

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF THE §
PETITION OF MARK KIRK § No. 449, 2001
FOR A WRIT OF MANDAMUS. §

Before **VEASEY**, Chief Justice, **WALSH** and **STEELE**, Justices.

Submitted: October 15, 2001

Decided: October 19, 2001

ORDER

This 19th day of October 2001, upon consideration of the petition for a writ of mandamus filed by Mark Kirk, and the answer and motion to dismiss filed by the State of Delaware, it appears to the Court that:

(1) In 1997, Kirk was convicted of three counts of Murder in the First Degree, one count of Arson in the Third Degree, two counts of Assault in the First Degree, and one count of Assault in the Third Degree. On appeal, the convictions were affirmed.¹ The Superior Court's denial of Kirk's first motion for postconviction relief was also affirmed on appeal.²

¹*Kirk v. State*, Del. Supr., No. 532, 1997, Berger, J., 1999 WL 415802 (April 29, 1999) (ORDER).

²*State v. Kirk*, Del. Super., IN96-12-0556, Barron, J., 2000 WL 1211214 (May 23, 2000), *aff'd*, *Kirk v. State*, Del., Supr., No. 271, 2000, Berger, J., 2000 WL 1637418 (Oct. 16, 2000) (ORDER).

(2) By order dated June 25, 2001, the Superior Court denied Kirk's second motion for postconviction relief.³ On October 11, 2001, Kirk filed an untimely notice of appeal from the Superior Court's June 25 order.⁴ By notice issued on October 11, the Clerk directed Kirk to show cause why his appeal should not be dismissed as untimely.

(3) In his petition for a writ of mandamus filed on September 12, 2001, Kirk contends that the Superior Court failed to send him the June 25 order in a timely manner and thus prevented him from filing a timely notice of appeal. Kirk requests that this Court issue a writ of mandamus directing the Superior Court to "rescind and expunge" the June 25 order to, in effect, restart the 30-day appeal period.⁵

(4) The Court will issue a writ of mandamus to a trial court only when the petitioner can show that there is a clear right to the performance of a duty at the time of the petition, no other adequate remedy is available, and

³*State v. Kirk*, Del. Super., IN96-12-0556-R2, Slights, J., 2001 WL 755942 (June 25, 2001).

⁴*Kirk v. State*, Del. Supr., No. 508, 2001.

⁵*See* Supr. Ct. R. 6(a)(iii) (providing that a notice of appeal shall be filed in the office of the Clerk within 30 days after entry upon the docket of an order denying postconviction relief).

the trial court has failed or refused to perform its duty.⁶ In this case, Kirk has not demonstrated that he has a clear right to a rescission of the Superior Court's June 25 order. Moreover, Kirk is not without an adequate remedy. If Kirk argues in a timely⁷ and cogent response to the notice to show cause, that his untimely appeal is attributable to court-related personnel, the Court will address Kirk's claim and will determine in due course whether Kirk's case falls within the exception to the general rule that mandates the timely filing of a notice of appeal.⁸

NOW, THEREFORE, IT IS ORDERED that the State's motion to dismiss is GRANTED. Kirk's petition for a writ of mandamus is DISMISSED.

BY THE COURT:

s/Joseph T. Walsh
Justice

⁶*In re Bordley*, Del. Supr., 545 A.2d 619, 620 (1988).

⁷It appears that Kirk's response to the notice to show cause is due to be filed by October 23, 2001.

⁸*See Bey v. State*, Del. Supr., 402 A.2d 362, 363 (1979) (holding that the defendant's untimely notice of appeal was attributable to court-related personnel).