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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ROBERT BLACK, JR., Plaintiff and Appellant, v. CALIFORNIA APPELLATE PROJECT, Defendant and Respondent.	B269291 (Los Angeles County Super. Ct. No. BC404775)
ROBERT BLACK, JR., Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; CALIFORNIA APPELLATE PROJECT, Real Party in Interest.	B268508 (Los Angeles County Super. Ct. No. BC404775)

APPEAL from an order of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed. Petition for Writ of Mandate Dismissed as Moot.

Robert Black, Jr., in pro. per., for Plaintiff and Appellant.

Charlston, Revich & Wollitz and Tim Harris for Defendant and Respondent.

A jury found defendant Robert Black, Jr., guilty of a first degree burglary committed in October 2006. Defendant was sentenced to state prison for a total term of 38 years to life.[1] (*Black I, supra,* 2008 WL 3919175 at p. *1.) Defendant appealed his conviction, arguing that the magistrate violated his constitutional rights by refusing to let him testify at the preliminary hearing without first waiving his right to counsel.

Through respondent California Appellate Project (CAP), this Court appointed attorney Catherine White to represent defendant on

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[1] This sentence was premised in part on defendant's admission that he had suffered two prior serious or violent felony convictions (Pen. Code, §§ 667, subds. (a), (b)-(i), 1170.12), and served three prior prison terms (Pen. Code, § 667.5, subd. (b)). (*People v. Black* (August 27, 2008, B197340 [nonpub. opn.] (*Black I*) (2008 WL 3919175 at p. *1).) We take judicial notice of this and our prior opinion in defendant's previous appeals, *Black v. California Appellate Project* (June 4, 2010, Nos. B217016, B217054, nonpub. opn.] (*Black II*) (2010 WL 2220928).) Some background facts are drawn from these opinions.

appeal. One of several arguments that White advanced on defendant's behalf, was that the court erred in refusing to permit defendant to testify at his preliminary hearing without first waiving the right to counsel. Division Seven of this District rejected defendant's assertions of error and found that, assuming defendant was placed in the untenable position of being forced to choose between the constitutional right to testify and his right to counsel, he "utterly failed to demonstrate that he was prejudiced *at trial* as a result" of being self–represented at the preliminary hearing. On the contrary, defendant chose to represent himself at trial–and was convicted–after declining multiple offers by the trial court to appoint counsel to represent him. The court rejected all claims of error and found the "evidence of defendant's guilt was overwhelming." Defendant's petition for review was denied by the California Supreme Court.

In December 2008, defendant filed civil actions in Los Angeles Superior Court (LASC) against CAP, Nancy Gaynor (White's supervisor) and White. The essence of these actions, which were considered as one, was defendant's claim that White provided inadequate representation, and CAP and Gaynor negligently failed or intentionally refused to assure that he received competent representation.

CAP and the other defendants filed demurrers.[2] CAP argued that the gravamen of defendant's action constituted legal malpractice, a claim barred as a matter of law. Absent proof of actual innocence, a defendant cannot sue anyone involved with his defense. (See *Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 539, 544–545; *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1201 (*Coscia*).) The demurrers were sustained without leave to amend, and the actions were dismissed.

Defendant appealed. We reversed. Although the trial court was correct that a showing of factual innocence is a prerequisite to maintenance of defendant's lawsuit, it erred when it dismissed the civil action. (*Black II, supra*, 2010 WL 2220928 at p. *4.) Although defendant neglected to advise the trial court of this fact, he had promptly sought federal habeas corpus relief after his unsuccessful direct appeal, and that petition remained pending at the time the court ruled on the demurrer. (*Id.* at pp. *3–4.) Accordingly, the trial court was "required to stay the present malpractice action 'during the period in which [defendant] timely and diligently pursue[d] post-conviction remedies.' (*Coscia, supra*, 25 Cal.4th at pp. 1210–1211.)" (*Id.* at p. *8.) We remanded the matter to the trial court with directions to vacate the

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[2] On appeal, defendant argues only that court erred in dismissing his action against CAP, and does not address dismissal of the cases against Gaynor and White. Accordingly, defendant has waived any appeal as to those matters. (See *Magic Kitchen LLC v. Good Things Internat., Ltd.* (2007) 153 Cal.App.4th 1144, 1161.) We limit our discussion to matters related to CAP.

dismissal and stay the action pending disposition of defendant's writ of habeas corpus. If that petition was denied, the court was free to consider the demurrers. (*Id.* at p. *4.)

Defendant's federal habeas petition was denied, as were his subsequent requests for relief in the federal courts, including the United States Supreme Court's 2012 denial of his untimely petition for certiorari. In December 2012, the court was informed that defendant's post-conviction efforts to obtain federal habeas relief had been unsuccessful, but he was still requesting that the United States Supreme Court reconsider its determination that his motion had been untimely. The trial court (Judge Dau) scheduled a hearing on an Order to Show Cause (OSC) re Dismissal for April 22, 2013. Defendant was ordered to show cause as to why the action should not be dismissed, and to report on the status of his request pending before the United States Supreme Court. In mid-April 2013, defendant informed the court that the Supreme Court considered the matter closed. On April 22, 2013, Judge Dau dismissed the action.

In a verification and proof of service by mail, defendant declared under penalty of perjury that, while incarcerated on April 26, 2013, he mailed a "Notice of Appeal" to the LASC Clerk (Dept. 57) and counsel for CAP "by placing such document(s) into a sealed postage-paid envelope and relinquishing such to a prison guard for placement into the United States Postal Service mail at San Diego, California." Portions of what appear to be a log of legal mail sent on defendant's behalf by the State Prison Legal Mail Program, indicate that mail was

sent to various LASC clerks at "111 N. Hill St., L.A." on April 25 and 30, 2013.

However, neither the LASC Case Summary or anything in the record indicates that any LASC clerk received for filing–or received and rejected–a notice of appeal on behalf of defendant in the action against CAP on any date following the April 22, 2013 dismissal.[3]

Nothing happened in the instant action for almost two years. Apparently, on February 2, 2015, defendant filed a petition seeking a writ of mandate/prohibition in the trial court. Although the LASC case summary and subsequent minute orders reflect that it was filed on that date, the writ petition is not in the appellate record.[4] The parties agree,

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[3] It is clear that the prison mail system functioned at least with respect to sending the April 26, 2013 and/or May 3, 2013 notices of appeal to CAP's counsel. In a letter dated May 7, 2013, CAP's attorney wrote to defendant noting that he had received the notice of appeal following the April 2013 dismissal of this action. He requested that defendant "dismiss [the] appeal," and enclosed an order defendant could sign to seek dismissal of the appeal against CAP.

[4] Defendant did not designate a petition for writ of mandate/prohibition filed on February 2, 2015 for inclusion in the appellate record. Rather, he designated an April 13, 2015 petition for writ of mandate and exhibits for inclusion in the record. However, no petition appears to have been filed on that date, the day on which the matter was reassigned to Judge Chalfant. On October 25, 2016, the clerk notified the parties that a search had been conducted for the designated writ, which remained missing from the court file, and that efforts to obtain copies from the parties had been unsuccessful. CAP makes a number of references to assertions defendant made in that 2015 writ petition, but chose not to include a copy of the petition in conjunction with its motion to augment the record.

however, that the petition was in fact filed and that its principal aim was to have the trial court order the clerk retroactively to file the April 2013 notice of appeal against CAP. On April 13, 2015, the matter was transferred to Writs and Receivers, Judge Chalfant.

On August 24, 2015, Judge Chalfant issued a minute order stating he had "reviewed the Court file in this matter and determine[d] that the dismissal of this case by Judge Ralph Dau on 4/22/13 was correct." Judge Chalfant informed defendant that, in order to proceed, he would have to file a new action and a new petition for writ of mandate in that action. The court issued an OSC re dismissal for October 22, 2015. On October 22, 2015, having reviewed the record, Judge Chalfant concluded the court lacked "jurisdiction in this matter and therefore no further action [would] be taken." Defendant's November 2015 Petition for Writ of Mandate and this timely appeal, filed in December 2015, followed.[5]

DISCUSSION

Defendant presents a single question on appeal: "Whether [*sic*] Superior Court Judge [Chalfant] in Writ of Mandate Proceeding to Compel Court Clerk to File [defendant's] Notice of Appeal, 'failed' in its

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[5] In February 2016, we issued an Order deferring further consideration of the petition for writ of mandate pending disposition of this appeal which addresses identical issues. We have reviewed and drawn some background facts from documents filed in connection with that now redundant writ petition, which we will dismiss as moot.

duty when judgment was made on another judges [*sic*] [Dau's] decision to dismiss civil suit." There was no error.

Defendant maintains that the filing of his petition for writ of mandate or prohibition in February 2015 triggered an obligation on the part of Judge Chalfant to compel the court clerk belatedly to perform a ministerial duty and file his nearly two-year–old notice of appeal from the April 22, 2013 order dismissing the action. (Code Civ. Proc., § 1085, subd. (a); Cal. Rules of Court, rule 8.702(e)(1)(A).)[6] Rather than perform this ministerial duty, defendant asserts that Judge Chalfant erred by converting the proceeding into a fact–finding action, reviewed the file and concluded the case was properly dismissed in 2013 and the court now lacked jurisdiction.

1. *The Prison Delivery Rule and the Standard of Review*

a. *The Prison Delivery Rule*

It is undisputed that neither the April 25 or April 30, 2013 notices of appeal from the April 22, 2013 dismissal order were timely filed. An untimely notice of appeal is wholly ineffectual. (*In re Chavez* (2003) 30 Cal.4th 643, 650 (*Chavez*).) The delay cannot be waived or cured by nunc pro tunc order and, absent public emergency, no court may extend the time to file a notice of appeal. (Rules 8.308(a), 8.60(d) ["a reviewing court may relieve a party from default for any failure to comply with these rules except the failure to file a timely notice of appeal"], 8.810(c).)

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[6] All "Rule" references are to the California Rules of Court.

An untimely appeal must be dismissed. (*Chavez, supra,* 30 Cal.4th at p. 650.) This rule of dismissal is subject to a narrow exception of "constructive" filing, which employs a legal fiction to treat a notice of appeal as timely filed. (See *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 113–114 (*Silverbrand*).) Defendant's argument rests on this fiction, known as the "prison delivery [mailbox] rule."

In *Silverbrand,* the California Supreme Court extended the prison delivery rule, previously applied only in criminal cases, to hold that a "notice of appeal by a self–represented prisoner in a civil case is deemed filed as of the date the prisoner properly submits the notice to prison authorities for forwarding to the superior court." (*Silverbrand, supra,* 46 Cal.4th at p. 129.) The rule aims to equalize the procedural position of incarcerated pro. per. litigants who file late through no fault of their own. (*Id*. at p. 118; see also Rule 8.25(b)(5) [if clerk receives mailed document from pro. per. inmate after filing period has expired, but envelope shows the document was mailed or delivered to prison officials within the period for filing the document, the document is deemed timely constructively filed].) As the Supreme Court explained, because timely filing of a notice of appeal remains a jurisdictional prerequisite for resolution of an appeal on its merits, the prison delivery rule does "'not *extend* the time to file a notice of appeal, but simply redefines the point at which the notice is deemed filed.' [Citation.]" (*Silverbrand, supra,* 46 Cal.4th at pp. 113, 126.)

Defendant maintains that he satisfied the prison delivery rule. Thus, the trial court should have deemed his April 2013 notice of appeal

constructively timely filed and ordered the clerk to file it. CAP argues that, among several problems with defendant's February 2015 petition for writ of mandate, one is that the petition seeking relief from an untimely filing was far too late. We conclude that defendant satisfied the prison delivery rule, but that his petition for writ of mandate was not timely.

b. *The Standard of Review*

We review a traditional writ of mandate brought under Code of Civil Procedure section 1085 under the abuse of discretion test, unless the case involves the resolution of questions of law, in which event our review is de novo. (*O.W.L. Foundation v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 585–586; *Zubarau v. City of Palmdale* (2011) 192 Cal.App.4th 289, 305.) If more than one inference may reasonably be deduced from the facts, we lack the power to substitute our deductions for those of the trial court. (*Primm v. Primm* (1956) 46 Cal.2d 690, 694.) An applicant for a writ of mandate must show that his right to such relief is clear and certain; the remedy is not available as a matter of right but in the exercise of sound judicial discretion. (*Irvine v. Gibson* (1941) 19 Cal.2d 14, 15; *Berry v. Coronado Board of Education* (1965) 238 Cal.App.2d 391, 397.)

2. *Defendant's April 2013 Notice of Appeal Was Constructively Timely Filed*

Defendant's April 26, 2013 proof of service states that, on that day, he placed the notice of appeal into a sealed postage–paid envelope which he "relinquish[ed] . . . to a prison guard for placement into the United States Postal Service mail" addressed to the LASC clerk. CAP insists that defendant cannot rely on the prison delivery rule because there is no evidence he did anything more than entrust the notice to a nameless "guard" for mailing to the court, or that prison policy even permitted him to follow this procedure.[7] But CAP has provided nothing that contradicts defendant's claim that he followed routine prison procedure for mailing legal documents to court, nor any indication of a policy that required him to name the prison official to whom he had entrusted the mailing. CAP also argues that the prison delivery rule does not apply because, unlike *Silverbrand* and most cases in which the exception has been employed, defendant's notice of appeal did not merely arrive late at the clerk's office; it never arrived. CAP misstates the rule. Under the prison delivery rule, a legal document in a civil action to which a self–represented prisoner is a party is deemed filed

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[7] CAP also maintains that the proof of service is defective because defendant signed it, and Code of Civil Procedure section 1013a, subdivision (1) requires that it be signed by a non-party. Assuming CAP (whose counsel indisputably received the notice of appeal), may raise this issue on behalf of the LASC, the argument has been forfeited. Defective notice may be deemed waived once opposing counsel addresses the merits of a motion. (See *Carlton v. Quint* (2000) 77 Cal.App.4th 690, 697 ["'a party who . . . contests a motion . . . below cannot object on appeal . . . that the notice was . . . defective.'"].)

upon his or her delivery within the filing period to prison authorities for forwarding to the superior court. (*Moore v. Twomey* (2004) 120 Cal.App.4th 910, 918.) Here defendant has provided some evidence (a State prison inmate mail log) that legal material was dispatched on his behalf to LASC clerks on April 30 and May 3, 2013, dates that closely track the April 26, 2013, proof of service. No principled distinction would permit use of the equitable fiction to constructively deem a notice timely filed where a prison guard caused it to arrive late, but refuse to apply the same exception had that guard lost or misplaced the document or otherwise prevented it from being mailed (or filed) at all. The prison delivery rule was satisfied here.

3. *Defendant's Dilatory Failure to Perfect and Prosecute the Appeal Negated his Ability to Obtain Relief*

Public policy unquestionably favors resolving an appeal on its merits. However, a respondent is entitled to have an appellant proceed with expedition. An appellant cannot sit on his hands after the notice of appeal is filed, and does not have an open-ended ticket to prosecute an appeal indefinitely. "[T]he burden is always upon an appellant to use reasonable diligence to perfect and prosecute his appeal. Where some step is required by the rules to be taken by an officer of the court and such officer delays unreasonably the appellant cannot sit by indefinitely and do nothing." (*Flint v. Board of Medical Examiners* (1946) 72 Cal.App.2d 844, 846 (*Flint*); *Drake v. Davis* (1946) 73 Cal.App.2d Supp. 1000, 1003.) A litigant acting as his own attorney is held to the same

standard. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 542.)

An appellant's failure diligently to prosecute an appeal may result in dismissal of the appeal on motion of the respondent or the Court's own motion. (*Caldwell v. Harvey* (1948) 85 Cal.App.2d 104.) The appellant must investigate unreasonable delays by the clerk or court reporter, and if necessary, take steps to see that they fulfill their legal duties. (*Caldwell, supra*, 85 Cal.App.2d at p. 107; *Flint, supra*, 72 Cal.App.2d at p. 846.)

We are not persuaded by defendant's necessarily implicit claim that he was unaware and never advised by any clerk of the LASC or this Court that he was up against a deadline for filing a required document or facing dismissal of the appeal. Defendant is an experienced pro. per. litigant who has had personal experience with technical filing requirements in at least four appeals he has filed in this Court since mid-2009, and almost as many writ petitions. He also has extensive federal court experience at every level, including the Supreme Court. Moreover, even if defendant was not aware of a specific requirement or deadline, he had the responsibility to research Court rules and timely file the record and his briefs, rather than sit quietly for many months doing nothing. Once he became aware there had been no action in his appeal involving CAP, defendant should have made inquiries regarding the status of that action. Had he done so he would have learned that the notice of appeal had not been filed, and could diligently have sought relief. (See e.g., *In re Benoit* (1973) 10 Cal.3d 72,

80.) He did not. Instead, for unknown reasons, he waited almost two years to do anything.

The pivotal issue is not whether defendant's failure to timely file a notice of appeal may be excused. Under other circumstances, the prison delivery rule could provide that excuse. The fatal flaw in defendant's case is his inexcusably lengthy failure to prosecute the appeal against CAP, or to seek relief upon learning the appeal was inexplicably dormant. "Excuse once established cannot be deemed a palliative for a continuing failure to act after the disability which justified the initial failure has been removed." (*In re Anderson* (1971) 6 Cal.3d 288, 293.) It cannot be overlooked that the time limit for filing an appeal may not be extended and is jurisdictional. The prison delivery rule does not indefinitely extend the time to file a notice of appeal. The rule merely redefines the point at which a belated notice may be deemed to have been filed. (*Silverbrand, supra,* 46 Cal.4th at pp. 113, 126.)

"As a general rule, a writ petition should be filed within the 60–day period that is applicable to appeals. [Citations.]" (*Volkswagen of America, Inc. v. Superior Court* (2001) 94 Cal.App.4th 695, 701.) A court may entertain a petition beyond this time limit, but ordinarily will not and should not unless extraordinary circumstances justify the delay. (*Ibid*.) Nothing in this record hints that any extraordinary circumstances justified defendant's extensive delay.

4. *The Court Correctly Concluded It Lacked Jurisdiction in this Matter*

We return to defendant's initial question: whether Judge Chalfant "failed" in his duty by denying the February 2015 petition for mandate by considering facts underlying Judge Dau's April 2013 judgment dismissing the action. He did not.

Judge Chalfant correctly concluded the trial court lacked jurisdiction in this matter. Even after applying the prison delivery rule, defendant's failure to perfect and diligently pursue the appeal against CAP, disentitled him to relief by way of a writ of mandate. A "party is not entitled to obtain review of an appealable judgment . . . by means of a petition for an extraordinary writ where he or she failed to timely file an appeal from the ruling." (*Mauro B. v. Superior Court* (1991) 230 Cal.App.3d 949, 952.)

The file before Judge Chalfant reflected that, on remand and at our direction, Judge Dau stayed this action until he was informed that defendant could not show actual innocence. Once Judge Dau received that information he issued an OSC re dismissal to which there was no response, and subsequently dismissed the action. Judge Chalfant reviewed that straightforward course of events, determined the dismissal was proper and that, as a result, he lacked jurisdiction to entertain defendant's writ. Defendant was advised to file a new writ petition in a new action if he wished to pursue the matter. He chose instead to pursue the instant meritless writ and appeal. Finding no abuse of discretion, we affirm the order dismissing this action.

DISPOSITION

The judgment is affirmed. The Petition for Writ of Mandate filed on November 30, 2015 is dismissed as moot. CAP shall recover its costs on appeal. (Rule 8.278(a)(1) & (2).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.