

I. INTRODUCTION

Reuben Vigilant ["Vigilant"] appeals from the Territorial Court's September 17, 1999 order and July 1, 2000 judgment convicting and sentencing him, *in absentia*, to forty-five and one-half years' imprisonment for violently attacking his girlfriend with a machete. Vigilant did not file his notice of appeal within ten days from the entry of judgment, nor did he appeal within the thirty-day extension period, as required under Virgin Islands Rule of Appellate Procedure 5. Moreover, Vigilant has not provided this Court with evidence indicating that "unusual circumstances" prevented him from timely filing his appeal. Accordingly, we will dismiss Vigilant's appeal for lack of jurisdiction.

II. FACTUAL AND PROCEDURAL BACKGROUND

On January 2, 1999, Vigilant attacked his girlfriend with a machete, slashing her face and body, and amputating her two thumbs and first two fingers of her right hand. The Government of the Virgin Islands ["government"] charged Vigilant with (1) two counts of first-degree assault in violation of V.I. CODE ANN. tit. 14, section 295(1) and (3) and 16 V.I.C. section 91(b)(1) and (2); (2) three counts of mayhem, in violation of 14 V.I.C. section 1341(a)(1), (2) and (3); (3) one count of attempted

murder in violation of 14 V.I.C. section 921, 14 V.I.C. section 922(a) (2) and 14 V.I.C. section 331; (4) two counts of third-degree assault in violation of 14 V.I.C. section 297(2) and (4) and 16 V.I.C. section 91(b) (1) and (2); (5) one count of aggravated assault and battery in violation of 14 V.I.C. section 298(5) and 16 V.I.C. section 91(b) (1) and (2); and (6) one count of possession of a dangerous weapon in violation of 14 V.I.C. section 2251(a) (2).

On June 1, 1999, a jury trial commenced on these charges. Near the end of his trial, Vigilant left St. Thomas and fled to his home country of Dominica. The jury convicted Vigilant, *in absentia*, of all of the charges. In a judgment dated July 1, 2000, the trial judge subsequently sentenced Vigilant, *in absentia*, to "forty-five and one-half (45 ½) years" of imprisonment.¹ (See Judgment, Crim. No. F25/99 (Terr. Ct. July 1, 2000).)

¹ It appears, however, that the trial judge miscalculated the length of Vigilant's sentence. The judge imposed Vigilant's "forty-five and one-half year" prison sentence accordingly: (1) fifteen years for first-degree assault with intent to commit murder, to run concurrently with a sentence of ten years for first-degree assault with intent to commit mayhem; (2) fifteen years on the three counts of mayhem, to run concurrently with each other; (3) five years for attempted murder; (4) five years for third-degree assault (inflicting serious bodily injury) to run concurrently with a five-year sentence for third-degree assault (with a deadly weapon); (5) one year for aggravated assault and battery to run concurrently; and (6) six months for carrying a dangerous weapon. (See J., Crim. No. F25/99 (Terr. Ct. July 1, 2000).) Although the judge sentenced Vigilant to "forty-five and one-half years," these sentences only add up to forty years and six months, or forty and one-half years (40 ½).

Sometime in the fall of 2000, Vigilant was captured in Dominica and returned to the Virgin Islands where he began serving his sentence.² On April 9, 2002, Vigilant filed a "Motion to Allow Late Notice of Filing of Appeal" in the Territorial Court, in which he sought to appeal his sentence. Because Vigilant's motion was untimely, the Territorial Court Judge concluded that he was without authority to permit Vigilant to appeal his sentence, and concluded that such a determination could only be made by the Appellate Division of this Court. (See Mem. Op. at 3-7 (Terr. Ct. May 15, 2002).)

Vigilant did not appeal this decision. Instead, on June 21, 2002, he filed a "Motion to Allow Late Filing of Appeal" in this Court, in which he seeks this Court's permission to appeal the July 1, 1999 judgment and the subsequent September 17, 2000 order sentencing him. Vigilant maintains that, because the trial court sentenced him *in absentia* and without his knowledge, it was impossible for him to file a timely appeal. He maintains that this "never truly activat[ed] the provisions applicable in Rule 5(b)" of the Virgin Islands Rules of Appellate Procedure ["VIRAP"]. (See Supporting Mem. of P. & A. of District Ct.'s Jur. under Appellate Rule 5(b) at 3-11.) In response, the

² The precise date on which Vigilant was returned to the Virgin Islands is unclear, but the trial court concluded that Vigilant was back in St. Thomas, at the latest, by November 1, 2000.

government avers that this Court does not have jurisdiction over Vigilant's motion and thus, should dismiss the matter.

III. DISCUSSION

A. This Court lacks Jurisdiction to Consider Vigilant's Motion (Construed as a Notice of Appeal) under the Virgin Islands Rules of Appellate Procedure

This Court has jurisdiction to consider the judgments and orders of the Territorial Court in criminal cases. 4 V.I.C. § 33; Section 23A of the Revised Organic Act of 1954.³ "The timely filing of a notice of appeal is a mandatory jurisdictional prerequisite to the right to appeal." *Soldiew v. Government of the Virgin Islands*, Civ. No. 92-108, 1995 WL 48467, at *1 (D.V.I. Jan. 19, 1995) (quoting *United States v. Grana*, 864 F.2d 312, 314 (3d Cir. 1989)).

Rule 5 of the VIRAP provides that "[i]n a criminal case, a defendant shall file the notice of appeal in the Territorial Court within ten days after the entry of [judgment.]" V.I. R. APP. P. 5(b)(1). "An appeal shall not be dismissed solely for informality of form or title of the notice of appeal" VIRAP 4(c). When a criminal defendant mistakenly files his

³ See Revised Organic Act of 1954 § 23A, 48 U.S.C. § 1613a. The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645 (1995 & Supp. 2001), reprinted in V.I. CODE ANN. 73-177, Historical Documents, Organic Acts, and U.S. Constitution (1995 & Supp. 2001) (preceding V.I. CODE ANN. tit. 1).

notice of appeal with the Appellate Division, this Court shall deem the notice as filed in the Territorial Court on the date so filed in the Appellate Division. VIRAP 5(b)(6). Although Vigilant has filed a "Motion to Allow Late Filing of Appeal," as opposed to a Notice of Appeal, and he has filed his motion in this Court, as opposed to the Territorial Court, we will, nevertheless, construe his motion as a notice of appeal erroneously filed in this Court.

Vigilant seeks to appeal the September 17, 1999 order and July 1, 2000 judgment of the Territorial Court. He filed his motion in this Court on June 21, 2002— clearly beyond the ten-day limit prescribed in Rule 5(b)(1).⁴ The local rules also allow that

[u]pon a showing of excusable neglect, the Appellate Division may—before or after the time has expired, with or without motion and notice—extend the time for filing a notice of appeal for a period not to exceed thirty days from the expiration of the time otherwise prescribed by this subdivision.⁵

⁴ Even if this Court were to count from April 9, 2002, the date on which Vigilant filed his motion in the Territorial Court, as the date on which he really filed his notice of appeal, he would still be well beyond the ten-day limit established under Rule 5(b)(1) as well as the thirty-day extension permitted by Rule 5(b)(5).

⁵ This Court recently amended VIRAP 5(b)(5) to permit the trial court, as opposed to the Appellate Division of this Court, to make findings concerning a claim of excusable neglect. Rule 5(b)(5) was further amended to permit a criminal defendant to file an untimely appeal within the thirty-day extension period upon a showing of "good cause," thus making Rule 5(b)(5) consistent with VIRAP Rule 5(a)(8) (concerning civil appeals) and Federal Rule of Appellate Procedure 4(b)(4) (applying to federal criminal appeals), both of which permit untimely appeals upon such a showing.

V.I. R. App. 5(b)(5) (emphasis added). Again, however, given that more than nineteen months have passed between the filing of the later July 1 judgment sentencing Vigilant and his filing of his motion in either the Territorial Court or this Court, this Court is also without jurisdiction to consider his appeal under Rule 5(b)(5).

B. Vigilant does not Qualify for Equitable Relief under the "Unique Circumstances" Doctrine

Notwithstanding VIRAP 5(b)(5)'s thirty-day extension for "excusable neglect," federal caselaw recognizes that an appellate court may extend the time for filing an appeal under the "unique circumstances" doctrine. See *Thompson v. INS*, 375 U.S. 384 (1964); *Kraus v. Consolidated Rail Corp.*, 899 F.2d 1360 (3d Cir. 1990). Under this doctrine, an appellate court may consider an otherwise out-of-time appeal if (1) the appellant relied to his or her detriment on a trial court's affirmative statements or actions and (2) it was reasonable for the appellant to do so. See *Kraus*, 899 F.2d at 1365. The Court of Appeals for the Third Circuit further held in *Kraus* that it will "narrowly construe[] and sparingly appl[y] the 'unique circumstances' exception to time restrictions." *Id.* (internal quotations omitted) (alterations in original). Here, however, Vigilant does not aver that he relied on any affirmative statement or action of the

Territorial Court that led him to believe that his notice of appeal would be timely. To the contrary, he maintains that the Territorial Court failed to inform him of his right to appeal his sentence. Accordingly, this Court should conclude that Vigilant has not made a showing warranting equitable relief under the "unique circumstances" doctrine.

C. Whether, upon Fleeing, Vigilant Waived his Right to Appeal his Sentence

Finally, Vigilant contends that, as a fugitive appealing his sentence after his return to custody, this Court must consider his appeal. Vigilant relies on the Supreme Court's holding in *Ortega-Rodriguez v. United States*, in which a criminal defendant fled after he was convicted and subsequently was sentenced *in absentia*. 507 U.S. 234, 237 (1993). At this point, the defendant did not appeal either his conviction or sentencing. *Id.* After he was taken back into custody, he moved for resentencing. The trial court granted the motion, vacated his sentence, and resentenced the defendant. *Id.* at 238-39. The defendant then timely appealed that judgment. *Id.*

Because the defendant had become a fugitive after his conviction and before his initial sentencing, the Court of Appeals dismissed the defendant's appeal. *Id.* at 239. The Supreme Court, in reversing the decision, noted that "[i]t has

been settled for well over a century that an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal." *Id.* (emphasis added). The Court, however, concluded that the same rationales that supported this rule did not apply in the instance where a defendant "flees the jurisdiction of a [trial] court, and is recaptured before he invokes the jurisdiction of the appellate tribunal."⁶ *Id.* at 242. Accordingly, the Court then held that appellate courts may not summarily dismiss the appeal of a former fugitive who had fled before having filed an appeal. *Id.* at 249.

Vigilant insists that, under the holding in *Ortega-Rodriguez*, this Court cannot dismiss his appeal. The facts here, however, are slightly different from those in *Ortega-Rodriguez*. Whereas the defendant in that case was resentenced and timely appealed the second sentence, here, Vigilant is untimely

⁶ The Court, in reaching this conclusion, noted that the justifications we have advanced for allowing appellate courts to dismiss pending fugitive appeals all assume some connection between a defendant's fugitive status and the appellate process, sufficient to make an appellate sanction a reasonable response. These justifications are necessarily attenuated when applied to a case in which both flight and recapture occur while the case is pending before the district court, so that a defendant's fugitive status at no time coincides with his appeal.

Ortega-Rodriguez, 507 U.S. at 244 (internal footnotes omitted). The Court subsequently determined that, when a defendant flees after having filed an appeal, he or she has "flouted" the authority of the appellate court, and dismissal of the appeal is an appropriate method by which the appellate court may restore its "dignity." *Id.* at 246. Conversely, a defendant who flees before filing an appeal, has "flouted" only the dignity of the trial court, and an appellate court may not dismiss an appeal "where such conduct has no connection to the course of appellate proceedings. *Id.*

attempting to appeal his sentence. Moreover, the Supreme Court, in dicta in *Ortega-Rodriguez*, noted that

[t]his sequence of events makes petitioner's case somewhat unusual. Had the District Court denied petitioner's motion for resentencing, petitioner would have been barred by applicable time limits from appealing his initial sentence and judgment. Petitioner was able to file a timely appeal only because the District Court granted his motion to resentence. Entry of the second sentence and judgment, from which petitioner noticed his appeal, is treated as the relevant "sentencing" for purposes of this opinion. We have no occasion here to comment on the propriety of either the District Court's initial decision to sentence *in absentia*, or its subsequent decision to resentence.

Id. at 239 n.9. In *Ortega-Rodriguez*, unlike in this instance, therefore, there was no question that the appeal was timely filed. Furthermore, this Court is still without jurisdiction, under either the VIRAP or the "unique circumstances" doctrine to consider Vigilant's appeal. Accordingly, we will dismiss Vigilant's motion for lack of jurisdiction.

IV. CONCLUSION

Vigilant attempts to appeal his sentencing and conviction well beyond the statutorily-defined time limits for doing so. Because this Court lacks jurisdiction to consider his appeal under the Virgin Islands Rule of Appellate Procedure, and Vigilant has not provided evidence that he should benefit from

For the reasons given in the accompanying memorandum of even date, it is hereby

ORDERED that Reuben Vigilant's Motion to Allow Late Filing of Appeal is **DISMISSED** for lack of jurisdiction.

ENTERED this 19th day of September, 2002.

ATTEST:
WILFREDO F. MORALES
Clerk of the Court

By: /s/
Deputy Clerk

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