

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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|--------------------|---|----------------------------|
| BEN ROTEN, | § | |
| | § | No. 441, 2017 |
| Defendant Below, | § | |
| Appellant, | § | Court Below—Superior Court |
| | § | of the State of Delaware |
| v. | § | |
| | § | Cr. ID No. 0907011738 (S) |
| STATE OF DELAWARE, | § | |
| | § | |
| Plaintiff Below, | § | |
| Appellee. | § | |

Submitted: November 1, 2017
Decided: December 13, 2017

Before **STRINE**, Chief Justice; **VALIHURA** and **VAUGHN**, Justices.

O R D E R

This 13th day of December 2017, it appears to the Court that:

(1) The appellant, Ben Roten, was found guilty in 2010 of Assault in a Detention Facility and was sentenced, as a habitual offender, to twenty-five years at Level V followed by six months at Level IV work release. On October 25, 2017, Roten filed a notice of appeal from the Superior Court's order of September 22, 2017, denying his request for a certificate of eligibility to file a petition to modify his habitual offender sentence under 11 *Del. C.* § 4214(f). On its face, Roten's notice of appeal was untimely filed.

(2) Under Supreme Court Rule 6, a notice of appeal in a postconviction proceeding must be received by the Clerk of this Court¹ no later than thirty days after the order that is sought to be reviewed was entered on the docket of the Superior Court.² Here, the Superior Court's order was dated and entered on the docket on September 22, 2017. Therefore, any appeal from the order was required to be filed on or before October 23, 2017. Roten's notice of appeal was not received for filing until October 25, 2017.

(3) On October 25, 2017, the Clerk issued a notice under Supreme Court Rule 29(b) directing Roten to show cause why his appeal should not be dismissed for his failure to file the notice of appeal within thirty days of September 22, 2017.³ On November 1, 2017, Roten filed a response explaining that he gave his "outgoing notice of appeal to the correctional staff" on October 20, 2017, believing that the appeal would be received by the Court's filing deadline.⁴

(4) The Court's power to exercise its appellate jurisdiction rests upon the perfecting of an appeal within the time fixed by law.⁵ An appellant's *pro se* or

¹ Del. Supr. Ct. R. 10(a).

² Del. Supr. Ct. R. 6(a)(iv). *See* 10 Del. C. § 147 (providing that "[n]o appeal from the Superior Court in a criminal action shall be received or entertained in the Supreme Court" unless the appeal is filed with the Clerk within thirty days after the Superior Court judgment).

³ Del. Supr. Ct. R. 29(b).

⁴ Actually, Roten states that he gave the notice of appeal to correctional staff on "Friday 10-20-17." October 20, 2017 was a Wednesday.

⁵ *Carr v. State*, 554 A.2d 778, 779 (Del. 1989). *Dupree v. State*, 2014 WL 3511160 (Del. July 14, 2014) (citing *Fisher v. Biggs*, 284 A.2d 117, 118 (Del. 1971)).

incarcerated status does not excuse a failure to comply strictly with the Court's jurisdictional requirements.⁶ Unless an appellant can demonstrate that the failure to file a timely notice of appeal is attributable to court-related personnel, an untimely appeal cannot be considered.⁷

(5) In this case, Roten does not claim, and the record does not reflect, that his failure to file a timely notice of appeal is attributable to court-related personnel. Consequently, this case does not fall within the exception to the general rule that mandates the timely filing of a notice of appeal.

NOW, THEREFORE, IT IS ORDERED, under Supreme Court Rule 29(b), that the appeal is DISMISSED.

BY THE COURT:

/s/ Karen L. Valihura
Justice

⁶ *Mason v. State*, 2010 WL 3603588 (Del. Sept. 15, 2010) (citing *Carr v. State*, 554 A.2d at 779)).

⁷ *Bey v. State*, 402 A.2d 362, 363 (Del. 1979).