Not For Publication.

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

CLAYTON BROWN, JR., Appellant/Defendant, **v.** **PEOPLE OF THE VIRGIN ISLANDS,** Appellee/Plaintiff.	**S. Ct. Crim. No. 2007-0063** Re: Super. Ct. Crim. No. 346/2004

On Appeal from the Superior Court of the Virgin Islands

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

ATTORNEYS:

Harris R. Angell, Jr., Esq.
St. Thomas, U.S.V.I.
Attorney for Appellant

Matthew Phelan, Esq.
Assistant Attorney General
St. Thomas, U.S.V.I.
Attorney for Appellee

ORDER OF THE COURT

PER CURIAM.

THIS MATTER comes before the Court pursuant to a September 15, 2010 response to this Court's September 1, 2010 Order filed by Appellant Clayton Brown (hereafter "Brown"), in which Brown requests that this Court deem the instant appeal timely or, in the alternative, remand the matter to the Superior Court for a second time to perform an excusable neglect determination. For the reasons that follow, we find that Brown filed a timely notice of appeal and shall allow the instant appeal to proceed on the merits.

I. FACTUAL AND PROCEDURAL BACKGROUND

The instant matter originally came before the Court on a May 1, 2007 notice of appeal filed by Brown's trial counsel,[1] which purported to appeal from the Superior Court's March 29, 2007 Judgment. Observing that it appeared that Brown's notice of appeal was filed fourteen days beyond the ten-day period prescribed by Supreme Court Rule 5(b)(1),[2] this Court, in a September 7, 2007 Order, *sua sponte* ordered both parties to submit briefs regarding the issue of whether this Court should dismiss Brown's appeal as untimely.[3] Upon consideration of the parties' briefs, this Court issued a January 31, 2008 Opinion which remanded this matter for the Superior Court to determine whether Brown could show excusable neglect for his untimely appeal as provided for in Supreme Court Rule 5(b)(5). *See Brown v. People*, 49 V.I. 378 (V.I. 2008).

In an Order entered on August 22, 2008, the Superior Court found that Brown's untimely filing of his May 1, 2007 notice of appeal was the result of inadvertence or mistake rather than excusable neglect.[4] Thereafter, Brown, though represented by a different court-appointed counsel on appeal, filed with this Court a *pro se* Motion for Mandamus—dated December 21, 2009 but received on January 5, 2010—seeking an update on the status of his appeal.

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[1] This Court, in an August 8, 2007 Order, granted the Office of the Territorial Public Defender's July 27, 2007 motion to withdraw as counsel and appointed a new attorney to prosecute the instant appeal on behalf of Brown.

[2] Effective January 1, 2010, Rule 5(b)(1) was amended to enlarge the time to file a notice of appeal in a criminal case to fourteen days. However, "this Court applies on appeal the . . . rules that were in effect at the time [the defendant] was tried in the Superior Court." *Blyden v. People*, S.Ct. Crim. No. 2007-0105, 2010 WL 2720736, at *10 n.15 (V.I. July 7, 2010).

[3] Brown maintained in this Court that his trial counsel, who later withdrew on appeal due to a breakdown of the attorney-client relationship, failed to file a timely notice of appeal despite being instructed to do so by Brown.

[4] Because neither the Clerk of the Superior Court nor counsel for either party alerted this Court to the Superior Court's August 22, 2008 Order, this Court did not learn of the Order until this Court received Brown's *pro se* Motion for Mandamus on January 5, 2010.

Subsequently, on March 16, 2010, Brown's counsel filed a "Motion for Dismissal for Lack of Jurisdiction and Final Payment" in which counsel asserted that he had consulted with appellate experts and had concluded that Brown's only recourse, given the Superior Court's August 22, 2008 Order, was to seek a writ of habeas corpus. Appellee People of the Virgin Islands did not file any response to the motion to dismiss and this Court, in a July 23, 2010 Order, granted voluntary dismissal.

On August 6, 2010, Brown filed a *pro se* petition for rehearing with this Court, in which he requested that this Court reconsider its July 23, 2010 Order because, according to Brown, his counsel never spoke to him before filing the motion to dismiss. This Court, in an August 9, 2010 Order, required Brown's counsel to respond to Brown's *pro se* filing. In his August 23, 2010 response, Brown's counsel re-iterated his belief that a petition for writ of habeas corpus is Brown's only recourse and contended that conducting further proceedings in this Court on the issue of whether Brown's appeal may proceed would be "futile." Furthermore, Brown's counsel did not dispute Brown's claim that he did not consult with Brown prior to filing the March 16, 2010 motion to dismiss, but stated that he sent a copy of the motion to Brown on the same day it was filed, together with a cover letter explaining that he did not believe there is anything to do other than to file a petition for writ of habeas corpus. Recognizing that Rules 1.2 and 1.4 of the ABA Rules of Professional Conduct prohibited Brown's counsel from unilaterally moving for dismissal of Brown's appeal without obtaining Brown's consent, this Court granted Brown's *pro se* petition for rehearing in an August 27, 2010 Order.[5] However, in a September 1, 2010 Order,

[5] Although it is this Court's practice to reject *pro se* filings submitted by litigants who are represented by counsel, *Blyden v. People*, S.Ct. Crim. No. 2007-0105, slip op. at 1 (V.I. Oct. 28, 2009) (citing *Phillips v. People*, S.Ct. Crim. No. 2007-0037, slip op. at 1 (V.I. Mar. 2, 2009)), this Court accepted Brown's *pro se* petition for rehearing because Brown "ha[d] no means of notifying this Court that he did not consent to his counsel's request for dismissal other

this Court directed Brown to show cause as to why this Court should not dismiss the instant appeal as untimely in light of the Superior Court's August 22, 2008 finding that Brown's untimely filing of his May 1, 2007 notice of appeal was the result of inadvertence or mistake rather than excusable neglect.

On September 15, 2010, Brown, through his appellate counsel, submitted a response to this Court's September 1, 2010 Order. In his response, Brown primarily contends that both this Court and the Superior Court ignored the fact that Brown had written a *pro se* letter to the trial judge on March 27, 2007 in which Brown had informed the trial judge of his intent to appeal his conviction, and that this letter should be construed as a timely notice of appeal because it was filed two days before the Superior Court entered its March 29, 2007 Judgment. Although Brown's counsel states that he "has attempted to obtain copies of th[is] letter[] . . . but has not been able to do so," he notes that Brown's May 30, 2007 *pro se* letter—which the Superior Court discussed in its August 22, 2008 Order—directly references the March 27, 2007 letter.[6]

II. DISCUSSION

In our January 31, 2008 Opinion, this Court "note[d] that the record before us contains an allegation that Brown personally wrote a letter, dated March 27, 2007, to the trial court 'evidencing his intention to appeal,'" but that "[t]he record before us contains no evidence of the letter . . . ." *Brown*, 49 V.I. at 382 n.3. This Court's finding that the record contained no evidence of a March 27, 2007 letter was based on the Superior Court's certified docket entries, which the Clerk of the Superior Court prepared on June 29, 2007 and transmitted to this Court on

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than through a *pro se* filing. . . ." *Brown v. People*, S.Ct. Crim. No. 2007-0063, slip op. at 2 n.3 (V.I. Aug. 27, 2010).

[6] Although the September 15, 2010 response also states that Brown sent the trial judge a letter that was docketed with the Superior Court on January 25, 2007, the Superior Court's record indicates that this was not a letter from Brown, but a letter from a corrections officer requesting that the trial judge impose a lenient sentence on Brown.

July 2, 2007. The docket entries for the pertinent period, which this Court relied upon when it issued both its September 7, 2007 Order and January 31, 2008 Opinion, read as follows:

> **03/20/2007** RECORD OF PROCEEDINGS COMPLETED
>
> **03/20/2007** HEARING CONCLUDED 02:30 P.M.
>
> **03/21/2007** CUSTOMER ASSISTANCE FOR WALK-INS – REP. FROM IMMIGRATION – RE: INQUIRED ABOUT DEFENDANT'S JUDGMENT.
>
> **03/22/2007** FILE FORWARDED TO JUDGE'S CHAMBERS
>
> **03/29/2007** JUDGMENT SIGNED
>
> **03/29/2007** RESTITUTION REQUIRED ($38,500.00)
>
> **03/29/2007** CASE TERMINATED

Likewise, the Superior Court docket entries that Brown has attached as Exhibit "C" to his September 15, 2010 response are identical to those this Court received from the Superior Court on July 2, 2007, indicating that Brown's counsel also relied on these docket entries in the proceedings in this Court and the Superior Court on remand.

However, this Court, after receiving Brown's December 21, 2009 *pro se* Motion for Mandamus, requested that the Clerk of the Superior Court transmit updated certified docket entries for the underlying Superior Court matter. *See* V.I.S.CT.R. 10(e) ("[T]he Supreme Court, on proper suggestion or of its own initiative . . . may direct . . . that a supplemental record be certified and transmitted.") On January 15, 2010, the Clerk of the Superior Court transmitted certified docket entries that were prepared on January 13, 2010. Curiously, these certified docket entries contain a new docket entry for March 28, 2007 that had not been included in the certified docket entries that had previously been transmitted on July 2, 2007:

03/20/2007 RECORD OF PROCEEDINGS COMPLETED

03/20/2007 HEARING CONCLUDED 02:30 P.M.

03/21/2007 CUSTOMER ASSISTANCE FOR WALK-INS – REP. FROM IMMIGRATION – RE: INQUIRED ABOUT DEFENDANT'S JUDGMENT.

03/22/2007 FILE FORWARDED TO JUDGE'S CHAMBERS

03/28/2007 LETTER TO THE COURT FROM DEFENDANT RECEIVED DATED MARCH 27, 2007 ADDRESSED TO JUDGE KENDALL.

03/29/2007 JUDGMENT SIGNED

03/29/2007 RESTITUTION REQUIRED ($38,500.00)

03/29/2007 CASE TERMINATED

Significantly, the Clerk of the Superior Court's January 15, 2010 transmittal letter did not call the retroactive addition of this docket entry to this Court's attention.

Nevertheless, this Court, after noticing that the January 15, 2010 certified docket entries for this period were different from the docket entries Brown's counsel attached to his September 15, 2010 response and that this Court had previously received on July 2, 2007, requested a copy of the letter listed as having been docketed on March 28, 2007, which the Clerk of the Superior Court transmitted to this Court on September 16, 2010. In this letter—which is dated March 27, 2007 but does not contain a Superior Court date stamp—Brown stated that, "[a]fter [his] conviction," he asked his trial counsel "to file an appeal of it, but [that he] do[es] not believe that he has yet done so." Moreover, Brown requested that the trial judge "appoint another attorney to represent [him] who will be able to properly appeal [his] conviction. . . ."[7]

[7] The letter reads, in its entirety, as follows:

Pursuant to this Court's Rules of Appellate Procedure, "[t]he Superior Court shall deem a paper filed by a *pro se* litigant after the decision of the Superior Court in a civil or criminal case . . . to be a notice of appeal despite informality in its form or title if it evidences an intention to appeal." V.I.S.CT.R. 4(g). Moreover, although Brown's letter does not contain a Superior Court date stamp, this Court declines to hold this formality against Brown.[8] *See Grey v. Grey*, 892 P.2d 595, 597 (Nev. 1995) ("The testimony illustrates that the date of receipt . . . by the clerk's

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> Dear Judge Kendall[,]
>
> My name is Clayton Brown Jr. and I was recently found guilty and sentenced in your court and believe that I was not adequately represented by my attorney, Samuel Joseph.
>
> Mr. Joseph was appointed to represent me shortly before my trial, and the first time I met Mr. Joseph, was December 4, 2006 at a status hearing before Your Honor. The trial started less than thirty days later, on January 8, 2007, just after the holidays.
>
> During the period of that month, Mr. Joseph only met with me once or twice at the Bureau of Correction.
>
> All three of the attorneys appointed to represent me were asked to file a motion to dismiss all charges as I was never advised of my rights, even at the hearing held before Honorable Judge Brenda Hollar for that purpose. The court transcript is very clear in this regard.
>
> After my conviction I asked Mr. Joseph to file an appeal of it, but do not believe that he has yet done so.
>
> I[']m asking, please appoint another attorney to represent me who will be able to properly appeal my conviction for the reasons stated above along with any other reasons that the attorney finds appropriate[.]
>
> Sincerely Yours,
>
> Clayton Brown

[8] This Court also recognizes that Brown was represented by counsel at the time he wrote his letter to the trial judge and that the United States Constitution does not guarantee the right to "hybrid" representation, *see McKaskle v. Wiggins*, 465 U.S. 168, 183, 104 S.Ct. 944, 953, 79 L.Ed.2d 122 (1984). However, Federal Rule of Criminal Procedure 32, which is made applicable to Superior Court proceedings pursuant to Superior Court Rule 7, mandates that "[i]f the defendant pleaded not guilty and was convicted, after sentencing the court must advise the defendant of the right to appeal the conviction," and that "[a]fter sentencing—regardless of the defendant's plea—the court must advise the defendant of any right to appeal the sentence." Fed. R. Crim. P. 32(j)(1)(A)-(B). Significantly, Rule 32 creates an exception to the general rule that a criminal defendant may only act through his counsel by providing that "[i]f the defendant so requests, the [C]lerk [of the Court] must immediately prepare and file a notice of appeal on the defendant's behalf." Fed. R. Crim. P. 32(j)(2). Moreover, even in the absence of Rule 32, we agree that "if [an] appellant has cognizable issues for review and expresses his desire to obtain that review . . . it would be a more economic use of judicial resources to address the appeal at that juncture" rather than "rely[ing] on the rule that a *pro se* pleading is a nullity where the pleader is represented by counsel" and "forcing the appellant to employ one or more collateral proceedings first to obtain the same result," *Hughes v. State*, 565 So.2d 354, 356 (Fla. Dist. Ct. App. 1990), particularly in a situation such as the instant one, in which Brown informed the Superior Court that his trial counsel had not filed a notice of appeal despite his request that he do so.

office is, at the very least, ambiguous. Accordingly, we are compelled to resolve the ambiguity in Roxanne's favor.") (citing *Huebner v. State*, 810 P.2d 1209 (Nev. 1991)); *cf. Demar v. Open Space & Conservation Commission*, 559 A.2d 1103, 1107 (Conn. 1989) ("Where a decision as to whether a court has subject matter jurisdiction is required, every presumption favoring jurisdiction should be indulged."). Therefore, because Brown's March 27, 2007 letter clearly demonstrated his intent to appeal his convictions, and "[a] notice of appeal filed after the announcement of a decision, sentence, or order – but before entry of the judgment or order – is treated as filed on the date of and after the entry of judgment," V.I.S.CT.R. 5(b)(1), Brown's appeal is timely and this Court's September 7, 2007 Order and January 31, 2008 Opinion were entered in error based on inaccurate documents received from the Superior Court.[9]

Finally, this Court is compelled to note the impact the Clerk of the Superior Court's failure to notify this Court of important events in the Superior Court proceedings has had on this Court's processing of the instant appeal. This Court recognizes the difficulty of docketing *pro se* filings that may have been directly mailed to a judge rather than filed with the Clerk's Office, particularly if the trial judge fails to timely forward the letter to the Clerk's Office after it has been received.[10] Nevertheless, the Clerk of the Superior Court, upon discovering and docketing Brown's letter, should have immediately notified this Court and the parties that the certified docket entries transmitted on July 2, 2007 were incomplete and transmitted both corrected docket

[9] Because this Court finds that Brown's March 27, 2007 letter constitutes a timely notice of appeal, it is not necessary for this Court to consider Brown's alternate argument that the Superior Court erred in its excusable neglect analysis.

[10] Since the Clerk of the Superior Court never brought the retroactive change to its certified docket entries to this Court's attention, and Brown's March 27, 2007 letter does not contain a Superior Court time stamp, this Court cannot ascertain when—or whether—the letter was received by the trial judge and when—and under what circumstances—the letter was transmitted to the Clerk's Office. However, we note that because the Superior Court's August 22, 2008 Order discusses Brown's May 30, 2007 letter but does not contain any reference to his March 27, 2007 letter, it is possible that the trial judge was also not aware of the March 27, 2007 letter when he performed his excusable neglect analysis.

entries and a copy of Brown's letter, particularly given that this Court's January 31, 2008 Opinion expressly stated that the record contained no evidence of a March 27, 2007 letter and remanded the matter to the Superior Court for an excusable neglect determination based on the assumption that a timely notice of appeal had not been filed. *See* V.I.S.CT.R. 10(e) ("If anything material to either party is omitted from the record by error or accident or is misstated therein . . . the Superior Court, either before or after the record is transmitted to the Supreme Court, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted."). Moreover, as this Court mentioned in its July 23, 2010 Order, the Clerk of the Superior Court also never notified this Court of the Superior Court's August 22, 2008 Order, with this Court not becoming aware that the Superior Court had entered a ruling until after Brown filed his December 21, 2009 *pro se* Motion for Mandamus. Significantly, these failures not only caused the parties to engage in unnecessary proceedings in both this Court and the Superior Court relating to the timeliness of Brown's May 1, 2007 notice of appeal, but also delayed adjudication of Brown's appeal on the merits for almost three and a half years, during which time Brown has been incarcerated. Therefore, this Court reminds the Clerk of the Superior Court of the heavy reliance placed on the certified docket entries and the Superior Court record and of the need to not just correct any errors or omissions internally, but to notify this Court and the parties of any retroactive changes, particularly the discovery of documents that—as here—are directly relevant to the appeal.

III. CONCLUSION

Because Brown's March 27, 2007 letter, despite its form, unambiguously demonstrates his intent to appeal his conviction and was filed after the Superior Court orally sentenced Brown on March 20, 2007 but before it entered its March 29, 2007 Judgment, the instant appeal is

timely pursuant to Supreme Court Rule 5(b)(1). Accordingly, the premises having been considered, it is hereby

ORDERED that Clayton Brown's March 27, 2007 letter is **ACCEPTED** as a timely notice of appeal; and it is further

ORDERED that the instant appeal **SHALL NOT BE DISMISSED** as untimely; and it is further

ORDERED that the Clerk of the Supreme Court **SHALL IMMEDIATELY ISSUE** a briefing schedule to the parties; and it is further

ORDERED that copies of this order be directed to the parties' counsel.

SO ORDERED this 27th day of September, 2010.

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: _____
Deputy Clerk

Dated: _____

Copies to:
Justices of the Supreme Court
Judges & Magistrates of the Superior Court
Harris R. Angell, Jr., Esq.
Matthew Phelan, Esq., AAG
Clayton Brown, Jr. – Golden Grove Adult Correctional Facility
P.O. Box 9955, RR#1, Kingshill, VI 00850
LEGAL MAIL – "OPEN IN PRESENCE OF INMATE ONLY"
Veronica J. Handy, Esq., Clerk of the Supreme Court
Venetia H. Velazquez, Esq., Clerk of the Superior Court
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