation of Callaway's mishandling of this appeal.¹⁰

BY THE COURT:

s/Joseph T. Walsh
Justice

¹⁰ Supr. Ct. R. 64(e)(2).