

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARVIN BURROUGHS,	§	
	§	No. 66, 2014
Defendant Below,	§	
Appellant,	§	Court Below–Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0710007029
Appellee.	§	

Submitted: March 17, 2014
Decided: April 16, 2014

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

ORDER

This 16th day of April 2014, upon consideration of the appellant’s response to the notice to show cause, the response filed by the appellant’s counsel, the appellee’s answer to the responses filed by the appellant and his counsel, and the appellant’s motion for appointment of counsel, it appears to the Court that:

(1) In 2008, the appellant, Marvin Burroughs, was convicted of Robbery in the First Degree and related offenses. In 2009, the Superior Court sentenced Burroughs as a habitual offender to life and a term of years

in prison. By Order dated February 3, 2010, this Court affirmed the Superior Court's judgment.¹

(2) On February 22, 2011, Burroughs, through privately retained counsel, filed a motion for postconviction relief under Superior Court Criminal Rule 61 ("Rule 61"). After consideration of an affidavit from Burroughs's trial counsel, briefing by the parties, and an evidentiary hearing, the Superior Court denied the postconviction motion on October 17, 2013.

(3) On February 11, 2014, Burroughs, acting *pro se*, filed an untimely notice of appeal from the Superior Court's October 17, 2013 order denying his motion for postconviction relief. A notice of appeal from the Superior Court's October 17, 2013 order should have been filed on or before November 18, 2013.²

(4) On February 11, 2014, the Clerk issued a notice directing that Burroughs show cause why the appeal should not be dismissed as untimely filed. Burroughs filed a response contending that he originally filed his notice of appeal in a timely manner but in the wrong court, and that his

¹ *Burroughs v. State*, 988 A.2d 445 (Del. 2010).

² See Del. Supr. Ct. R. 6(a)(iii) (providing that a notice of appeal must be filed "[w]ithin thirty days after entry upon the docket of a judgment or order in any proceeding for post-conviction relief").

postconviction counsel failed to advise him in which court to file the notice of appeal.

(5) On February 20, 2014, the Clerk requested a response from Burroughs' postconviction counsel. By letter dated March 4, 2014, counsel advised that he "was ineffective in failing to file the Notice of Appeal in this case, or at least ascertaining from the appellant whether he wished to file an appeal."

(6) "Time is a jurisdictional requirement."³ In Delaware, 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."⁴

(7) In this case, because the delay in filing the notice of appeal is attributable to Burroughs' postconviction counsel, the Court has no jurisdiction to consider the appeal. Under the circumstances, however, because the ineffective assistance of Burroughs' postconviction counsel deprived Burroughs of the opportunity to file an appeal from the denial of his first motion for postconviction relief under Rule 61, the Court will remand this matter to the Superior Court for the appointment of counsel to

³ *Carr v. State*, 554 A.2d 778, 779 (Del. 1989).

⁴ *See Honaker v. State*, 2006 WL 298165 (Del. Feb. 6, 2006) (quoting *Riggs v. Riggs*, 539 A.2d 163, 164 (Del. 1988)).

represent Burroughs in filing a second motion for postconviction relief under Rule 61.

NOW, THEREFORE, IT IS ORDERED that, pursuant to Supreme Court Rule 29(b), this appeal is DISMISSED as untimely filed. This matter is REMANDED to the Superior Court for the appointment of counsel to represent the appellant in filing a second motion for postconviction relief under Rule 61. The motion for appointment of counsel in this Court is denied as moot.

BY THE COURT:

/s/ Randy J. Holland

Justice