

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LAMARR POTTS,	§	
	§	No. 160, 2007
Defendant Below,	§	
Appellant,	§	Court Below-Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0408019267
Appellee.	§	

Submitted: April 13, 2007  
Decided: May 4, 2007

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

**ORDER**

This 4<sup>th</sup> day of May 2007, upon consideration of the Out of Time Motion for Extension of Time filed by the appellant's counsel and the Memorandum in Support of Dismissal filed by the appellee's counsel, it appears to the Court that,

(1) On February 27, 2007, the appellant, Lamarr Potts (Potts), was convicted of violation of probation and was sentenced to a total of five years imprisonment, suspended after one year, for three years of probation. On March 30, Potts' counsel (Defense Counsel) filed a notice of appeal from the February 27 VOP proceeding. Defense Counsel also filed a motion for

extension of time to file the appeal, stating that he had inadvertently overlooked the “March 27” filing deadline.

(2) Counsel for the appellee opposes Defense Counsel’s motion for extension of time. Appellee’s counsel suggests that the Court remand the case for the reimposition of sentence.

(3) Defense Counsel’s motion for extension of time must be denied. Under Delaware law and procedure, the Clerk of this Court must receive a notice of appeal within the applicable time period.<sup>1</sup> The jurisdictional defect that is created by the untimely filing of a notice of appeal cannot be excused “in the absence of unusual circumstances which are not attributable to the appellant or the appellant’s attorney.”<sup>2</sup>

(4) The notice of appeal in this case was due to be filed on or before March 29, 2007, not March 27, as Defense Counsel stated.<sup>3</sup> Nonetheless, Defense Counsel is correct that the appeal is untimely because it was filed more than thirty days from Potts’ sentencing on February 27, 2007.<sup>4</sup>

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<sup>1</sup>Del. Supr. Ct. R. 6(a), 10(a) (2007); *Carr v. State*, 554 A.2d 778, 780 (Del. 1989).

<sup>2</sup>*Riggs v. Riggs*, 539 A.2d 163, 164 (Del. 1988).

<sup>3</sup>*See* Del. Supr. Ct. R. 6(a)(ii) (providing that a notice of appeal must be filed within thirty days of sentencing); Del. Supr. Ct. R. 11(a) (providing that the day of the act or event shall not be included in any period of time prescribed or allowed by the Rules).

<sup>4</sup>*Id.*

(5) Although the untimely appeal must be dismissed, the Court will remand this case to the Superior Court for the reimposition of sentence. Re-sentencing Potts will renew the time to file an appeal and will give Defense Counsel another opportunity to effectively discharge his continuing obligation to properly prepare and file the appeal papers.<sup>5</sup>

NOW, THEREFORE IT IS ORDERED, that this appeal is DISMISSED and REMANDED to the Superior Court to vacate and reimpose the February 27, 2007 sentence. Jurisdiction is not retained.

BY THE COURT:

/s/ Carolyn Berger  
Justice

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<sup>5</sup>See Del. Supr. Ct. R. 26(a) (providing for counsel's continuing obligation to represent defendant on appeal in criminal cases). *E.g.*, *Floyd v. State*, 2006 WL 2466464 (Del. Supr.) (dismissing and remanding for re-sentencing when counsel filed untimely appeal); *Eley v. State*, 2000 WL 275593 (Del. Supr.); *Dixon v. State*, 581 A.2d 1115, 1117 (Del. 1990) (citing *Braxton v. State*, 479 A.2d 831, 834 (Del. 1984)).