

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
No. 21-CV-3521

DYLAN PEAKE,
Appellant,

v.

VERMONT DEP'T OF CORRECTIONS
Appellee.

RULING ON THE TIMELINESS OF APPEAL

Appellant Dylan Peake seeks review under 28 V.S.A. § 724 of a case staffing decision dated May 19, 2021, imposing a two-year interrupt. He dated his notice of appeal June 15, 2021. It was first received either by the DOC or the court on November 3, 2021. Noting that the notice of appeal was filed many months after the 30-day appeal period had expired, the court requested that the parties brief the issue of timeliness. The parties now have briefed the matter and the court rules as follows.

There is no specific time for filing an appeal expressly set out in 28 V.S.A. § 724 other than by its reference to Rule 74. 28 V.S.A. § 724(c). Rule 74(b) provides: “An appeal or review under this rule shall be taken by filing with the clerk of the administrative body described in subdivision (a) or other appropriate officer a notice of appeal in the manner and within the time provided in Rules 3 and 4 of the Rules of Appellate Procedure.” V.R.A.P. 4(a) provides generally for a 30-day appeal period: “the notice of appeal required by Rule 3 must be filed . . . within 30 days after entry of the judgment or order appealed from.”

However, that 30-day appeal period is subject to the prison mailbox rule, as follows:

(f) Appeal by an Inmate Confined in an Institution.

- (1) A notice of appeal filed by an inmate confined in an institution is timely if deposited in the institution’s internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a notarized statement accompanying the notice of appeal stating the date the notice of appeal was deposited in the institution’s internal mailing system. The notarized statement establishes a presumption that the notice of appeal was deposited in the institution’s internal mailing system on the date shown in the statement. The presumption may be rebutted by documentary or other evidence.
- (2) If an inmate files the first notice of appeal under this Rule 4(f), the 14-

day period provided in Rule 4(a)(6) for another party to file a notice of appeal runs from the date when the superior court docket the first notice. (3) Nothing in this rule precludes other evidence of timely filing such as a postmark or an official date stamp showing the filing date of the document.

V.R.A.P. 4(f).

Mr. Peake, in the argument of counsel only, asserts that he placed his notice of appeal in the prison mail system “on or about” the end of the 30-day appeal period. He blames its late arrival 4 1/2 months later on the slowness of either or both the prison mail system or the USPS. He does not claim excusable neglect for having mailed the notice late. This is insufficient in the circumstances of such a lengthy delay.

Mr. Peake essentially is seeking to take advantage of the prison mailbox rule, V.R.A.P. 4(f). Yet, he claims at most that he placed his notice in the prison mail system “on or about” the end of the appeal period. “About” could mean after though near the end of the 30-day period, which is too late. Moreover, that assertion only appears in the argument of counsel. Mr. Peake filed no affidavit asserting that he placed the notice in the prison mail system within the 30-day appeal period.

Moreover, the prison mailbox rule applies only if the notice was placed in the “system designed for legal mail.” There is no representation of counsel or affidavit from Mr. Peake to the effect that he sent his notice through the system designed for legal mail or that no such system exists at his facility.

Finally, Mr. Peake is not entitled to any presumption of timeliness because he did not include any certification of timeliness with the notice.

The only relevant evidence in the record shows that Mr. Peake’s notice in fact was filed many months late. The court therefore lacks jurisdiction over this case.

Order

For the foregoing reasons, this case is dismissed. The State shall submit a form of judgment. V.R.C.P. 58(d).

SO ORDERED this 5th day of April, 2022.



Robert A. Mello
Superior Judge