

2004

Utah v. Cox : Brief of Respondent

Utah Supreme Court

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IN THE UTAH SUPREME COURT

.59
DOCKET NO. 20040894-SC

STATE OF UTAH, :
Plaintiff/Respondent, :
v. : Sup. Ct. Case No. 20040894-SC
ROBERT ELLIS COX, :
Defendant/Petitioner. :

BRIEF OF RESPONDENT

ON A WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

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IN THE UTAH SUPREME COURT

STATE OF UTAH, :
Plaintiff/Respondent, :
v. : Sup. Ct. Case No. 20040894-SC
ROBERT ELLIS COX, :
Defendant/Petitioner. :

BRIEF OF RESPONDENT

JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDINGS

This case is before the Court on a grant of a writ of certiorari to the Utah Court of Appeals. This Court has jurisdiction under Utah Code Ann. § 78-2-2(5) (West 2004).

**STATEMENT OF ISSUE
AND STANDARD OF REVIEW**

The order granting certiorari review framed the sole issue as follows:

Whether an appellate court has authority to remand for nunc-pro-tunc resentencing after it has determined it lacks jurisdiction over a direct appeal from a criminal conviction?

Standard of Review: This Court reviews “the court of appeals’ decision for correctness and grant[s] no deference to its conclusions of law.” *State v. Shipp*, 2005 UT 35, ¶ 8, __ P.3d __ (citing *State v. James*, 2000 UT 80, ¶ 8, 13 P.3d 576). “Jurisdictional issues are likewise reviewed for correctness.” *State v. Finlayson*, 2004 UT 10, ¶ 5, 84 P.3d 1193.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The text of the following constitutional, statutory, and rule provisions are reproduced in **Addendum B**:

Utah Const., art. VIII, §§ 3, 4;
Utah Code Ann. § 78-2-2 (West 2004) (Supreme Court jurisdiction);
Utah Code Ann. § 78-2a-3 (West 2004) (Court of Appeals jurisdiction);
Utah R. App. P. 2;
Utah R. App. P. 4.

STATEMENT OF THE CASE¹

Defendant was charged with four counts of sodomy on a child, four counts of aggravated sexual abuse of a child, and one count of rape of a child, all first degree felonies.

R118-21. On 15 October 2003, a jury found defendant guilty on all counts. R161-76.

On 5 December 2003, defendant filed a motion for new trial. R182. Defendant was sentenced three days later, on 8 December 2003. R203-06. On 11 March 2004, the trial court denied defendant's motion for new trial. R263-65. On 8 April 2004, defendant filed his notice of appeal. R266.

On 30 April 2004, the State moved this Court to dismiss defendant's appeal for lack of jurisdiction because defendant's notice of appeal was untimely. The State's motion explained that defendant's new trial motion was filed prematurely—before sentencing—and was therefore untimely. *See State v. Putnik*, 2002 UT 122, ¶¶ 7-8. This meant that defendant's new trial motion did not toll the time for filing a notice of appeal. *See id.* at 3-8;

¹The underlying facts are irrelevant to the question on review. Thus, this brief will only present the procedural history of the case.

see also Utah R. App. P. 4(b). Thus, to be timely, defendant's notice of appeal had to be filed no later than 7 January 2004, thirty days after sentencing. *See* Utah R. App. P. 4; *Putnik*, 2002 UT 122, ¶ 10. Because defendant did not file his notice of appeal until three months later, on 8 April 2004, it was untimely and this Court lacked jurisdiction over the appeal.

Without ruling on the State's motion to dismiss, this Court transferred the case to the court of appeals. The court of appeals issued a sua sponte motion for summary disposition, also on the ground that the notice of appeal was untimely because defendant's new trial motion was premature and did not toll the time for appeal.

Instead of responding to the two motions, defendant filed a "Motion to Temporarily Remand for Resentencing." *State v. Cox*, 2004 UT App 277, at page 2. (A copy of the court of appeals' unpublished decision is attached at **Addendum A**). Defendant's motion conceded that his notice of appeal was untimely, but argued that the appeal should not be dismissed. Instead, defendant argued, the appeal should be temporarily remanded to the trial court for nunc pro tunc resentencing. *Id.* *See also* Defendant's Supporting Memorandum, attached as **Addendum C**. The court of appeals denied defendant's motion because when "a notice of appeal is untimely filed, [an appellate court] lacks jurisdiction to do anything other than dismiss the action." *Id.* at page 1 (citing *Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569, 570 (Utah App. 1989)). The court of appeals informed defendant, however, that he could seek nunc pro tunc resentencing through a post-conviction petition in the district court. *Id.*

at pages 2-3 (citing *State v. Johnson*, 635 P.2d 36, 38 (Utah 1981) and *Manning v. State*, 2004 UT App 87, ¶ 20, 89 P.3d 196, *cert. granted by* 98 P.3d 1177 (Utah 2004).

This Court granted defendant's timely petition for a writ of certiorari.

SUMMARY OF ARGUMENT

It is well-settled in this state that an appellate court lacks jurisdiction over an untimely appeal. It is equally well-settled that when an appellate court lacks jurisdiction, it must dismiss the appeal. Indeed, courts universally recognize that a court without jurisdiction lacks the authority to do anything but dismiss the appeal.

Defendant concedes both that his notice of appeal was untimely and that the court of appeals lacked jurisdiction over his appeal. He nevertheless claims that the court of appeals erred in dismissing his appeal. Defendant argues that the court of appeals should have instead remanded his untimely appeal to the district court with an order that he be resentenced so as to restart the time for appeal.

But, as stated, the court of appeals lacked jurisdiction to do anything but dismiss the untimely appeal. Neither this Court's inherent supervisory authority nor its writ authority authorizes an appellate court to suspend, circumvent, or enlarge the time limits for appealing in rule 4, Utah Rules of Civil Procedure. Thus, the court of appeals properly dismissed the appeal and left defendant to pursue any right to resentencing in the district court.

ARGUMENT

BECAUSE AN APPELLATE COURT LACKS JURISDICTION TO DO ANYTHING BUT DISMISS AN UNTIMELY APPEAL, IT DOES NOT HAVE AUTHORITY TO REMAND FOR NUNC-PRO-TUNC RESENTENCING

Jurisdiction is “[a] court’s power to decide a case or issue a decree.” Black’s Law Dictionary 867 (8th ed. 2004). *See also Chen v. Stewart*, 2004 UT 82, ¶ 38, 100 P.3d 1177 (subject matter jurisdiction is “the authority of the court to decide the case”). In Utah, it is well-settled that an appellate court does not have the power or jurisdiction to decide an untimely appeal. *See State v. Bowers*, 2002 UT 100, ¶ 5, 57 P.3d 1065. The question before this Court is whether an appellate court in general, and the court of appeals in particular, has jurisdiction in an untimely appeal to remand to the district court with directions to resentence the defendant, so as to restart the time for appeal.

As explained below, the answer is unequivocally “no.” An appellate court that lacks jurisdiction to decide an untimely appeal necessarily lacks jurisdiction to order any kind of relief for the appellant. Rather, the appellate court has power only to dismiss the untimely appeal. Contrary to defendant’s argument, neither this Court’s inherent supervisory power nor its writ authority permits either it, or the court of appeals, to enlarge its appellate jurisdiction. This is true even when it appears obvious that the appellant may be entitled to relief in some other forum, such as resentencing in the district court.

A. When a matter is outside a court’s jurisdiction it retains only the authority to dismiss the action.

1. An appellate court lacks jurisdiction over an untimely appeal.

Rule 4, Utah Rules of Appellate Procedure, requires that a notice of appeal be filed “within 30 days after entry of the judgment or order appealed from.” Utah R. App. 4(a). A *timely* motion for new trial under rule 24, Utah Rules of Criminal Procedure, tolls the time for appeal. Utah R. App. 4(b). If a timely rule 24 motion is filed, the time for appeal runs from the entry of the order denying a new trial, rather than from the final judgment. *See State v. Putnik*, 2002 UT 122, ¶ 4, 63 P.3d 91. An untimely motion for new trial, however, does not toll the time for appeal. *Id.* at 10. If, as here, an *untimely* motion for new trial is filed, the notice of appeal must be filed within 30 days after entry of the final judgment, which in criminal cases, is the sentence. *See id.*; *Bowers*, 2002 UT 100, ¶ 4. Defendant concedes, as he did in the court of appeals, that his notice of appeal was untimely. Br. Pet. 3, 5.

“Failure to file a timely notice of appeal deprives this court of jurisdiction over the appeal.” *See Reisbeck v. HCA Health Services of Utah, Inc.*, 2000 UT 48, ¶ 5, 2 P.3d 447. *See also State v. Houskeeper*, 2002 UT 118, ¶ 23, 62 P.3d 444; *Bowers*, 2002 UT 100, ¶ 5; *Miller v. USAA Casualty Ins. Co.*, 2002 UT 6, ¶ 20-21, 44 P.3d 663; *State v. Johnson*, 635 P.2d 36, 37 (Utah 1981); *State v. Boggess*, 601 P.2d 927, 928-29 (Utah 1979). This is true in both civil and criminal appeals. *See id.*; *State v. Johnson*, 635 P.2d at 37.

An appellate court does not have the authority to enlarge the time for appeal. *Johnson*, 635 P.2d at 37. *See also Bowers*, 2002 UT 100, ¶ 5 (“This court has no authority

to extend its jurisdiction beyond the 30-day period for filing notice of appeal plainly stated in [rule 4]”). “Nor does this court have power to transubstantiate an untimely notice of appeal into a timely one.” *Bowers*, 2002 UT 100, ¶ 5. And while an appellate court may suspend many of the rules of appellate procedure, it may not suspend the time limits in rule 4. *See* Utah R. App. 2.

In sum, an appellate court lacks jurisdiction over an untimely appeal.

2. An appellate court must dismiss an untimely appeal.

This Court has stated that an appellate court must dismiss untimely appeals: [I]t is ‘axiomatic in this jurisdiction that failure to perfect an appeal is a jurisdictional failure, requiring dismissal of the appeal.’” *Bowers*, 2002 UT 100, ¶ 5 (quoting *Prowswood v. Mountain Fuel Supply Co.*, 676 P.2d 952, 955 (Utah 1984)) (emphasis added). Thus, once an appellate court determines that it lacks jurisdiction, it has no choice but to dismiss the appeal. *See Johnson*, 635 P.2d at 37 (“Out-of-time appeals *must* be dismissed.”) (emphasis added); *Miller v. USAA Casualty Ins. Co.*, 2002 UT 6, ¶ 20, 44 P.3d 663 (“If we lack jurisdiction, we must dismiss.”); *Bradbury v. Valencia*, 2000 UT 50, ¶ 8, 5 P.3d 649 (“Where an appeal is not properly taken, this court lacks jurisdiction and we must dismiss.”). *Cf. State v. Payne*, 892 P.2d 1032, 1033 (Utah 1995) (if district court, at any point during trial, becomes aware that it lacks jurisdiction, it “must immediately dismiss the action”).

Because defendant has conceded the untimeliness of his appeal, the court of appeals properly followed the foregoing authority and dismissed defendant’s appeal.

3. An appellate court can do nothing beyond dismissing an untimely appeal.

The question here, however, is whether the court of appeals could, in addition to dismissing the appeal, temporarily remand to the district court with instructions to resentence defendant so as to restart the time for appeal. It could not.

American courts, including both Utah courts, have universally recognized that a court lacking jurisdiction has no authority to do anything but dismiss the case. *See, e.g., Nebeker v. Utah State Tax Comm'n*, 2001 UT 74, ¶ 24, 34 P.3d 180 (citing *Blaine Hudson Printing v. Utah Tax Comm'n*, 870 P.2d 291, 292 (Utah App. 1994), for proposition that an agency without subject matter jurisdiction “lacks the power to do anything beyond dismissing the proceedings”); *Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569, 570 (Utah App. 1989) (“When a matter is outside the court’s jurisdiction it retains only the authority to dismiss the action.”); *Thompson v. Jackson*, 743 P.2d 1230, 1232 (Utah App. 1987) (“Upon a determination by the Court that its jurisdiction is lacking, its authority extends no further than to dismiss the action.”). *See also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (“Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”); *Blankenship v. Blankenship*, 893 So.2d 303, 307 (Ala. 2004) (a court lacking subject matter jurisdiction “may take no action other than to exercise its power to dismiss the action”); *Indiana Family and Soc. Servs. Admin. v. Legacy Healthcare, Inc.*, 756 N.E.2d 567, 572 (Ind. Ct. App. 2001) (where court lacks subject matter jurisdiction, it is “without jurisdiction to do anything in the case except to enter an order of dismissal”); *University of*

Kansas v. Dep't of Human Resources, 887 P.2d 1147, 1150 (Kan. Ct. App. 1995) (“When a court lacks subject matter jurisdiction of an action, its authority extends no further than to dismiss the action.”); *McCleese v. Todd*, 591 N.W.2d 375, 377 (Mich. Ct. App. 1998) (“When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void”); *State v. Oxenhandler*, 159 S.W.3d 417, 420 (Mo. Ct. App. 2005) (a court lacking subject matter jurisdiction “may take no action other than to dismiss the suit”); *Lurie v. Blackwell*, 948 P.2d 1161, 1164 (Mont. 1997) (“Once a court has determined that it lacks subject-matter jurisdiction . . . the only further action it can take is to dismiss the case.”); *St. John Medical Center v. Dep't of Social and Health Servs.*, 38 P.3d 383, 388 (Wash. App. 2002) (“A court lacking jurisdiction may do nothing more than enter an order of dismissal.”); *Geerts v. Jacobsen*, 100 P.3d 1265, 1269 (Wyo. 2004) (unless court has jurisdiction, “it lacks authority to proceed, and any decision, judgment, or other order is, as a matter of law, utterly void and of no effect for any

purpose”).² In other words, an appellate court lacks jurisdiction in an untimely appeal to issue any orders except an order of dismissal.

The court of appeals correctly followed the foregoing universal rule when it dismissed defendant’s appeal and denied his motion to temporarily remand for resentencing. *State v. Cox*, 2004 UT App 277, at 1 (“When a notice of appeal is untimely filed, this court lacks jurisdiction to do anything other than dismiss the action”). Granting defendant’s motion would have required the court of appeals to act without jurisdiction. The court of appeals, therefore, properly dismissed defendant’s appeal for lack of jurisdiction and declined to issue an order clearly outside its jurisdiction.

²*See also Ex parte C.L.C.*, 897 So.2d 234, 237 (Ala. 2004) (“[W]hen [a] court has no power to sit, nor has general jurisdiction over that nature of proceeding or over the parties, it cannot make any effective order.”) (Brackets in original); *People v. Rivera-Bottzeck*, 2004 WL 3017269, ___ P.3d ___ (Colo. App. 2004) (“Any action taken by a court which lacks jurisdiction is a nullity.”); *Diaz v. Provena Hospitals*, 817 N.E.2d 206, 213 (Ill. Ct. App. 2004) (“An order or judgment is void if the court lacked personal or subject matter jurisdiction or otherwise lacked the power to decide the particular matter presented to it.”); *Ardoin v. Stine Lumber Co., Inc.*, 885 So.2d 43, 49 (La. Ct. App. 2004) (“As a general rule, any action taken by a court without proper subject-matter jurisdiction is an absolute nullity.”); *Falk Integrated Technologies, Inc., v. Stack*, 513 S.E.2d 572, 574 (N.C. Ct. App. 1999) (“A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity.”); *Trottier v. Bird*, 635 N.W.2d 157, 159 (N.D. 2001) (“As a prerequisite to issuing a valid order or judgment, a court must have both subject matter and personal jurisdiction.”); *Pratts v. Hurley*, 806 N.E.2d 992, 996 (Ohio 2004) (“If a court acts without jurisdiction, then any proclamation by that court is void.”); *Bancorp Group, Inc. v. Pirgos, Inc.*, 744 A.2d 791, 792 (Pa. Super. Ct. 2000) (“[A]ction taken by a court without jurisdiction is a nullity.”) (Brackets in original); *Suntrust Bank, Nashville v. Johnson*, 46 S.W.3d 216, 221 (Tenn. Ct. App. 2000) (“Without subject matter jurisdiction, a court cannot enter valid, enforceable order”); *Green v. State*, 906 S.W.2d 937 (Tex. Crim. Ct. App. 1995) (“[I]t is . . . axiomatic that where there is no jurisdiction, the power of the court to act is as absent as if it did not exist, . . . and any order entered by a court having no jurisdiction is void.”) (Brackets in original and internal quotation marks omitted).

B. This Court has always followed the universal rule that an appellate court lacks authority to do anything but to dismiss an untimely appeal, even when it appears on the record that defendant lost his appeal due to counsel's ineffectiveness.

Defendant acknowledges that the court of appeals lacked jurisdiction over his appeal.

Br. Pet. 9. But, he argues, “[w]hile an appellate court may lack jurisdiction to consider a direct appeal from defendant’s convictions, the lack of jurisdiction does not preclude the court from saying something about the matter.” *Id.*

Defendant is correct that a lack of jurisdiction does not prevent a court from “saying something” about the matter. *Id.* Indeed, as defendant rightly points out, appellate courts lacking jurisdiction sometimes issue what are, in effect, advisory opinions suggesting procedures to be followed to invoke the court’s jurisdiction or to otherwise obtain relief. *See, e.g., State v. Johnson*, 635 P.2d 36, 37 (Utah 1981) (dismissing untimely appeal, but explaining how defendant may still obtain direct appellate review by seeking resentencing in post-conviction proceedings); *State v. Jiminez*, 938 P.2d 264, 265 (Utah 1997) (dismissing untimely appeal, but informing defendant that he may seek *Johnson* resentencing through post-conviction petition). But while a lack of jurisdiction does not prevent a court from “saying something,” it does, as explained above, prevent a court from ordering something.

Moreover, defendant here did not ask the court of appeals to merely “say something” about jurisdiction. Rather, he asked the court of appeals not to dismiss his untimely appeal, and to temporarily remand with an order directing the district court to resentence him. **Add. C.** at 1-2. In other words, defendant asked the court of appeals to help him cure the jurisdictional defect in his appeal by, in effect, enlarging the time for appeal. Such an order

would have been a clear violation of rule 2, Utah Rules of Appellate Procedure, which prohibits an appellate court from suspending the time limits in rule 4. The court of appeals, therefore, correctly held that it had only the power to dismiss the appeal and that it lacked jurisdiction to temporarily remand with an order in effect granting defendant relief in the form of resentencing.

In *State v. Johnson*, this Court recognized that it was powerless to grant the relief defendant seeks. Johnson, like defendant, also filed an untimely notice of appeal. *Johnson*, 635 P.2d at 37. Johnson claimed that he asked his attorney to file an appeal within the 30-day time limit, but his attorney failed to do so. *Id.* Thus, Johnson, like defendant, claimed that his attorney alone was to blame for his untimely notice of appeal. *Id.* at 37. Johnson asked this Court to extend the time for appeal so that he could obtain direct appellate review of his conviction. *Id.*

This Court noted that the “30-day period for filing a notice of appeal in a criminal case is jurisdictional and cannot be enlarged by this Court.” *Id.* (citations omitted). Because it lacked jurisdiction over the untimely appeal, this Court explained that it had to deny Johnson’s request, and dismiss the appeal. *See id.*

But this Court was concerned that defendant had been denied both his state constitutional right to appeal his conviction and his federal constitutional right to the effective assistance of counsel. *Id.* at 37-38. Accordingly, the Court explained—for the benefit of Johnson, lower courts, and future similarly-situated defendants—how Johnson should proceed to obtain a direct appeal. *Id.*

The Court first explained that Johnson’s “remedy to establish the denial of his right to appeal is not in this Court; it lies in the district court, which can receive evidence (including the taking of oral testimony, if necessary) and make findings of fact.” *Id.* at 38. The Court then instructed Johnson to seek this remedy under then-applicable post-conviction procedures. *Id.* If Johnson could prove that he lost his right to appeal as a result of his counsel’s ineffectiveness, the district court could grant relief by resentencing Johnson so as to restart the time for appeal. *Id.* In this way, Johnson could timely invoke this Court’s appellate jurisdiction.

The *Johnson* court, however, did not remand to the district court to hold a hearing on Johnson’s factual allegations. Nor did it remand to the district court with instructions to resentence Johnson. Rather, it simply dismissed the appeal—just as it said it must do given its lack of jurisdiction. *Id.* at 37-38.

Defendant suggests that this Court may nevertheless remand and direct resentencing because, unlike in *Johnson*, “the existing record [in this case] already supports that counsel was ineffective in perfecting [defendant]’s appeal.” Br. Pet. 29. Thus, defendant reasons, there is no need to require him to resort to post-conviction proceedings for the purpose of developing a factual record. *Id.*

But *Johnson*’s dismissal of the appeal was based, not on the lack of a settled factual predicate, but on the Court’s lack of jurisdiction over an untimely appeal. *See Johnson*, 635 P.2d at 37. Thus, even if the record in *Johnson* had conclusively established counsel’s ineffectiveness, the Court still lacked jurisdiction and so was still required to dismiss the

appeal. *See id.* *See also State v. Jiminez*, 938 P.2d 264, 265 (Utah 1997). Because the Court had authority to only dismiss, it necessarily lacked jurisdiction to issue any other orders.

This Court's post-*Johnson* opinions are consistent with this approach. For example, in *State v. Jiminez*, 938 P.2d 264 (Utah 1997), the defendant lost his right to appeal because his attorney did not file a timely notice of appeal after the trial court had disposed of his timely new trial motion. This Court dismissed because it lacked jurisdiction over the untimely appeal. *Id.* Although it appeared as obvious from that record as it does from this one that Jiminez lost his right to appeal because of his counsel's procedural missteps, this Court did not remand to the district court for resentencing. Rather, it dismissed the appeal and informed Jiminez that he could seek resentencing in the trial court by filing a post-conviction petition under the Post-Conviction Remedies Act and rule 65C, Utah Rules of Civil Procedure. *Id.*

The defendant in *State v. Bowers*, 2002 UT 100, likewise lost the right to appeal his conviction due to his attorney's procedural missteps. Bowers timely filed a motion to arrest judgment between verdict and sentencing. *Id.* at ¶ 2; *see* Utah R. App. P. 23. Unlike a rule 24 motion for new trial, however, a rule 23 motion to arrest judgment does not toll the time for appeal. *See* Utah R. App. P. 4(b). The trial court issued its findings, conclusions, and order denying the motion to arrest judgment after sentencing, but before the time for appeal had passed. *Id.* at ¶¶ 2-3. Bowers filed his notice of appeal within 30 days of the denial of his motion to arrest judgment, but more than 30 days after sentencing. *Id.* at ¶¶ 3-4. This Court dismissed Bowers's untimely appeal for lack of jurisdiction. *Id.* at ¶ 5.

Again, it was just as obvious from the procedural history in *Bowers* as it is here, that Bowers lost his appeal due to his counsel's ineffectiveness. Yet this Court did not remand to the trial court for resentencing. Indeed, it did not even inform Bowers that he could seek resentencing through post-conviction proceedings. Rather, this Court affirmed that the 30-day limit for appealing was jurisdictional, that the Court did not have the power to enlarge the time for appeal or "to transubstantiate an untimely notice of appeal into timely one," and that "failure to perfect an appeal is a jurisdictional failure, requiring dismissal of the appeal." *Id.* at ¶ 5.

After *Bowers*, this Court affirmed the dismissal of a criminal appeal on procedural facts identical to this case. *See State v. Putnik*, 2002 UT 122, 63 P.3d 91. Putnik, like defendant, filed a premature, and therefore untimely, motion for new trial. *Id.* at ¶¶ 1, 8. While Putnik's notice of appeal was timely as to the denial of his new trial motion, it was untimely as to his sentence. *Id.* at ¶ 1, 4. Accordingly, the court of appeals dismissed Putnik's appeal. *Id.* at ¶ 1.

On certiorari review, this Court simply affirmed the court of appeals' dismissal of Putnik's appeal:

Because petitioner did not file his motion for a new trial within the time frame mandated in rule 24, he was required to file his motion for appeal within thirty days of sentencing. He failed to do so. The court of appeals properly dismissed his appeal for lack of jurisdiction.

Id. at ¶ 10. However obvious it may have been that Putnik lost his appeal due to his counsel's mistakes, this Court neither remanded nor ordered resentencing. *Id.* Nor did this Court tell Putnik how he could obtain a direct appeal through resentencing. *Id.*

In short, none of this Court's precedent supports defendant's contention that an appellate court may, in an untimely appeal, remand to the district court with instructions to resentence the defendant. To the contrary, *Johnson*, *Jiminez*, *Bowers*, and *Putnik* all followed the universal rule—that a court lacking jurisdiction retains only the authority to dismiss the action. The court of appeals, therefore, did not err in following that precedent.

C. This Court's inherent supervisory powers may not be invoked to circumvent the time limits of rule 4(b), Utah Rules of Appellate Procedure.

For the first time in this case, defendant asserts that this Court “may invoke its supervisory powers to remand for resentencing in a case, even when it lacks jurisdiction over an appeal from the convictions.” Br. Pet. 11. Defendant did not argue this claim to the court of appeals, *see Add. C*, nor did he raise it in his petition for certiorari review. This Court should therefore decline to address this claim.

In any event, defendant has no valid supervisory authority claim. On certiorari, this Court reviews the court of appeals' decision for error. *See State v. Shipp*, 2005 UT 35, ¶ 8, __ P.3d __. Here, even if defendant had raised the claim below, the court of appeals could not have remanded pursuant to “inherent supervisory authority,” because—as will become apparent below—the court of appeals, unlike this Court, has no such authority. Thus, the

court of appeals did not err in not invoking its supervisory authority to remand for resentencing.

But should this Court nevertheless address this issue for the first on certiorari review, no precedent supports defendant's supervisory authority argument.

"This court's supervisory power is an inherent power which has been recognized in many cases." *State v. Bennett*, 2000 UT 34, ¶ 13, 999 P.2d 1 (Durham, J., concurring in the result) (citing 15 cases). Citing to the Utah Constitution, Justice Durrant has suggested that it "stems from [the Court's] authority 'to adopt rules of procedure and evidence to be used in the courts of the state.'" *State v. Maestas*, 2002 UT 123, ¶ 81, 63 P.3d 621 (Durrant, J., dissenting in part and concurring in part) (quoting Utah Const. art. VIII, § 4). Article VIII, section 4 of the Utah Constitution could in fact be read to mean that the Court's supervisory power is limited to rule-making: "The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process."

While this Court has invoked its "inherent supervisory power" with some frequency since *State ex rel. Clatterbuck*, 700 P.2d 1076, 1081 (Utah 1985), its precise sources, character, and limits remain unclear. Its bounds have never been staked or even debated. Indeed, this power is so ill-defined that one justice of this Court, referring to "our so-called supervisory powers," added, "whatever that means apart from our appellate power." *State v. Gordon*, 913 P.2d 350, 360 n.6 (Utah 1996) (Stewart, J. dissenting). Similarly, the question of whether to invoke supervisory power to fill perceived gaps in state criminal rules or constitutional provisions recently splintered this Court. *See Maestas*, 2002 UT 123, ¶ 45

(Durham, C.J.), ¶¶ 80-83 (Durrant, J., dissenting in part and concurring in part); ¶¶ 140-41 (Russon, J. dissenting in part and concurring in part).

1. No precedent permits this Court to invoke its supervisory authority in order to exercise jurisdiction in an untimely appeal.

Whatever parameters might surround this Court's supervisory authority, this Court may not invoke it to create jurisdiction where none exists. This Court's appellate jurisdiction is determined by statute. Utah Const. art. VIII, § 3 ("The Supreme Court shall have appellate jurisdiction over all matters to be exercised as provided by statute"). *See* Utah Code Ann. § 78-2-2 (setting forth this Court's appellate jurisdiction). Thus, this Court could not invoke its inherent supervisory power to take jurisdiction over an appeal that had not been assigned to it by statute. Likewise, as explained, rule 2, Utah Rules of Appellate Procedure, expressly prohibits this Court from suspending the time requirements of rule 4. Thus, this Court clearly could not invoke its supervisory authority to nevertheless circumvent those jurisdictional time limits. Yet that is what defendant asks this Court to do. By remanding this untimely appeal with an order for the district court to resentence defendant, the Court would, in effect, be circumventing the time limits in rule 4 by enlarging the time for appeal. This the Court may not do. *See Johnson*, 635 P.2d at 37.

Significantly, defendant cites no published decision in which this Court exercised its supervisory authority to assume jurisdiction where none existed. Indeed, all cases in which this Court has invoked its supervisory authority have dealt with what is essentially ad hoc rule-making by the Court or oversight of the administration of lower courts. *See, e.g., State*

v. Arguelles, 921 P.2d 439, 442 (Utah 1996) (stating in effective assistance of counsel case that “pursuant to our inherent supervisory power over the courts, we may presume prejudice in circumstances where it is unnecessary and ill-advised to pursue a case-by-case inquiry to weigh actual prejudice”); *State v. Carter*, 888 P.2d 629, 650 (Utah 1995) (advising, pursuant to inherent supervisory power, that trial courts should be more conservative in ruling on for-cause challenges to jurors in capital cases); *State v. Menzies*, 889 P.2d 393, 407 n.7 (Utah 1994) (stating that language changes made in other cases to burden of proof instruction were undertaken pursuant to court’s supervisory power over lower courts); *State v. Thurman*, 846 P.2d 1256, 1266, 1271-72 (Utah 1993) (invoking “inherent supervisory authority over all courts of this state” to establish appropriate standards of review); *State v. Brown*, 853 P.2d 851, 857 (Utah 1992) (holding, pursuant to court’s inherent supervisory power over courts, that “counsel with concurrent prosecutorial obligations may not be appointed to defend indigent persons”); *State v. Wareham*, 772 P.2d 960, 965 (Utah 1989) (adopting, pursuant to court’s supervisory power, bifurcated hearing process in simple sexual abuse/aggravated sexual abuse cases); *State v. James*, 767 P.2d 549, 557 (Utah 1989) (invoking court’s inherent supervisory power over trial courts to adopt bifurcated hearing process in first degree murder trials where evidence of prior convictions is introduced); *In re Criminal Investigations*, 7th Dist. Court No. CS-1, 754 P.2d 633, 653 (Utah 1988) (invoking inherent supervisory power over judicial branch to require that all criminal investigations under Subpoena Powers Act “be fully documented” and that such documentation “be maintained by the district court authorizing the investigation”); *State v. Bishop*, 753 P.2d 439, 499 (Utah

1988) (Zimmerman, J., concurring in result) (noting that requiring trials to proceed in bifurcated fashion to prevent evidence of prior convictions in murder trial is “entirely within our inherent power to supervise the courts”), *overruled in part on other grounds by Menzies*, 889 P.2d at 397–98; *State v. Lafferty*, 749 P.2d 1239, 1260 (Utah 1988) (calling on court’s inherent supervisory power to impose requirements of instructions and written findings on proof of aggravating circumstances in penalty phase of capital case); *State ex rel. Clatterbuck*, 700 P.2d 1076, 1081 (Utah 1985) (exercising inherent supervisory power to require detailed findings and reasons for certifying juveniles to adult court); *Hi-Country Estates Homeowners Assoc. v. Bagley & Co.*, 2000 UT 27, ¶ , 996 P.2d 534 (in timely interlocutory appeal, exercising “authority to supervise and oversee the administration of the lower courts of this state” to review presiding judge’s decision in unsigned minute entry to reassign case under Utah Code Jud. Admin. Rule 3-104(3)(E) (1999)).

None of those cases involved this Court invoking its supervisory authority in an untimely appeal to remand for resentencing. Rather, the appellant in each of the foregoing cases had properly invoked the Court’s jurisdiction by filing a timely notice of appeal.

Defendant acknowledges that *Johnson* says nothing about the Court’s supervisory authority, but he nevertheless claims that this Court in effect exercised that authority by adopting a new procedure that permitted a criminal defendant to seek resentencing when he was denied his right to appeal. Br. Pet. 13-17. Defendant seems to argue that if *Johnson* adopted a new procedural rule that permitted resentencing, this Court may invoke its

supervisory authority now to extend that rule to permit an appellate court in an untimely appeal to remand for automatic resentencing.

Johnson, however, did not adopt a new rule of procedure. It simply pointed the defendant to an existing procedure—post-conviction proceedings—as a means for proving that he was denied his right to appeal and for obtaining relief in the form of resentencing.

But *Johnson* does not help defendant's cause for a more fundamental reason. Whatever the *Johnson* court had to say about the correct procedure for resentencing, it did not exercise its supervisory authority to remand with an order to resentence defendant. It instead properly recognized its jurisdictional limitations over an untimely appeal and it dismissed the appeal with the explanation that defendant could seek a remedy with a court that would have jurisdiction. *Johnson* 635 P.2d at 38. In sum, *Johnson* does not represent an exercise of this Court's inherent supervisory authority. Certainly, it does not support defendant's claim that this Court may exercise its inherent supervisory power to formulate rules that allow it to act outside its jurisdiction.³

³Defendant spends much of his brief arguing that *Johnson* permits him to seek resentencing by filing a motion in the underlying criminal case instead of by filing a separate civil post-conviction petition. Br. Pet. 13-16, 23-29. That, however, is not the issue before this Court. Defendant has not sought resentencing in the district court. He has only sought an appellate remedy. The only question before this Court is whether the court of appeals had jurisdiction to grant him that remedy. The notes, however, that the question of the appropriate procedure to use in seeking resentencing in the district court is currently before this Court in *Manning v. State*, 2004 UT App 87, 89 P.3d 196, *cert. granted by* 98 P.3d 1177 (Utah 2004).

2. Defendant improperly relies on unpublished orders from other appeals to support his claims.

Because no published authority supports his position, defendant resorts to citing to unpublished orders issued by this Court: *State v. Clark*, Case No. 20010819-SC; *State v. Munford*; Case No. 20010413-SC; and *State v. Hassan*, Case No. 20020885-SC. Br. Pet. 11. According to defendant, these orders support his claim that this Court “may invoke its supervisory power to remand for resentencing in a case, even where it lacks jurisdiction over an appeal from the convictions.” *Id.*

The *Munford* order, issued on 31 July 2001, states:

The State’s motion to dismiss this case for lack of jurisdiction is granted, but the case is remanded to the trial court for re-sentencing and appointment of counsel, so that defendant may perfect his appeal as of right.

See Br. Pet., Addendum. E. The *Clark* order was issued approximately six months later on 17 January 2002. It states:

The State’s motion to dismiss is granted, but the case is remanded to the trial court for resentencing, so that defendant may exercise his constitutional right to appeal. In remanding the case, this court invokes its supervisory powers, where it is obvious from the record that defendant was denied his constitutional right to appeal by an attorney who has since been suspended from the practice of law and where fundamental values are threatened by other modes of proceedings. *State v. Bennett*, 2000 UT 34, ¶ 13, 999 P.2d 1.

See Br. Pet., Addendum D. The *Hassan* order, issued on 21 April 2003, states:

The court denies defendant’s motion for order affirming this court’s jurisdiction over his appeal. The court grants defendant’s motion for order remanding his case to the trial court for re-sentencing. This court invokes its authority to remand the case under section 78-2-2(2) which vests this court with “authority to issue all writs and process necessary to carry into effect its

orders, judgments, and decrees.” Utah Code Ann. § 78-2-2(2) (2001). The Court denies the State’s motion to dismiss the appeal.

Br. Pet., Addendum F.

As a threshold matter, defendant’s citation to these orders as precedent is improper. In *Grand County v. Rogers*, 2002 UT 25, ¶¶ 16-17, 44 P.3d 734, this Court held that parties could cite to unpublished court of appeals’ memorandum decisions “to the degree that they are useful, authoritatively and persuasively.” *Id.* at ¶ 16. In so holding, this Court explained that such decisions are “issued and distributed as are all other opinions, except for the fact that they are not published in the Utah Advance Reports or the West reporter system.” *Id.* Moreover, the court of appeals’ memorandum decisions are “generally available to the bar and public through the internet service provided by the Administrative Office of the Courts.” *Id.* Accordingly, this Court held that such decisions could be “presented as precedential authority to a lower court or as persuasive authority to this [C]ourt, so long as all parties and the court are supplied with accurate copies at the time the decision is first cited.” *Id.* at 16. The Court recognized, however, that the precedential value of memorandum decisions may be limited, given the tendency of such decisions to omit procedural and substantive background and to forego detailed analysis. *Id.* at ¶¶ 16-17.

Prior to *Grand County*, the Rules of Judicial Administration expressly prohibited parties from citing to unpublished decisions in any state court. *Id.* at ¶ 16 n.4 (citing Utah R. Jud. Admin. 4-508). After *Grand County*, this Court amended its appellate rules to permit parties to cite “as precedent” both “[p]ublished decisions of the Supreme Court and the Court

of Appeals” and “[u]npublished decisions,” so long as accurate copies of the unpublished decisions were provided to all parties and the court. Utah R. App. P. 30(f). Defendant cites to rule 30, presumably as authority for citing to these three orders.

But neither rule 30 nor *Grand County* support relying on such orders as precedent. Rule 30, adopted the year after *Grand County* was issued, was clearly intended to formally incorporate *Grand County*’s new rule into the appellate rules of procedure. Moreover, the term “decisions” as used in rule 30 clearly does not contemplate the type of orders that defendant cites. The term “decisions” in rule 30 is distinguished by two modifiers: “published” and “unpublished.” Utah R. App. P. 30(f). Obviously, “published decisions” refer to the opinions issued by this Court and the court of appeals that are published in the official reporter. See *Grand County*, 2002 UT 25, ¶ 7. “Unpublished decisions” then must refer to same type of decision, but which is not published in the official reporter. Given the context of the term and in light of *Grand County*, “decision” cannot possibly refer to the kind of brief, unpublished *orders* defendant now cites.

Indeed, it is difficult to imagine when an unpublished order such as these would have any useful precedential value, given that such orders tend to have even less analysis and background than unpublished memorandum decisions. None of these orders contains any procedural or factual background, nor any supporting analysis or reasoning, although they were clearly issued in response to motions to dismiss the appeal. Moreover, while unpublished memorandum decisions are made “available to the bar and public through the internet service provided by the Administrative Office of the Courts” and on research

databases such as WestLaw and Lexis, the orders cited here were not. They were distributed only to the parties in the case. Thus, other litigants searching for authority to cite would be unable to access these orders. This alone demonstrates that this Court did not intend for these orders to have any binding or precedential value for other cases.

But even if these orders could be properly cited as precedent, they provide no guidance as to whether this Court may invoke its supervisory authority in an untimely appeal. Neither the *Munford* nor *Hassan* orders uses the term “inherent supervisory authority.” The *Clark* order is the only one to use that term. But even so, the *Clark* order provides no explanatory background into the basis for the order. Consequently, it contributes nothing to the issue here. And, more importantly, to the extent that the *Clark* order supports defendant’s argument, it represents a departure from the well-established jurisdictional rules set out in published opinions cited above. As such, any possible precedential value is *de minimis*.

In sum, this Court’s supervisory authority may not be invoked in order to create jurisdiction where none exists or to circumvent the jurisdictional time frame for appeal.

D. The state constitutional and statutory “All Writs” provisions do not permit an appellate court to take any action other than dismissal in an untimely appeal.

The Utah Constitution grants this Court “appellate jurisdiction over all other matters to be exercised as provided by statute” and “power to issue all writs and orders necessary for the exercise of the Supreme Court’s jurisdiction or the complete determination of any cause.” Utah Const. art. VIII, § 3. Statute also grants this Court “jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect

its orders, judgments, and decrees or in aid of its jurisdiction.” Utah Code Ann. § 78-2-2 (West 2004). Statute likewise grants the court of appeals jurisdiction “to issue all extraordinary writs and to issue all writs and process necessary: (a) to carry into effect its judgments, orders, and decrees; or (b) in aid of its jurisdiction.” Utah Code Ann. § 78-2a-3(1) (West 2004).

1. Neither this Court nor the court of appeals may issue a writ “in aid of” non-existent jurisdiction.

In the court of appeals, defendant argued that the court could remand for resentencing by issuing a writ under the “in aid of its jurisdiction” provision of section 78-2a-3(1)(b). *See Cox*, 2004 UT App 277, at 2. Defendant renews that claim here.

The court of appeals stated in response to defendant’s argument that the authority granted under subsection (1)(b) “presumes that this court has appropriate jurisdiction” and “does not confer jurisdiction where this court does not otherwise have it because of an untimely notice of appeal.” *Id.*

The court of appeals’ reading of that statutory provision is correct. The phrase “in aid of its jurisdiction” by its terms presupposes that the court already has jurisdiction over the matter. Otherwise, a writ could not be “in aid of” jurisdiction. This reading is supported by federal decisions interpreting a similar phrase in federal statutes. For example, in *United States v. Crockett*, 861 A.2d 604, 610 (D.C. 2004), the court held that “in aid of their respective jurisdictions” in 28 U.S.C. § 1651(a) does not “create an independent basis for jurisdiction where the court otherwise had none.” The United States Supreme Court likewise

interpreted the phrase “in aid of its jurisdiction” in 28 U.S.C. § 2283, to presuppose jurisdiction in the first place. *See Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng’rs*, 398 U.S. 281, 294 (1970) (holding that, “if the District Court does have jurisdiction, it is not enough that the requested injunction is related to that jurisdiction, but it must be ‘necessary in aid of’ that jurisdiction”). *See also James v. X. Bellotti*, 733 F.2d 989, 993 (1st Cir. 1984) (“[T]he district court’s jurisdiction to issue an injunction under the [in aid of its jurisdiction] exception[] in section 2283 is ancillary to its jurisdiction in the underlying case”); *In re Diet Drugs Products Liability Litigation*, 369 F.3d 293, 306 (3rd Cir. 2004) (federal district court, pursuant to its authority to issue injunctions that are necessary in aid of its jurisdiction, may enjoin state court action that if allowed, would “run afoul” of a settlement agreement that the federal court retained exclusive jurisdiction over); *Signal Properties, Inc. v. Farha, et. al.*, 482 F.2d 1136, 1140 (5th Cir. 1973) (“[T]he district court should be able to issue an injunction in aid of its jurisdiction to prevent the [state] court from continuing multiplicitous proceedings, from rendering a decision which could effectively deprive the federal court of its *in rem* jurisdiction through principles of *res judicata* and collateral estoppel, or from rendering a decision potentially inconsistent with a decision of the federal district court”); *Krahm v. Graham*, 461 F.2d 703, 708-09 (9th Cir. 1972) (“[Section] 2283 is a limitation on the exercise by the federal courts of their equitable jurisdiction, but is not a jurisdictional statute”); *Tyler v. Russel*, 410 F.2d 490, 491 (10th Cir. 1969) (“Section 2283 is not a jurisdictional statute but rather a limitation upon the exercise by a district court of its equity jurisdiction”); *Henson v. Hoth*, 258 F. Supp. 33, 35 (D. Colo.

1996) (The phrase, “in aid of its jurisdiction” in 28 U.S.C. § 2283 “refers only to jurisdiction which has already attached, it cannot be considered an original jurisdictional grant”).

Defendant relies on *Barnard v. Murphy*, 882 P.2d 679, 681 (Utah App. 1994) (“*Barnard II*”) to support his argument that an appellate court may issue a writ “in aid of its jurisdiction,” even when it lacks jurisdiction. Br. Pet. 19-20. *Barnard II*, however, is inapposite because it involved an original writ proceeding. Barnard, a lawyer, had moved the trial judge to recuse himself from several cases in which Barnard represented a party. *Id.* at 680-81. As required by rule, the trial judge certified one affidavit to another judge, but took no action in the other cases. *Id.* Barnard petitioned the court of appeals for extraordinary relief in the nature of mandamus. *Barnard v. Murphy*, 852 P.2d 1023, 1024 (Utah App. 1993) (“*Barnard I*”). The court of appeals granted the writ and ordered the trial judge to immediately comply with the applicable rule on judicial disqualification. *Id.* at 1025. The trial judge then referred all but two of the affidavits to another judge. *Id.*

In *Barnard II*, Barnard petitioned the court of appeals for another extraordinary writ, also in the nature of mandamus, ordering the trial judge to comply with the rule in the last two cases. 882 P.2d at 681. The petition also asked the court to direct the trial judge’s recusal from all cases in which Barnard filed an affidavit of bias. *Id.*

The court of appeals held in *Barnard II* that it had jurisdiction over the second petition for extraordinary relief under Utah Code Ann. § 78-2a-3(1)(a), which grants that court “all writs and process necessary: (a) to carry into effect its judgments, orders, and decrees.” *Id.* at 681. The court of appeals reasoned that since it had already ordered the trial judge to

comply with the disqualification rule in the respective cases, issuing the second writ “would only be “carry[ing] into effect its judgments, orders, and decrees.” *Id.* In other words, the court of appeals “could properly issue a writ to enforce [its] prior order.” *Id.*

The *Barnard II* court then went on to hold that it also had jurisdiction to issue the second writ under the “in aid of jurisdiction” provision. *Id.* The court reasoned that because it had general appellate jurisdiction over the subject matter of the cases at issue—i.e., divorce cases—the writ could properly issue “in aid of its jurisdiction,” “even if no appeal is pending.” *Id.*

A pending appeal was unnecessary to invoke the court of appeals’ jurisdiction in *Barnard II*, however, because its jurisdiction had been invoked by an original writ proceedings. Because of the court of appeals has original appellate jurisdiction over divorce cases, *see* Utah Code Ann. § 78-2a-3(2)(h), there was no question that it, not this Court, was the appropriate court for seeking extraordinary relief in the nature of mandamus.

In this case, defendant did not attempt to invoke the writ jurisdiction of either appellate court through an original writ proceeding. Rather, he unsuccessfully tried to invoke the this Court’s appellate jurisdiction by filing an untimely notice of appeal. Thus, while the *Barnard II* court had underlying jurisdiction over the original writ proceeding, the court of appeal never had jurisdiction over defendant’s untimely appeal. Thus, the court of appeals could not issue a writ “in aid of” its non-existent jurisdiction.

Bogges v. Morris, 635 P.2d 39 (Utah 1981) (“*Bogges II*”), on the other hand, is a perfect example of a writ issued “in aid of” an appellate court’s jurisdiction. *Bogges* was

issued on the same day as *Johnson*. Boggess, like Johnson, had initially filed an untimely notice of appeal from his manslaughter conviction. *Id.* at 40. Boggess filed a habeas petition in the district court alleging that he had timely asked his counsel to appeal, but that his counsel had failed to file a notice of appeal. *Id.* at 40-41. After taking evidence, the district court found Boggess's allegations to be true and ruled that he "had been denied his right to appeal and his right to counsel." *Id.* at 40. In an attempt to afford Boggess relief, the district court entered an order granting him "permission to file an out-of-time appeal and directing him to return to the district court for further relief if this Court refused to entertain that appeal." *Id.*

Without addressing the merits of Boggess's claims, this Court dismissed the untimely appeal for lack of jurisdiction. *State v. Boggess*, 601 P.2d 927 (Utah 1979) ("*Boggess I*"). Accordingly, Boggess returned to the district court for habeas relief. *Boggess II*, 635 P.2d at 40-41. The district court ordered that if this Court did not take jurisdiction "of the substantive merits of an appeal by [Boggess] within thirty (30) days," it would grant Boggess's habeas petition and release him from prison." *Id.* at 41. Thirty days later, the district court vacated defendant's conviction and released him from custody, with the understanding that the State could reprosecute Boggess. *Id.* The State timely appealed the order granting habeas relief. *Id.*

Citing to *Johnson*, this Court explained that ordinarily a defendant denied his right to appeal should seek resentencing through post-conviction proceedings. *Id.* at 42. The Court noted, however, "the unusual circumstances of this case, where the facts [had] already been

established by findings in a habeas corpus proceeding.” *Id.* Under these circumstances, the Court stated, “it would be needlessly circular to require that defendant return to the district court to re-establish the facts by a postconviction hearing and then to be resentenced to qualify for a direct appeal.” *Id.*

This Court noted that while Boggess’s criminal conviction was “no longer subject to review by the statutory remedy of appeal,” the habeas proceeding was properly before the Court on appeal. *Id.* at 43. “In that circumstance, where this Court has appellate jurisdiction over the habeas corpus proceeding and original jurisdiction to issue the writ of certiorari for the record in the criminal conviction, *the effect of the two writs can unite* to open the door for direct review of a criminal conviction in this Court.” *Id.* In other words, where this Court already had appellate jurisdiction over the habeas proceeding, it could issue a writ of certiorari in aid of that jurisdiction to provide Boggess with relief. *See also State v. Hallett*, 856 P.2d 1060, 1061-62 (Utah 1993) (approving court of appeals’ use of *Boggess* procedure in nearly identical circumstances).

This Court cautioned, however, that this procedure was not “available as an alternate means of review.” *Id.* Otherwise, “these two writs could make a mockery of the time limits for appeal, undermine the finality of criminal judgments, and promote the indefensible merry-go-round of collateral attack.” *Id.*

Moreover, it is significant that the remedy in *Boggess* was neither offered nor afforded Johnson. This is because this Court lacked appellate jurisdiction over Johnson’s appeal and because Johnson had not yet established the factual allegations that would entitle him to

resentencing. Defendant's circumstances here mirror Johnson's, not Boggess's. Like the *Johnson* court, this Court lacks jurisdiction over defendant's untimely appeal. And unlike the *Boggess* court, this Court has no appellate jurisdiction over a habeas proceeding. Thus, this Court should grant defendant the same remedy that it granted Johnson: dismissal of the untimely appeal with the advice that defendant seek a resentencing order in postconviction proceedings in the district court.

2. Defendant's argument that this Court has independent jurisdiction to issue a writ to order resentencing is unpreserved.

For the first time before this Court, defendant argues that this Court has power to issue a writ "independent of appellate jurisdiction over a case." Br. Pet. 17. Defendant neither raised this argument in the court of appeals, *see Add. C*, nor in his petition for certiorari review. Rather, he argued only that the court of appeals had authority to remand with an order of resentencing pursuant to its statutory writ power "in aid of its jurisdiction." He should not be permitted at this late date to raise this new appellate claim, which is not fairly included in his petition for certiorari review.

In any event, the fact that both this Court and the court of appeals have the authority to issue extraordinary writs independent of their appellate jurisdiction does not aid defendant. First, defendant did not invoke the court of appeals' statutory authority to issue a writ for extraordinary relief. *See* Utah Code Ann. § 78-2a-3. Rather, he asked only for a writ "in aid of" the court of appeals' jurisdiction. But even if defendant had sought extraordinary relief, it would not have been available to him. Extraordinary writs have always been available only

when “no other plain, speedy and adequate remedy is available.” *See* Utah R. Civ. P. 65B. *See also Osborne v. Adoption Center of Choice*, 2003 UT 15, ¶ 24, 70 P.3d 58. Here, defendant had a plain, speedy, and adequate remedy—an appeal. *See Commercial Security Bank v. Phillips*, 655 P.2d 678, 679-80 (Utah 1982) (plaintiffs who did not exercise right to appeal district court’s adverse ruling could not substitute that “plain, speedy and adequate remedy at law” with petition for extraordinary relief). Also, as held by *Johnson*, defendant has an plain, speedy and adequate remedy at law in the form of post-conviction proceedings seeking resentencing.⁴

E. Rule 60(b), Utah Rules of Civil Procedure, is not a mechanism for an appellate court to order relief from an untimely appeal.

Defendant argues that rule 60(b), Utah Rules of Civil Procedure “would accommodate a request for relief under the circumstances here.” Br. Pet. 31. Assuming for the sake of argument, but not conceding that this rule of civil procedure even applies in criminal proceedings, defendant has not explained how this rule may be invoked for the first time in the appellate court in an untimely appeal. As the court of appeals stated, rule 60(b) is a rule of civil procedure “to be invoked in the *trial* court.” *Cox*, 2004 UT 277, at 2 (emphasis added). “It is not appropriate to bring a motion under rule 60(b) in [an appellate] court for

⁴Defendant also failed to follow the correct procedures for invoking either this Court’s or the court of appeals’ authority to issue an extraordinary writ. Extraordinary relief procedures are governed by rule 65B, Utah Rules of Civil Procedure. *See Osborne*, 2003 UT 15, ¶ 23. That rule requires that a separate petition seeking relief be filed. Utah R. Civ. P. 65B. Defendant here filed no petition for extraordinary relief. He merely argued in his untimely appeal that the court of appeals should act outside its jurisdiction and grant him relief. Moreover, it is unclear whether defendant could establish any of the grounds for relief set forth in rule 65B.

the first time.” *Id.* Indeed, the State knows of no authority that permits an appellant to bring such a motion in the appellate court, even when the court’s jurisdiction has been properly invoked. It defies reason to assume that an appellate court would have jurisdiction to grant rule 60(b) motion in an untimely appeal over which the court lacks jurisdiction.

F. Good policy does not support an appellate court acting outside its jurisdiction.

Defendant finally argues that policy supports remand for resentencing because “it conserves resources, it is fundamentally fair, and it does not prejudice the State.” Br. Pet. 37.

As a threshold matter, a court may not act outside its jurisdiction no matter how many policy considerations argue for it to do so. And acting without jurisdiction is always bad policy. As explained in the beginning of this argument, the court of appeals lacked jurisdiction over defendant’s untimely appeal and, accordingly, had power only to dismiss the appeal. Thus, defendant’s policy arguments are irrelevant to the question at hand.

But defendant’s policy arguments are also incorrect. First, it does not necessarily conserve resources for an appellate court to remand the case with an order to the district court to resentence the defendant. Whether the appellate court issues a remand or requires the defendant to seek an order of resentencing in the district court, the case has to be sent back to the district court for the resentencing. If the case must go back to the district court in either case, it is little more trouble for the defendant to file a petition in the district court seeking resentencing relief. Indeed, defendant here is represented by able counsel who can

file a simple petition that will take far less time to prepare than has the appellate briefing already submitted on the issue.

Moreover, whether a defendant is entitled to resentencing is, as *Johnson* noted, a factual issue better suited to resolution in the trial court. *Johnson*, 635 P.2d at 38-39. If, as defendant claims, the record obviously demonstrates that he was denied his right to appeal due to his counsel's ineffectiveness, he should have no problem establishing that fact to the district court. Indeed, the State routinely stipulates to the grant of a post-conviction petition and resentencing when the record facts indisputably demonstrate that the defendant was denied his right to appeal. Also, in obvious cases, there is no reason why the post-conviction petition and resentencing hearings cannot be scheduled at the same time.

Second, requiring defendant to seek a resentencing order in the district court is not fundamentally unfair. As stated, the procedure is simple and in obvious cases can be expedited. Moreover, fundamental unfairness is more likely to result under defendant's proposed procedure. As explained above, this Court has often dismissed the untimely appeals of criminal defendants who are in the same position as defendant. *See Jiminez*, 938 P.2d at 264; *Bowers*, 2002 UT 100; *Putnik*, 2002 UT 122. The record facts in those cases were no less obvious than this case in demonstrating that their appeals were lost due to their counsel's procedural missteps. Yet this Court did not remand with an order to resentence them. It instead dismissed each case for lack of jurisdiction. Defendant asks that his case be given preferential treatment.

This Court has observed, however, that it is unjust to afford preferential treatment to some defendants, but not others:

[G]iven the fact that we have routinely dismissed appeals that were improperly taken, even after briefing and argument, we bear a heavy burden of justification when we single out one improperly taken appeal for preferential treatment that has been denied so many others. The essence of justice is to treat similar cases similarly. Until we can explain persuasively why any one case deserves treatment denied to others, we should deny extraordinary treatment.

A.J. Mackay Co. v. Okland Construction Co., Inc., 817 P.2d 323, 325-26 (Utah 1991) (citations omitted).⁵

Defendant advances no reason why he should be granted preferential treatment over all other defendants who have filed untimely appeals because of their counsel's ineffectiveness. Indeed, it makes little sense to have one jurisdictional rule for those cases in which it appears obvious that counsel was ineffective and those in which it is not so obvious. As a practical matter, such a line would be difficult to draw objectively. One case might appear obvious to one person, but would not necessarily appear obvious to another.

This leads to defendant's final claim that remanding for automatic sentencing would not prejudice the State. As stated, the State often stipulates to the grant of a post-conviction petition and resentencing when a defendant demonstrates that he was denied his right to

⁵*A. J. Mackay* involved a civil appeal that was improperly certified under rule 54(b), Utah Rules of Civil Procedure. Holding that an appellate court lacks jurisdiction over appeals improperly certified under rule 54(b), this Court noted that in "extraordinary cases" it could "choose to treat a purported [appellate rule 3 appeal of right] as an interlocutory appeal under [appellate rule 5]." *Id.* at 325. It declined to do so in *A. J. Mackay*, however, because the Court would have denied a petition for interlocutory review. *Id.* at 326.

appeal because of his counsel's ineffectiveness. The State will not stipulate to resentencing, however, when a defendant consciously foregoes his right to appeal by pleading guilty or instructing his counsel not to file a notice of appeal. Allowing a defendant to circumvent post-conviction proceedings in the district court deprives the State of the opportunity to dispute or test defendant's factual allegations that he was denied his right to appeal through the fault of counsel.

The situation in *Manning v. State*, 2004 UT App 87, 89 P.3d 196, *cert. granted by*, 98 P.3d 1177 (Utah 2004), illustrates this point. Manning filed an untimely notice of appeal from her conviction and sentence entered on her guilty pleas. *Id.* As defendant does here, Manning argued that court of appeals should not dismiss her untimely appeal; rather the court should simply remand with directions to the district court to resentence her. *See State v. Manning*, 2002 UT App 114 (unpublished memorandum decision) (attached at **Addendum D**). The court of appeals refused, stating that since it lacked jurisdiction over the untimely appeal, it had no authority to do anything but dismiss. *Id.*

Manning subsequently filed a post-conviction petition in the district court, claiming that she was denied her right to appeal due to her counsel's ineffectiveness. *Manning v. State*, 2004 UT App, ¶ 7. The State disputed that claim and after holding a hearing, the district court found that rather than being denied her right to appeal, Manning had merely chosen not to exercise that right. *Id.* Accordingly, the district court held that Manning was not entitled to resentencing under *Johnson*. *See id.* The court of appeals affirmed that ruling

and the case is currently under submission before this Court on a writ of certiorari. *Id.* at ¶ 35.

The point is that if the court of appeals had granted Manning's original request to remand for automatic resentencing, the State would have been deprived of its right to dispute the claim that Manning was entitled to be resentenced. Moreover, while it may appear obvious on some records that a defendant has been denied her right to appeal, the reality is that there are often conflicting extra-record facts that the appellate court will be unaware of. Thus, it will be impossible for an appellate court to always determine which cases warrant resentencing and which cases do not. Consequently, the only way to ensure fair and even-handed treatment for both the State and all defendants is to require the procedure set out in *Johnson* in all cases—i.e, dismiss the untimely appeal and allow the defendant to pursue any resentencing remedy in the district court.

CONCLUSION

The Court should affirm the court of appeals' order dismissing defendant's untimely appeal.

RESPECTFULLY SUBMITTED this 1 day of July, 2005.

MARK L. SHURTLEFF
ATTORNEY GENERAL



LAURA B. DUPAIX
ASSISTANT ATTORNEY GENERAL

MAILING CERTIFICATE

I hereby certify that on this 1st day of July, 2005, I mailed, postage prepaid, two accurate copies of the foregoing Appellee's Brief to:

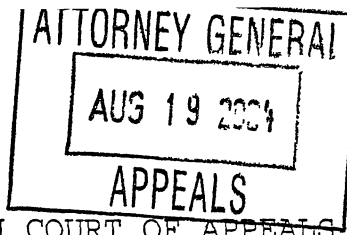
Linda M. Jones
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt lake City, Utah 84111

Lee Nakamura

ADDENDUM A

Court of Appeals' Decision

State v. Cox, 2004 UT App 277



UTAH APPELLATE COURTS
AUG 19 2004

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20040300-CA
v.)	
)	F I L E D
Robert Ellis Cox,)	(August 19, 2004)
)	
Defendant and Appellant.)	2004 UT App 277

Third District, Salt Lake Department
The Honorable Robin W. Reese

Attorneys: Linda M. Jones, Salt Lake City, for Appellant
Mark L. Shurtleff and Laura B. Dupaix, Salt Lake
City, for Appellee

Before Judges Bench, Davis, and Jackson.

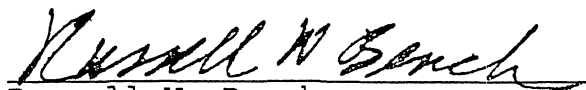
PER CURIAM:

This case is before the court on this court's motion as well as the State's motion for summary dismissal for lack of jurisdiction. See Utah R. App. P. 10. The summary dismissal motion was based on an untimely notice of appeal. Appellant Cox was convicted by a jury. The Sentence, Judgment, and Commitment issued December 8, 2003. Cox filed a motion for a new trial on December 5, 2003, prior to sentencing and issuance of the final judgment. The trial court issued findings denying Cox's motion for a new trial on March 11, 2004. Cox filed his notice of appeal on April 8, 2004. Because the motion for a new trial was filed prior to sentencing and issuance of the final judgment, the motion was premature and, therefore, untimely. See Utah R. Crim. P. 24(c). As a result, the motion did not toll the time for filing the notice of appeal. See Utah R. App. P. 4(b); State v. Putnik, 2002 UT 122, ¶5, 63 P.3d 91. The notice of appeal, filed within thirty days of the order denying the motion for a new trial, rather than thirty days from the final judgment, is untimely. See State v. Todd, 2004 UT App 266; State v. Putnik, 2002 UT at ¶5. When a notice of appeal is untimely filed, this court lacks jurisdiction to do anything other than dismiss the action. See Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah Ct. App. 1989).

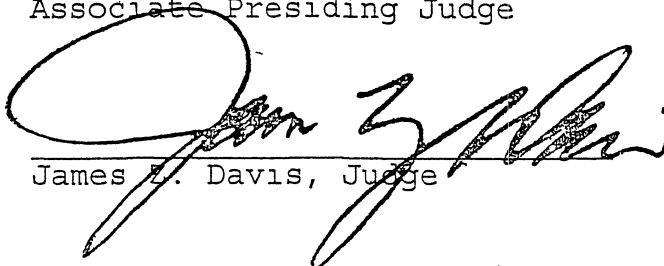
direct appeal as a result of ineffective assistance of counsel.
See Johnson, 635 P.2d at 38.

Cox argues that a motion under the Post-Conviction Remedies Act would not be feasible for him because of his pro se status and the lack of resources available to him at the prison. Cox also argues that proceeding under the Post-Conviction Remedies Act would not be a speedy remedy. However, the trial court has the authority to appoint counsel on a pro bono basis for purposes of a post conviction petition if the petition is not summarily dismissed. See Utah Code Ann. § 78-35a-109 (2002). Moreover, the fact that the process of litigating a post-conviction petition takes time does not allow this court to assume jurisdiction of an appeal not properly before it.

Accordingly, this appeal is summarily dismissed for lack of jurisdiction.



Russell W. Bench,
Associate Presiding Judge



James L. Davis, Judge



Norman H. Jackson Judge

ADDENDUM B

Constitutional provisions, statutes, and rules

Utah Constitution, art. VIII

Sec. 3. [Jurisdiction of Supreme Court]

The Supreme Court shall have original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States. The Supreme Court shall have appellate jurisdiction over all other matters to be exercised as provided by statute, and power to issue all writs and orders necessary for the exercise of the Supreme Court's jurisdiction or the complete determination of any cause.

Sec. 4. [Rulemaking power of Supreme Court--Judges pro tempore--Regulation of practice of law]

The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature. Except as otherwise provided by this constitution, the Supreme Court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah. The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.

U.C.A. 1953 § 78-2-2
§ 78-2-2. Supreme Court jurisdiction

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) a judgment of the Court of Appeals;
- (b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;
- (c) discipline of lawyers;
- (d) final orders of the Judicial Conduct Commission;
- (e) final orders and decrees in formal adjudicative proceedings originating with:
 - (i) the Public Service Commission;
 - (ii) the State Tax Commission;
 - (iii) the School and Institutional Trust Lands Board of Trustees;
 - (iv) the Board of Oil, Gas, and Mining;
 - (v) the state engineer; or
 - (vi) the executive director of the Department of Natural Resources reviewing actions of the Division of Forestry, Fire and State Lands;
- (f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (3)(e);
- (g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;
- (h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;
- (i) appeals from the district court involving a conviction or charge of a first degree felony or capital felony;
- (j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction; and
- (k) appeals from the district court of orders, judgments, or decrees ruling on legislative subpoenas.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

- (a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;
- (b) election and voting contests;
- (c) reapportionment of election districts;
- (d) retention or removal of public officers;

- (e) matters involving legislative subpoenas; and
- (f) those matters described in Subsections (3)(a) through (d).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

U.C.A. 1953 § 78-2a-3
§ 78-2a-3. Court of Appeals jurisdiction

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;
- (b) appeals from the district court review of:
 - (i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and
 - (ii) a challenge to agency action under Section 63-46a-12.1;
- (c) appeals from the juvenile courts;
- (d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;
- (e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;
- (f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;
- (g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;
- (h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;
- (i) appeals from the Utah Military Court; and
- (j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

Utah Rules App.Proc.

RULE 2. SUSPENSION OF RULES

In the interest of expediting a decision, the appellate court, on its own motion or for extraordinary cause shown, may, except as to the provisions of Rules 4(a), 4(b), 4(e), 5(a), 48, 52, and 59, suspend the requirements or provisions of any of these rules in a particular case and may order proceedings in that case in accordance with its direction.

RULE 4. APPEAL AS OF RIGHT: WHEN TAKEN

(a) Appeal from final judgment and order. In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) Motions post judgment or order. If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion is filed in the trial court (1) for a new trial under Rule 24 of the Utah Rules of Criminal Procedure;; or (2) to withdraw a plea under Utah Code Ann. § 77-13-6, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying the motion to withdraw the plea. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

(c) Filing prior to entry of judgment or order. Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

(d) Additional or cross-appeal. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires.

(e) Extension of time to appeal. The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties

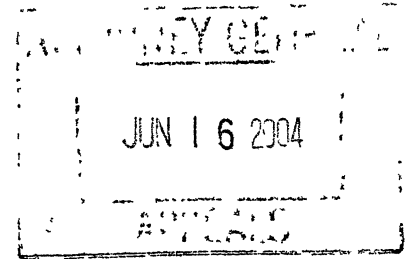
in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(f) Appeal by an Inmate Confined in an Institution. If an inmate confined in an institution files a notice of appeal in either a civil or criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been prepaid. If a notice of appeal is filed in the manner provided in this paragraph (f), the 14-day period provided in paragraph (d) runs from the date when the trial court receives the first notice of appeal.

ADDENDUM C

***Defendant's Memorandum in Support of
his Motion to Temporarily Remand
for Resentencing***

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Attorneys for Appellant



IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	MEMORANDUM IN SUPPORT OF
	:	MOTION TO TEMPORARILY RE-
Plaintiff/Appellee,	:	MAND THIS CASE TO THE TRIAL
	:	COURT FOR RESENTENCING; AND
v.	:	IN OPPOSITION TO THE SUA
	:	SPONTE MOTION FOR SUMMARY
	:	DISPOSITION, AND TO THE
ROBERT ELLIS COX,	:	STATE'S MOTION TO DISMISS
	:	
Defendant/Appellant.	:	Case No. 20040300-CA

This Memorandum is in response to the Sua Sponte Motion for Summary Disposition and the State's Motion to Dismiss for Lack of Jurisdiction. Also, it is in support of Appellant Robert Cox's motion for resentencing. Cox requests that this Court temporarily remand this case for resentencing so that he may file a timely notice of appeal.

FACTUAL BACKGROUND

In lower court proceedings, the state charged Cox by Information with nine sexual offenses against a child. A jury convicted Cox as charged, and on December 8, 2003, the trial court imposed a combination of consecutive and concurrent sentences and entered judgment against Cox. On December 5, 2003, prior to sentencing and judgment, counsel for Cox filed a motion for a new trial. The state opposed the motion and on March 11, 2004, the trial court entered findings of facts, conclusions of law, and an order denying

the motion. On April 8, 2004, Cox filed a notice of appeal.

This Court maintains it lacks jurisdiction over the appeal where the new trial motion "was premature and untimely" and did not "toll the time for filing a notice of appeal." (Sua Sponte Motion, May 12, 2004.) The state asserts the same. (State's Motion to Dismiss, April 30, 2004.) The state has asked this Court to dismiss the appeal. (Id.)

Yet, a remedy exists for Cox. Pursuant to Utah Code Ann. § 78-2a-3(1)(b) (2002); the unpublished decisions of the Utah Supreme Court in State v. Hassan, Case No. 20020885-SC; State v. Clark, Case No. 20010819-SC; and State v. Munford, 20010413-SC;¹ and Rule 60, Utah R. Civ. P., this Court may temporarily remand this case to the trial court with directions to resentence Cox in order that he may properly perfect the appeal.

ARGUMENT

THE CONSTITUTION ENTITLES A CRIMINAL DEFENDANT TO A DIRECT APPEAL. WHERE COX'S RIGHT TO APPEAL WAS COMPROMISED THROUGH NO FAULT OF HIS OWN, COX IS ENTITLED TO THE PROCEDURAL REMEDY OF RESENTENCING IN THE LOWER COURT .

The Utah Constitution provides that "[i]n criminal prosecutions the accused shall have . . . the right to appeal in all cases." Utah Const. art. I, § 12. In State v. Tuttle, 713 P.2d 703 (Utah 1985), the Utah Supreme Court stated that the right of appeal is essential to a fair proceeding. "Rights guaranteed by our state constitution are to be carefully protected by the courts. We will not permit them to be lightly forfeited." Id. at 704;

¹ The unpublished decisions of the Utah Supreme Court in Hassan, Case No. 20020885-SC, Clark, Case No. 20010819-SC, and Munford, 20010413-SC, are attached hereto as Addenda A, B, and C, respectively. See Utah R. App. 30(f) (2004).

see Manning v. State, 2004 UT App 87, ¶9, 496 Utah Adv. Rep. 26. If defendant has been denied the right to appeal, Utah law recognizes that "in certain limited circumstances a defendant should be resentenced in order to revive [that] right." Manning, 2004 UT App 87, ¶10. Cox's circumstances support resentencing, as further set forth herein.

A. In Manning this Court Reiterated the Procedural Remedy of Resentencing.

In Manning, 2004 UT App 87, this Court considered the procedures available to a criminal defendant who has failed to perfect an appeal within the time limits set forth in the rules. There, Manning entered a guilty plea to "one count of unlawful dealing with property by a fiduciary, a second degree felony; one count of failing to file a proper tax return, a third degree felony; and one count of theft, a third degree felony." Id. at ¶2. In connection with the plea, Manning "acknowledged that by entering a guilty plea she was waiving certain rights, including her right to appeal the conviction." Id. at ¶3.

"On September 27, 2001, Manning was sentenced." Id. at ¶5.

On November 23, 2001, Manning filed a pro se notice of appeal, which this court later dismissed for lack of jurisdiction. In an unpublished decision, this court explained that when a notice of appeal is filed beyond the 30-day appeal deadline, *see* Utah R. App. P. 4(a), we lack appellate jurisdiction, and Manning's only remedy if she was deprived of the right to appeal was to seek postconviction relief under the Utah Rules of Civil Procedure.

Id. at ¶6. Manning returned to the lower court and filed a petition pursuant to Rules 65B(b) and 65C, Utah R. Civ. P., requesting "to be sentenced nunc pro tunc" in order to "extend[] the time in which to file a notice of appeal." Id. at ¶7. The trial court denied the petition. Id. In the recently published opinion, this Court affirmed. It ruled that

Manning would not be entitled to be resentenced. This Court stated, "If a defendant knows of her right to appeal but voluntarily chooses to forego it, a change of heart after the 30-day period for filing an appeal does not entitle her to be resentenced." Id. at ¶24.

This Court then elaborated on when a criminal defendant may be entitled to resentencing, and when the defendant may be allowed a remedy under Rule 65C of the Utah Rules of Civil Procedure and the Post-Conviction Remedies Act ("PCRA").

Specifically, in Manning, this Court recognized that "in circumstances where the right to appeal has been *denied*, the trial court may resentence a criminal defendant nunc pro tunc to provide the defendant with an opportunity to file a timely appeal." Id. at ¶9 (citing Boggess v. Morris, 635 P.2d 39, 43 (Utah 1981)). According to the Court,

Both [the state and Manning] agree that if a defendant who wishes to appeal is *denied* that right -- by an attorney who fails to file a notice of appeal or, say, a prison official who refuses to mail to an attorney a defendant's instructions to file an appeal--the defendant should be resentenced to resurrect the right to appeal.

Id. at ¶24. Also, the state admitted that if a defendant affirmatively seeks to exercise the right to appeal, and the right has been denied as a result of the inaction of counsel, or due to an interference in the criminal justice system, the defendant should be resentenced. Id.

Yet, "resentencing" does not require compliance with Rule 65C and the PCRA.

To explain, the PCRA "establishes a substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies, including a direct appeal." Manning, 2004 UT App 187, ¶15 (cite omitted). The substantive legal remedies under the PCRA include "post-conviction relief

to vacate or modify the conviction or sentence." Utah Code Ann. § 78-35a-104(1) (2002). In addition, the PCRA "does not apply" to "petitions that do not challenge a conviction or sentence for a criminal offense." Utah Code Ann. 78-35a-102(2)(a).

Resentencing is not a substantive remedy. It is procedural. A defendant who seeks resentencing to perfect a direct appeal is not seeking to "vacate or modify the conviction or sentence" (Utah Code Ann. §§ 78-35a-102(2)(a), -104(1)) at that juncture. Resentencing contemplates reimposition of a sentence already imposed so as to afford a defendant the opportunity of "perfecting an appeal, since the time for taking such appeal would date from the rendition of the new judgment." State v. Johnson, 635 P.2d 36, 38 (Utah 1981). It is an efficient, limited remedy. The door of resentencing does not swing open in the trial court for a substantive challenge on the conviction or sentence. See State v. Hallett, 856 P.2d 1060, 1062 (Utah 1993) (once a court determines that defendant was denied an appeal, a direct appeal is immediately provided without deciding other claims).

In addition, where a person has been denied his right to appeal, he may not be allowed the substantive remedies available under the PCRA. Id. Indeed, before a person may be allowed such remedies, he must "exhaust[] all other legal remedies, including a direct appeal." Utah Code Ann. §§ 78-35a-102(1), -106, 108(1) (2002).² Where a person has been "denied" a direct appeal due to an occurrence that is not his fault, see

² According to Utah Code Ann. § 78-35a-102(1), the PCRA establishes a substantive remedy in cases involving criminal offenses "except as provided in Subsection (2)." Under Subsection (2), the chapter does not apply to petitions that "do not challenge a conviction or sentence in a criminal matter." Utah Code Ann. § 78-35a-102(2)(a).

Manning, 2004 UT App 87, ¶¶24-25, that person has not yet exhausted his direct appeal. Thus, his remedy is immediate resentencing. Hallett, 856 P.2d at 1062.

B. A Defendant May Be Resentenced in the Trial Court Under This Court's Authority Pursuant to § 78-2a-3(1)(b) or Rule 60(b).

When a defendant's right to appeal is compromised due to the malfeasance/deficiency of counsel, defendant is entitled to a procedural remedy in order to protect the right to appeal. Specifically, this Court may temporarily remand the case for resentencing pursuant to Utah Code Ann. § 78-2a-3(1)(b), or Rule 60(b)(6), Utah R. Civ. P.

Section 78-2a-3(1)(b) gives this Court jurisdiction to issue any process necessary "in aid of its jurisdiction." Utah Code Ann. § 78-2a-3(1)(b) (2002). The Utah Supreme Court has invoked a similar provision to ensure that the right to appeal as guaranteed by the Utah constitution is adequately protected. See id. at § 78-2-2(2).

In State v. Hassan, Case No. 20020885-SC, defendant filed a premature new trial motion, resulting in an untimely notice of appeal. To remedy the untimely filing, the Utah Supreme Court relied on its authority under § 78-2-2(2) to remand the case to the trial court for resentencing in order that the defendant may properly perfect his appeal. See Addendum A, hereto; Clark, Case No. 20010819-SC, Addendum B; Munford, 20010413-SC, Addendum C. This Court may do the same.

This Court has ruled that its authority to enter orders in aid of its jurisdiction is equal to the authority of the Utah Supreme Court. In Barnard v. Murphy, 882 P.2d 679 (Utah App. 1994) ("Barnard II"), an attorney filed a writ with this Court against a trial

judge, who failed to comply with the recusal procedures in Morris v. Morris, a divorce case, among others. The writ was prompted by the fact that this Court had ordered the judge in a previous matter to comply with the procedures. See id. at 681. The trial judge waited until shortly before oral argument in Barnard II to comply with the procedures in Morris. Id. No appeal was pending in Morris. Notwithstanding, this Court relied on its authority under § 78-2a-3(1)(a), (b) to address recusal. Id. at 681-82.

This Court reasoned that where Utah law has provided this Court with subject matter jurisdiction over Morris v. Morris, "we have authority to issue necessary writs in connection with that case even if no appeal is pending." Barnard II, 882 P.2d at 681; see Utah Code Ann. § 78-2a-3(1)(a) and (2). This Court stated the following:

[T]his court's more generally phrased writ jurisdiction is apparently as broad as the "original" writ jurisdiction bestowed upon the Supreme Court. In crafting the jurisdictional language for the Court of Appeals, it is possible the Legislature chose more general terminology to ensure this court's ability to issue extraordinary writs in *any* case within the scope of our jurisdiction, whether the case fell within our original appellate jurisdiction or was transferred to us by the Supreme Court.

Barnard II, 882 P.2d at 682.

Barnard II is relevant here. Where the Utah Supreme Court has applied its companion provision (§ 78-2-2(2)) to order resentencing in cases where, for example, the new trial motion was premature, see Addendum A, this Court may do the same. Barnard II, 82 P.2d at 682 (recognizing that even for cases transferred from the supreme court, this Court may invoke its jurisdictional powers under § 78-2a-3(1)). Thus, Cox requests that this Court invoke its authority to issue any process in aid of its jurisdiction under §

78-2a-3(1)(b), and temporarily remand this case with directions to resentence Cox.

In the alternative, this Court may temporarily remand this case for resentencing under the civil rules. See Utah R. Civ. P. 1(a), 81(e) (2004). Specifically, pursuant to Rule 60(b), a party may request relief from a final judgment for any reason "justifying relief" and "upon such terms as are just." Utah R. Civ. P. 60(b)(6) (2004).³

In this case, where Cox may be denied his right to appeal due to trial counsel's failure to file a timely notice (see infra, subpart C., herein), Rule 60(b)(6) operates to provide limited relief from the judgment. See Stewart v. Sullivan, 506 P.2d 74, 75-76 (Utah 1973) (stating that Rule 60(b)(7) – now 60(b)(6) – is sufficiently broad to permit the court to set aside an order where counsel was incompetent and the opposing party was not unduly prejudiced); State v. Parker, 872 P.2d 1041, 1044 and n. 3 (Utah App. 1994) (applying the provision of Rule 60(b) that "most benefits" the party seeking relief). That is, due to trial counsel's malfeasance, Cox may be relieved from judgment, then resented *nunc pro tunc* so that he may perfect a proper appeal. Such terms would be just and ensure Cox's right to appeal. See Utah R. Civ. P. 60(b)(6); Utah Const. art. I, §12.

C. Unless the Court Remands for Resentencing Cox Will Be Denied his Appeal.

³ In the federal courts, Rule 60(b) is a successor to the writ of coram nobis. See U.S. v. Torres, 282 F.3d 1241, 1245 n.6 (10th Cir. 2002). Also, federal courts have retained their authority to issue common law writs in criminal proceedings. See Ejelonu v. INS, 355 F.3d 539, 544-45 (6th Cir. 2004). A motion for writ of coram nobis "is a step in the criminal case and not" a separate civil proceeding. U.S. v. Morgan, 346 U.S. 502, 505 n. 4 (1954); see Johnson, 635 P.2d at 38 (recognizing that coram nobis could be used to vacate judgment in a criminal case and to resentence a defendant to open the door to an appeal when the facts show that counsel's conduct deprived the defendant of the appeal).

In this case, private counsel represented Cox in proceedings below. After the trial and before sentencing, counsel filed a motion for a new trial. (See Trial Court Docket, attached as Addendum D, at 10-14.) The motion for a new trial was untimely. See Utah R. Crim. P. 24(c) (2004) (motion must be filed within 10 days after sentencing).

At sentencing, counsel for Cox referenced the appeal, and stated that since the new trial motion was filed, "the necessity of filing an appeal is stayed pending the resolution of that [motion]." (See Sentencing Transcript, attached as Addendum E, at 5; also Motion for a New Trial Transcript, attached as Addendum F, at 15-17.) Counsel's understanding of the matter was erroneous. See State v. Putnik, 2002 UT 122, ¶5, 63 P.3d 91; State v. Vessey, 957 P.2d 1239 (Utah App. 1998). The untimely motion did not stay the time for filing a notice of appeal. Utah R. App. P. 4(b) (2004).

In order to ensure a timely appeal, counsel for Cox should have either re-filed the motion for a new trial within 10 days after sentencing, or filed a notice of appeal within 30 days of the judgment. See Utah R. Crim. P. 24(c); Utah R. App. P. 4. Counsel here filed neither. (See Addendum D hereto, at 11-15.) Where the record supports that Cox intended to appeal from the convictions in this matter and counsel failed to file a timely notice of appeal, counsel's performance was deficient, and/or constituted malfeasance. See Manning, 2004 UT App 87, ¶23 (recognizing that in cases where defendant intended to appeal and trial counsel failed to file a timely notice, defendant was denied appellate rights due to the malfeasance); Stewart, 506 P.2d at 75-76 (attorney's incompetence justifies relief from judgment under Rule 60(b)); State v. Hovater, 914 P.2d 37, 39 (Utah

1996) (deficient performance and prejudice constitute ineffective assistance).

In addition, the trial court did not notify Cox at sentencing that he had 30 days to file an appeal. (See Addendum E); Utah R. Crim. P. 22(c) (2004) (following the imposition of sentence, the court *shall advise* defendant of the time for filing an appeal).

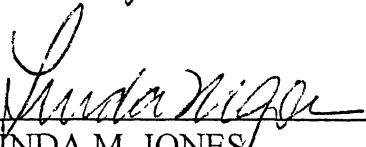
Cox was prejudiced by the lack of notice and the deficient performance: If a notice of appeal is not timely filed, this Court must dismiss the appeal. See Johnson, 635 P.2d at 37 (out-of-time appeals must be dismissed); Burgers v. Maiben, 652 P.2d 1320, 1322 (Utah 1982) (dismissing appeal relating to untimely notice for lack of jurisdiction).

In this case, Cox intended to exercise his constitutional right to appeal. (See Addendum F, at 15-17.) He did not waive that right. See Manning, 2004 UT App 87, ¶¶ 24-25. If this Court dismisses the appeal for jurisdictional reasons, Cox will be denied a fundamental right. To obviate the prejudice that may result from the deficient performance, Cox requests that this Court invoke its authority under § 78-2a-3(1)(b), and temporarily remand this case with directions to the trial court to resentence Cox so that he may perfect a proper appeal. See Manning, 2004 UT App 87, ¶¶ 24-25; Hassan, Case No. 20020885-SC; Clark, Case No. 20010819-SC; Munford, 20010413-SC. In the alternative, Cox requests that this Court temporarily remand this case for such relief and resentencing under Rule 60(b)(6). See Stewart, 506 P.2d at 75-76. Supra, subparts A & B.

CONCLUSION

As set forth herein, Cox respectfully requests that this Court temporarily remand this case with directions to resentence in order that Cox may perfect a proper appeal.

SUBMITTED this 16th day of June, 2004.



LINDA M. JONES
SALT LAKE LEGAL DEFENDER ASSOC.
Attorneys for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, LINDA M. JONES, hereby certify that I have caused to be delivered an original and four copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Fifth Floor, Salt Lake City, Utah 84101, and one copy to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 16th day of June, 2004.



LINDA M. JONES

DELIVERED this ____ day of _____, 2004.

ADDENDUM D

***State v. Manning*, 2002 UT App 114
(Unpublished Memorandum Decision)**

2002 WL 538092 (Utah App.), 2002 UT App 114

(Cite as: 2002 WL 538092 (Utah App.))

H

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Utah.
STATE of Utah, Plaintiff and Appellee,
v.
Carolyn Roberts MANNING, Defendant and
Appellant.
No. 20010911-CA.

April 11, 2002.

Joan C. Watt, Salt Lake City, for appellant.

Mark L. Shurtleff and Brett J. DelPorto, Salt Lake
City, for appellee.

Before BENCH, ORME, and THORNE, JJ.

MEMORANDUM DECISION (Not For Official
Publication)

PER CURIAM.

*1 This case is before the court on its own motion for summary disposition for lack of jurisdiction due to an untimely notice of appeal. Appellant pleaded guilty to unlawful dealing by a fiduciary and theft, both second degree felonies. She was sentenced on September 27, 2001, and the judgment was entered the same day. Appellant filed a pro se notice of appeal on November 23, 2001, beyond the statutory thirty-day deadline for filing a notice of appeal. See Utah R.App. P. 4(a).

Because the notice of appeal was filed untimely, this court is deprived of jurisdiction. When a matter is outside the court's jurisdiction, it retains only the authority to dismiss the action. See *Serrato v. Utah Transit Auth.*, 2000 UT App 299, ¶ 7, 13 P.3d 616; *State v. Palmer*, 777 P.2d 521, 522 (Utah Ct.App.1989); *Varian-Eimac v. Lamoreaux*, 767

P.2d 569, 570 (Utah Ct.App.1989). This court does not have the authority to, along with a dismissal, remand with instructions to resentence Appellant nunc pro tunc, as Appellant requests. Appellant's remedy, if she has been deprived of a constitutional right of appeal, is to seek post-conviction relief under Rule 65B of the Utah Rules of Civil Procedure. See *State v. Johnson*, 635 P.2d 36, 38 (Utah 1981).

For the reasons stated above, this appeal is dismissed for lack of jurisdiction.

RUSSELL W. BENCH, GREGORY K. ORME,
and WILLIAM A. THORNE JR., JJ., concur.

2002 WL 538092 (Utah App.), 2002 UT App 114

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