



## State v. Garlick

80 N.M. 352 (1969) | Cited 5 times | New Mexico Supreme Court | June 2, 1969

MOISE, Justice.

From a refusal of the district court to set aside a sentence of confinement to the penitentiary, this appeal is prosecuted.

At the outset, we note a question of jurisdiction in this court, which is determinative. See *Rice v. Gonzales*, 79 N.M. 377, 444 P.2d 288 (1968). We briefly state the facts.

Appellant's motion to vacate the judgment and sentence under Rule 93 (§ 21-1-1(93), N.M.S.A. 1953) was filed June 30, 1966. A supplemental motion was filed on December 20, 1966. On January 5, 1968, after making findings of fact and conclusions of law, an order was entered denying the motion to vacate. Thereafter, new counsel was appointed and, on May 17, 1968, a motion was filed on appellant's behalf seeking to have the proceedings reopened so that additional testimony could be presented. On the same date, the court entered an order permitting the presentation of the additional testimony. After hearing the evidence tendered on behalf of appellant, and after making supplemental findings of fact and conclusions of law, the court, on August 5, 1968, entered its order denying the motions filed by appellant, and denying him relief. Notice of appeal was filed August 16, 1968.

It is well established in New Mexico that timely taking of an appeal is jurisdictional. *Board of Education, Penasco Ind. School Dist. No. 4 v. Rodriguez*, 77 N.M. 309, 422 P.2d 351 (1966);

*Miller v. Doe*, 70 N.M. 432, 374 P.2d 305 (1962).

Supreme Court Rule 5(1) (§ 21-2-1(5), N.M.S.A. 1953), subject to certain exceptions not here applicable, limits the time for taking an appeal to thirty days from the entry of a final judgment. It necessarily follows that the time for appeal from the order of January 5, 1968, denying relief, expired with the passage of thirty days. Compare *Rice v. Gonzales*, *supra*.

The only possibility for avoiding this consequence would be to treat the motion filed on May 17, 1968, seeking to have the proceedings reopened, as a new motion for relief, under Rule 93 (§ 21-1-1(93), *supra*). If it could be so viewed, the jurisdiction in this cause would be in the Court of Appeals, because filed after the effective date of Ch. 24, § 1, N.M.S.L. 1967 (§ 16-7-8, N.M.S.A. 1953), which placed jurisdiction of appeals from post-conviction proceedings in that court. It appears that counsel took this view of his appeal and filed the case there. That court, however, considered



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whether an appeal was being prosecuted from a determination in a proceeding seeking post-conviction relief instituted after jurisdiction had been vested in it, and determined that it was not and, accordingly, under the authority of § 16-7-10, N.M.S.A. 1953, transferred the case to this court. We see no error in this action. Compare *Stae v. Weddle*, 77 N.M. 420, 423 P.2d 611 (1967).

It follows that the appeal was not taken within the time permitted by the rules, and we are without jurisdiction to consider it. It must be dismissed. IT IS SO ORDERED.

WE CONCUR:

M. E. Noble, C.J., Waldo Spiess, Chief Judge, Court of Appeals

