

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re

DAVID LEE BONNER,

On Habeas Corpus.

F072132

(Kings Super Ct. No. 09CM0397)

OPINION

THE COURT*

ORIGINAL PROCEEDING; petition for writ of habeas corpus.

David Lee Bonner, in pro. per., for Petitioner.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Brian G. Smiley and Max Feinstat, Deputy Attorneys General, for Respondent.

-ooOoo-

David Lee Bonner (petitioner) seeks permission to file a belated notice of appeal by way of a petition for writ of habeas corpus, to challenge his sentence from a conviction of murder and robbery. We will grant petitioner's request for a belated appeal.

* Before Kane, A.P.J., Poochigian, J., and Smith, J.

STATEMENT OF THE FACTS

Stephen Girardot represented petitioner at trial. Petitioner stated after being sentenced on February 9, 2015, Mr. Girardot came to discuss the details of the sentence. When petitioner asked how and when his appeal would be filed, Mr. Girardot stated he would file the appeal later that day.

On July 28, 2015, petitioner contacted the Central California Appellate Program regarding his appeal, and found out no appeal had been filed. Petitioner filed the instant petition for writ of habeas corpus seeking leave to file a belated notice of appeal on August 14, 2015. On September 10, 2015, petitioner filed an additional declaration. On October 15, 2015, this court sent a letter to Mr. Girardot giving him 30 days to respond to petitioner's petition. Mr. Girardot did not respond to this court's request for a response to the instant petition.

On December 3, 2015, this court issued an order granting the Attorney General leave to file a response. The Attorney General filed an informal response on December 23, 2015, indicating it had contacted Mr. Girardot and corroborated petitioner's claim that he had asked Mr. Girardot to file an appeal. The Attorney General concedes that petitioner is entitled to relief.

DISCUSSION

A notice of appeal must be filed within 60 days after the judgment or order being appealed to confer appellate jurisdiction on this court. (Cal. Rules of Court, rule 8.308(a).) An appealable judgment in a criminal case is generally rendered at the time of sentencing. (Pen. Code, § 1237, subd. (a).) Based on petitioner's February 9, 2015, sentencing, a timely notice of appeal must have been filed by April 10, 2015.

A criminal defendant has the burden of timely filing a notice of appeal, but that burden may be delegated to counsel. (*In re Fountain* (1977) 74 Cal.App.3d 715, 719.) When applicable, the doctrine of constructive filing allows an untimely filed notice of appeal to be deemed timely if the defendant relied upon the promise of trial counsel to

timely file the notice on the defendant's behalf, and displayed diligence in seeing that his attorney has discharged this responsibility. (*In re Benoit* (1973) 10 Cal.3d 72.) The doctrine protects defendants who have been "lulled into a false sense of security" by counsel's promise. (*Id.* at p. 87.) Reasonable doubts as to the veracity of a petitioner's allegations in these matters are to be resolved in favor of the petitioner to protect the right of appeal rather than forfeit it on technical grounds. (Cf. *People v. Rodriguez* (1971) 4 Cal.3d 73, 79; see *In re Benoit, supra*, 10 Cal.3d at p. 89.)

In petitioning this court, petitioner declares under penalty of perjury that after being sentenced on February 9, 2015, he asked his trial attorney when his appeal would be filed, and his attorney reassured him the appeal would be filed later that day. Petitioner states he only discovered an appeal had not been filed on July 28, 2015, after contacting the Central California Appellate Program. Petitioner's attorney did not respond to the allegation. In its informal response and based on a review of the petition, the Attorney General concedes petitioner is entitled to relief.

Based on petitioner's statement that he was assured by his attorney he would file an appeal, corroboration of this statement by the Attorney General, and the Attorney General's concession that petitioner is entitled to relief, we find petitioner relied on his counsel's promise to file an appeal, and diligently pursued the appeal by promptly filing a petition for writ of habeas corpus once he discovered no appeal had been filed. Therefore, we grant petitioner's request to file a belated notice of appeal.

DISPOSITION

Petitioner is granted leave to file a notice of appeal on or before 30 days from the date of this opinion, in Kings County Superior Court case No. 09CM0397.

Let a writ of habeas corpus issue directing the Clerk of the Kings County Superior Court, if the court receives the notice of appeal on or before 30 days from the date of this opinion, to treat the notice of appeal as being timely filed, and to process the appeal in accordance with the applicable rules of the California Rules of Court.