Circuit Court for Baltimore City
Case Nos. 198022020, 23

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2513

September Term, 2015

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THOYT HACKNEY

v.

STATE OF MARYLAND

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Reed,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Kenney, J.

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Filed: July 18, 2017

In 1998, Thoyt Hackney, appellant, was convicted by a jury sitting in the Circuit Court for Baltimore City of two counts each of second-degree murder, use of a handgun in a crime of violence, and wearing, carrying, or transporting a handgun. On October 23, 1998, he was sentenced to two consecutive thirty-year terms of imprisonment for second-degree murder and two concurrent twenty-year terms of imprisonment for use of a handgun. The remaining convictions were merged for sentencing purposes.

Hackney thereafter sought relief under the Maryland Uniform Postconviction Procedure Act. As a pro se, incarcerated petitioner, he attempted to file his postconviction petition through the prison mail system. He submitted that petition, bearing a certificate of service dated October 20, 2008 (three days before the expiration of the ten-year statute of limitations, under Maryland Code, Criminal Procedure Article ("CP"), § 7-103), to the prison mailroom. The prison mailroom date-stamped the envelope, containing Hackney's petition, on October 22, 2008, one day before the expiration of the ten-year statute of limitations, and mailed it the same day.[1] The clerk of the circuit court received and docketed Hackney's petition on October 24, 2008, one day after the expiration of the statute of limitations. The circuit court dismissed his petition as untimely.

Hackney filed an application for leave to appeal, claiming that the "prison mailbox rule" should apply to his petition. Applying that rule, his petition would be deemed to have been filed no later than October 22, 2008, and would be considered timely. This Court granted the application and transferred the case to the regular appeals docket.

[1] The envelope was post-marked October 22, 2008.

Although we are not unsympathetic to Hackney's claim, we conclude, for the reasons that follow, that we lack the authority to grant his requested relief. Accordingly, we affirm the circuit court's dismissal of Hackney's postconviction petition.

## BACKGROUND

Hackney and a co-defendant, Roland Thompson, were charged and jointly tried, in the Circuit Court for Baltimore City, for their roles in a double-homicide. Following their convictions and sentences, Hackney and Thompson appealed, and, in an unreported opinion, this Court affirmed the judgments in full. *Hackney and Thompson v. State*, No. 1676, Sept. Term, 1998, slip op. at 18 (filed June 16, 1999). We quote the unreported opinion in that appeal for its summary of the underlying facts in this case:

> On November 25, 1997, at 11:56 p.m., police officers were called to the scene of a shooting at Fowler Way and Armistead Gardens in Baltimore City. Upon arrival, the officers found that two men, Edward Demski and Eric Melzer, had been shot to death. Demski was seated in a truck, having sustained a lethal gunshot wound to his head. At his side was an unloaded .45 caliber handgun. Melzer was lying on a sidewalk, having been shot a total of eight times. He died due to chest wounds.
>
> Robert Fleek testified to the following. On the evening of November 25, 1997, he, Philip Saunders, and [Hackney and Thompson] were together in Armistead Gardens. They encountered Demski and Melzer near a [7-Eleven] store on Pulaski Highway. Melzer showed the group a .45 caliber semiautomatic handgun which he wanted to sell or exchange for cocaine. No transaction took place, but shortly thereafter the same group of people reassembled on Quantril Way in Armistead Gardens. At that point, Demski was driving a truck in which Melzer was a passenger, and the two men asked

> whether the other group of men knew anyone who wanted to purchase the gun.
>
> Fleek received a page and returned to the 7-Eleven to make a phone call. Fleek's caller wanted to purchase drugs, so Fleek, who was in the business of dealing drugs, went back to retrieve his drugs at Quantril and Fowler Ways. At that point, he heard arguing and shots from the area around the truck and observed Eric Melzer running. While Melzer was fleeing, a man standing behind a tree shot him. The man then stood over Melzer, firing at him repeatedly. Shortly thereafter, Fleek again encountered [Hackney and Thompson], who appeared "stunned." Thompson made comments to the effect of "they tried to rob us or whatever and I had to what I had to do," and subsequently "I shot him."

*Id.*, slip op. at 1-3.

As noted earlier, Hackney, while incarcerated, submitted a pro se postconviction petition,[2] with a certificate of service dated October 20, 2008, to the prison mailroom. The prison mailroom date-stamped the envelope, containing Hackney's petition, on October 22, 2008, and mailed it the same day. The petition was delivered to the clerk of the circuit

[2] Because we resolve this case on jurisdictional grounds, we need not address the merits of Hackney's postconviction claims. We simply note that he raised eight allegations of error, most of which involved purported errors committed by the trial judge (and which, therefore, were presumably waived or, to the extent raised and decided on direct appeal, finally litigated). Thereafter, through counsel, in two supplemental petitions, he added additional claims, contending: (1) that trial counsel had been ineffective in failing to object to inadmissible other crimes evidence; (2) that the trial court had erred in belatedly swearing the jury; (3) that trial counsel had been ineffective in failing to object to that belated swearing; (4) that trial counsel had been ineffective in failing to file a motion for modification of sentence; (5) that trial counsel had been ineffective in failing to object to the trial court's refusal to ask the entire voir dire panel whether anyone would be more or less likely to believe the testimony of a police officer; (6) a catch-all provision alleging cumulative effect of all of the purported errors.

court, which received and docketed it on October 24, 2008, one day after the expiration of the statute of limitations.[3]

Subsequently, counsel from the Public Defender's Office entered an appearance and filed two supplemental petitions, raising various allegations of ineffective assistance of trial counsel. In a footnote in the first of those supplemental petitions, Hackney's counsel raised the matter of whether the original petition had been timely filed and contended that it was.[4]

At the ensuing postconviction hearing, regarding the issue of limitations, Hackney's counsel submitted "on the basis of what [he had written] in the Footnote," and, in response, the State moved to dismiss "on statute of limitations grounds." Hackney further testified

[3] Maryland Code (2001), Criminal Procedure Article ("CP"), § 7-103(b)(1), in effect at the time Hackney's petition was filed, provided:

> Unless extraordinary cause is shown, in a case in which a sentence of death has not been imposed, a petition under this subtitle may not be filed more than 10 years after the sentence was imposed.

Effective October 1, 2013, as part of the bill repealing the death penalty, that statute was amended by striking the phrase, "in a case in which a sentence of death has not been imposed," and by re-designating it as CP § 7-103(b). 2013 Md. Laws, ch. 156, ch. 3. In the remainder of this opinion, we will refer to the statute by its current designation.

[4] In that footnote, Hackney's counsel contended that, under Maryland Rule 1-203, "the date of sentencing is not included in computing the prescribed period of time" and that, therefore, Hackney's original, pro se petition, filed on October 24, 2008, was timely. (Hackney, in his appellate brief, abandoned that argument, and it is not before us in this appeal.) In the same footnote, counsel further contended that, under the "prison mailbox rule," Hackney's pro se petition should be deemed timely.

that, on October 20, 2008, he had placed postage on the envelope, containing his pro se postconviction petition, and submitted it to the prison mailroom.

When the postconviction court dismissed Hackney's petition as untimely, Hackney filed a timely application for leave to appeal,[5] which was granted, and this appeal followed.

## DISCUSSION

### I.

Hackney contends that his pro se postconviction petition should be deemed timely under either the "prison mailbox rule" or the extraordinary cause provision of the Maryland Uniform Postconviction Procedure Act, CP § 7-103(b). Before addressing Hackney's arguments regarding the "prison mailbox rule," we will explain why his petition was untimely under the pertinent statute and court rule.

As noted earlier, the Maryland Uniform Postconviction Procedure Act, in the absence of a showing of "extraordinary cause," prohibits the filing of a petition "more than 10 years after the sentence was imposed." CP § 7-103(b). Hackney was sentenced on October 23, 1998.

Maryland Rule 1-322 governs the filing of a pleading or other paper in a circuit court. At the time Hackney attempted to file his postconviction petition, that rule provided in pertinent part:

> **(a) Generally.** The filing of pleadings and other papers with the court as required by these rules shall be made by filing them

[5] Not only was Hackney's application for leave to appeal timely, his postconviction counsel also filed an additional, timely application for leave to appeal.

> with the clerk of the court, except that a judge of that court may accept the filing, in which event the judge shall note on the papers the filing date and forthwith transmit them to the office of the clerk. . . .

Md. Rule 1-322(a) (2008). The Court of Appeals has interpreted that provision to mean:

> "A pleading or paper is filed by actual delivery to the clerk. This may be accomplished in person or by mail. However, **the date of filing is the date the clerk receives the pleading, not the date when the pleading was mailed.** Filing therefore differs from service of a pleading or paper by mail, which is, in fact, complete upon mailing[.]"

*Molé v. Jutton*, 381 Md. 27, 34 (2004) (quoting Paul V. Niemeyer & Linda M. Shuett, *Maryland Rules Commentary* 35 (2d ed.1984)) (emphasis added) (internal citation omitted).[6]

Hackney cites several older cases, *Beard v. Warden*, 211 Md. 658 (1957), and *Coates v. State*, 180 Md. 502 (1942), in support of his assertion that his petition should be deemed timely filed, as well as a more recent decision of this Court, *In re Vy N.*, 131 Md. App. 479 (2000), which we quote because it summarizes his argument:

> A person who has been convicted and sentenced to prison is entitled to file a belated appeal if the trial court is persuaded that the prisoner has made every reasonable effort to file a timely appeal, but that attempt to do so was thwarted by the action—or inaction—of a guard, or a court clerk, or any other employee or agent of the government.

*Id.* at 486 (citing *Beard*).

[6] The version of Rule 1-322 that was interpreted in *Molé v. Jutton*, 381 Md. 27 (2004), was, in pertinent part, identical to the 2008 version. *See id.* at 33 (quoting Rule 1-322).

Hackney pays scant attention to the above-quoted language from *Molé v. Jutton*, which is the most pertinent authority on Rule 1-322. Instead, he analogizes his situation to that of the appellant in *Molé*, who mailed the pleading at issue to the post office box designated by the clerk. The Court held that delivery to the post office box in that case was filing with the clerk. *Molé*, 381 Md. at 38. Hackney thus argues that he should not be "at the mercy of the procedure set up by the Clerk's Office [or, in his case, the prison] for its convenience." *Id.*[7] And, in *In Re Vy N.*, he points out that this Court found that the pleading was delivered to the clerk's office after 4:30 p.m. on a particular date but not "stamped in" until the next day. We concluded that the delivery date controlled. *In Re Vy N.*, 131 Md. App. at 482. Looking to these cases, he argues that when there is uncertainty as to a later date, a more certain date should be accepted. In other words, either October

[7] The entire quote from *Molé* provides a different and, from Hackney's perspective, less favorable context:

> We believe that, whether delivered by the Postal Service directly to the Clerk's Office or to a post office box, the mail is received, and therefore pleadings or papers filed, when the mail is delivered to the address designated by the Clerk. That the Clerk may have the mail delivered to a post office box, rather than to his office directly, does not change the analysis or the result. Delivery of pleadings or papers by the Postal Service to the address designated by the addressee is receipt by the addressee of those pleadings or papers. A person aware of the filing deadline, who acts reasonably to file pleadings timely, should not be at the mercy of the procedure set up by the Clerk's Office for its convenience.

*Id.* at 37-38.

20, 2008, when the petition was purportedly[8] delivered to the prison authorities, or, at the latest, October 22, 2008, when it was date-stamped by the prison authorities, should be deemed the filing date.

But, even if we were to assume that the Jessup mailroom received Hackney's pro se petition on October 20, 2008, the record would not support a finding (and none was made) that the prison mail system failed to function in a reasonable manner. The clerk's office received it only four days later, on October 24, 2008. And, of course, assuming receipt of Hackney's petition by the mailroom on October 22, 2008 (the date of both its date stamp and postmark) would imply that the clerk's office received it only two days later. Either date, October 20 or October 22, standing alone, would not necessarily mean that the filing of Hackney's petition "was thwarted by the action—or inaction—of a guard, or a court clerk, or any other employee or agent of the government." *In re Vy N.*, 131 Md. App. at 486.

What is certain in this case is that the date the clerk received Hackney's postconviction petition was October 24, 2008, which, according to the *Molé* Court, is "the date of filing." *Molé*, 381 Md. at 34. Furthermore, it is also not disputed that it was received ten years and one day after Hackney was sentenced in the underlying criminal case. Therefore, under CP § 7-103(b), his petition was untimely, unless he established "extraordinary cause."

[8] The postconviction court made no finding as to when Hackney delivered the petition to the prison mailroom.

As the State points out, Hackney did not expressly allege "extraordinary cause" in the circuit court, and he did not present any evidence, at his postconviction hearing, to establish its existence. To the extent that he might wish us to infer that his incarceration is a "unique set of circumstances" that in itself constitutes "extraordinary cause," we are not persuaded. The filing of a Maryland Uniform Postconviction Procedure Act petition by an unrepresented incarcerated prisoner is not "extraordinary."[9] And, to the extent that

[9] There are, thus far, no reported Maryland decisions interpreting the "extraordinary cause" provision in CP § 7-103(b). In *Poole v. State*, 203 Md. App. 1 (2012), we considered whether a postconviction petitioner, wishing to amend his timely petition, after the expiration of the 10-year statute of limitations, must show "extraordinary cause," and concluded that such a showing was not required. We therefore had no occasion, in that case, to consider the meaning of the "extraordinary cause" provision in the Maryland Uniform Postconviction Procedure Act.

That same phrase, however, has appeared (or currently appears) in at least two other Maryland statutory provisions: former Art. 27, § 591, enacted by ch. 212 of the Acts of 1971 (and since superseded by CP § 6-103, which no longer contains that phrase), provided that the date set for trial in a criminal case in a circuit court "shall be not later than six months from the date of the arraignment of the person accused or the appearance or the appointment of counsel for the accused whichever occurs first" and that that date "shall not be postponed except for extraordinary cause shown by the moving party"; and CP § 3-107 mandates dismissal of charges against a defendant, who, having been found incompetent to stand trial, remains so for a sufficiently long period of time, depending upon the nature of the charges, "unless the State petitions the court for extraordinary cause to extend the time[.]"

In *State v. Hicks*, 285 Md. 310 (1979), the Court of Appeals interpreted "extraordinary cause," in Art. 27, § 591, and its implementing Rule, former Rule 746 (since superseded by Rule 4-271), to mean "cause beyond what is ordinary, usual or commonplace" or that "is not regular or of the customary kind." *Hicks*, 285 Md. at 319. More recently, in *Ray v. State*, 410 Md. 384 (2009), the Court of Appeals interpreted that same phrase, in the context of CP § 3-107, as "limited to only the rarest of circumstances[.]" *Ray*, 410 Md. at 407.

Hackney is contending that the dismissal of his postconviction petition violated "his right to due process, equal protection of the laws, and his right to access the courts," these contentions were not raised in his applications for leave to appeal.[10] But were that argument before us, we would not be persuaded that CP § 7-103 and Maryland Rule 1-322, as interpreted by the Court of Appeals, violate State or federal constitutional principles. Not only does CP § 7-103 provide an extremely long time to file a petition, it provides a "safety valve" in the form of an extension of time for "extraordinary cause."

**II.**

We next consider Hackney's contention that the "prison mailbox rule" should apply in this case and that, under that rule, his petition was timely. We acknowledge that, if that rule applied, his petition would, indeed, have been timely. But, as an error-correcting court, we lack the authority to create such a rule or to interpret Maryland Rule 1-322 differently than the Court of Appeals.

Hackney cites *Houston v. Lack*, 487 U.S. 266 (1988), in support of his contention that we should recognize the "prison mailbox rule." In that case, the Supreme Court, exercising its supervisory powers over the federal courts, held that a pro se notice of appeal,

[10] The only reference to a constitutional violation was in Hackney's pro se application for leave to appeal, in which he raised the bald allegation that the postconviction court's dismissal of his petition as untimely "violated his constitutional rights by not adhering" to Maryland Rule 4-406(a), which entitles a petitioner (such as Hackney) to a hearing on an original postconviction petition, and Maryland Rule 4-407(a), which requires that a postconviction court provide "a statement setting forth separately each ground upon which the petition is based, the federal and state rights involved, the court's ruling with respect to each ground, and the reasons for the action taken thereon."

which had been delivered by an incarcerated prisoner to the prison mailroom 27 days after entry of judgment but not received by the clerk of the federal District Court until four days later, 31 days after the entry of judgment, should be deemed as having been filed within the 30-day time limit required by Federal Rule of Appellate Procedure 4(a)(1). *Id.* at 268-69.

As Hackney points out, a number of state courts (in addition to the federal courts, which, of course, are bound by *Houston*) have subsequently adopted its rationale and recognized a "prison mailbox rule." If we were writing on a blank slate, we might be persuaded to follow the reasoning of those cases. But, in our view, the Court of Appeals has spoken clearly, in *Molé v. Jutton*, as to the proper interpretation of Rule 1-322(a).[11] Although we understand and appreciate that Hackney must raise this point before us in order to bring it before the Court of Appeals, a significant change in either the common law or in the interpretation of Rule 1-322(a) rests with that Court.

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS ASSESSED TO APPELLANT.**

[11] We note that the Standing Committee on Rules of Practice and Procedure recently considered a proposed amendment to Rule 1-322, containing a "prison mailbox rule." If such a rule was unnecessary (a logical inference to be drawn from Hackney's argument), then it would hardly be necessary for the Rules Committee to engage in careful deliberations as to whether to even recommend that the Court of Appeals adopt it. A more reasonable conclusion is that, as of this date, Maryland does not recognize the "prison mailbox rule."