## IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

STATE OF DELAWARE :

: I.D. No. 0710015083

V.

:

MARK RIVERA,

:

Defendant.

## ORDER

Defendant, Mark Rivera ("Rivera"), contends that he did not receive notice of a previous order by the Court denying his previous motion for correction of sentence. As a result, it is Rivera's position that he is procedurally barred from appealing that order and from filing a Rule 61 motion for post-conviction relief. Accordingly, Rivera requests an evidentiary hearing to probe the cause of the deficiency. He requests that the Court issue a new order date so that he may pursue those remedies. Whether Rivera should be excused from the time limitations set by the Supreme Court for appeal is not a determination for this Court. Moreover, the timeliness of Rivera's Rule 61 motion is not ripe until Rivera has actually filed a Rule 61 motion.

## FACTS AND DISCUSSION

On February 17, 2010, Rivera was sentenced as a result of having been convicted of Murder First Degree. Subsequently, Rivera filed a motion for correction of sentence pursuant to Superior Court Criminal Rule 35(a). That petition was denied on the merits on August 15, 2011. Subsequent to that, Rivera filed a second motion for correction of sentence. That motion was denied on the grounds that it was a reargument of the original.

On June 1, 2012, Rivera filed the instant motion in which he contends that he did not receive notice of the Court's ruling denying his first motion for correction of

sentence. Because he did not receive notice, he contends that he thought the matter was still pending. Accordingly, Rivera declined to pursue an appeal of the Court's order and, apparently, declined to file a Rule 61 motion for post-conviction relief.

Herein, Rivera argues that, because he did not receive notice of the Court's ruling denying his original motion for correction of sentence, the time period in which he may challenge that ruling on appeal and the time period in which he may institute a Rule 61 motion have lapsed. Rivera prays for the following relief: (1) an evidentiary hearing to determine why he did not receive notice of the Court's order denying the Rule 35(a) motion and/or (2) "an updated order date for his Rule 35(a) correction of illegal sentence so that he can appeal the denial of his motion and enable him to pursue post-conviction relief via Rule 61."

First, the Court will address Rivera's argument as it pertains to his ability to perfect an appeal. In a direct appeal from a criminal conviction, notice must be filed in the Supreme Court within thirty days of the imposition of sentence. Similarly, post-conviction appeals must be initiated in the Supreme Court within thirty days after the order challenged has been entered into the docket. As an 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.

<sup>&</sup>lt;sup>1</sup> Supr. Ct. R. 6(a)(ii).

<sup>&</sup>lt;sup>2</sup> Supr. Ct. R. 6(a)(iii).

<sup>&</sup>lt;sup>3</sup> See Herring v. State, 968 A.2d 491 (Del. 2009) (TABLE); see also Bey v. State, 402 A.2d 362 (Del. 1979).

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 its

denial of his request for correction of sentence. 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.

The Court turns its attention now to Rivera's argument as it pertains to a Rule

61 motion for post-conviction relief. Rule 61 motions must be filed in this Court

within one year after the judgment of conviction becomes final.<sup>4</sup> At this juncture,

Rivera has not filed a Rule 61 motion. Should Rivera decide to do so, he may. At that

time, should the State proceed to challenge the motion on the grounds that it is

untimely, it may be appropriate for Rivera to raise the issue that he has presented

herein. However, until that time, Rivera's argument is not ripe for determination.

CONCLUSION

Rivera's motion for an evidentiary hearing and/or a new order date for the denial

of his previous motion for correction of sentence is *denied*.

IT IS SO ORDERED this 5<sup>th</sup> day of July, 2012.

/s/ William L. Witham, Jr.

Resident Judge

WLW/dmh

<sup>4</sup> Super. Ct. Crim. R. 61(i)(1).

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