

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2004-CP-00244-COA

DAMAZIO PENN

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

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|-----------------------------|--------------------------------------------------------------------------|
| DATE OF JUDGMENT: | 12/31/2002 |
| TRIAL JUDGE: | HON. JANNIE M. LEWIS |
| COURT FROM WHICH APPEALED: | HOLMES COUNTY CIRCUIT COURT |
| ATTORNEY FOR APPELLANT: | DAMAZIO PENN (PRO SE) |
| ATTORNEY FOR APPELLEE: | OFFICE OF THE ATTORNEY GENERAL BY: W. DANIEL HINCHCLIFF |
| NATURE OF THE CASE: | CIVIL - POST- CONVICTION RELIEF |
| TRIAL COURT DISPOSITION: | THE CIRCUIT COURT DISMISSED PENN'S MOTION FOR POST-CONVICTION RELIEF. |
| DISPOSITION: | AFFIRMED - 08/16/2005 |
| MOTION FOR REHEARING FILED: | |
| MANDATE ISSUED: | |

BEFORE BRIDGES, P.J., GRIFFIS AND BARNES, JJ.

BRIDGES, P.J., FOR THE COURT:

PROCEDURAL HISTORY

¶1. A grand jury, sitting before the Holmes County Circuit Court, indicted Damazio Penn on seven charges: (1) burglary of a dwelling; (2) armed robbery; (3) aggravated assault; (4) auto theft; (5) kidnaping, and; (6) two counts of sexual battery. Penn accepted an offer from the State and entered a guilty plea on all charges. On October 5, 2000, the Holmes County Circuit Court sentenced Penn to the following sentence: five years for the auto theft charge; twenty years for the aggravated assault charge; and twenty-five years on all other charges. The circuit court set the three sentences to run concurrent to one

another. In effect, the circuit court sentenced Penn to twenty-five years in the custody of the Mississippi Department of Corrections.

¶2. Penn, citing ineffective assistance of counsel, filed a motion for post-conviction relief on March 6, 2002. On December 31, 2002, the circuit court held that Penn's argument regarding ineffective assistance of counsel lacked merit and denied Penn's request for post-conviction relief. On July 28, 2003, Penn filed a motion for records and transcripts along with a designation of records and a notice of appeal by which Penn sought to appeal the circuit court's denial of his motion for post-conviction relief. On December 18, 2003, the circuit court considered Penn's notice of appeal as an out-of-time appeal request and dismissed Penn's appeal as untimely.

¶3. On February 2, 2004, Penn filed a notice of appeal of the circuit court's December 18, 2003 order. In his February 2nd notice of appeal, Penn states that he sought to appeal the circuit court's order "dismissing [Penn's] Notice of Appeal filed on January 15, 2003 and the Appeal Brief filed on July 28, 2003." However, no such notice of appeal from January 15, 2003 appears in the record, Penn's record excerpts, or the circuit court's certified list of documents filed on this matter. In short, Penn filed an unsuccessful motion for post-conviction relief, attempted an untimely appeal, and now appeals the circuit courts dismissal of that untimely appeal. Regardless, Penn alleges that his court-appointed counsel rendered ineffective assistance. Because Penn's appeal is untimely, we affirm the circuit court's decision to dismiss Penn's appeal.

STANDARD OF REVIEW

¶4. "When reviewing a lower court's decision to deny a petition for post-conviction relief this Court will not disturb the trial court's factual findings unless they are found to be clearly erroneous. However,

where questions of law are raised the applicable standard of review is de novo.” *Brown v. State*, 731 So.2d 595 (¶6) (Miss. 1999).

ANALYSIS

¶5. The State argues that this Court should dismiss Penn’s appeal due to Penn’s failure to file a timely notice of appeal. We agree. The circuit court denied Penn’s motion for post-conviction relief on December 31, 2002. Afterwards, Penn filed his notice of appeal on July 28, 2003.¹ The circuit court took Penn’s notice of appeal as an out-of-time appeal request and subsequently dismissed Penn’s attempt to appeal out-of-time.

¶6. Rule 4(a) of the Mississippi Rules of Appellate Procedure sets forth the time limit for filing an appeal. After the circuit court denied his motion for post-conviction relief on December 31, 2002, Penn had thirty days to appeal the circuit court’s decision. M.R.A.P. 4(a). Since Penn filed his notice of appeal on July 28, 2003, he was clearly outside the thirty day time limit set forth in Rule 4(a). The record contains no order that would grant Penn an extension until July 28, 2003. Consequently, Penn filed an untimely appeal. “An appeal shall be dismissed if the notice of appeal was not timely filed pursuant to Rules 4 or 5 [of the Mississippi Rules of Appellate Procedure].” M.R.A.P. 2(a)(1). Accordingly, we dismiss Penn’s appeal.

¶7. THE JUDGMENT OF THE HOLMES COUNTY CIRCUIT COURT DISMISSING PENN’S UNTIMELY APPEAL IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO HOLMES COUNTY.

KING, C.J., LEE, P.J., IRVING, MYERS, CHANDLER, GRIFFIS, BARNES AND ISHEE, JJ., CONCUR.

¹As mentioned, Penn’s February 2, 2004 notice of appeal references a January 15, 2003 notice of appeal, but that document is not in the record. The record reflects a July 28, 2003 notice of appeal corresponding to the circuit court’s denial of Penn’s motion for post-conviction relief.