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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re MARK ALAN RING	G046670
on Habeas Corpus.	(Super. Ct. No. 10HF1919)
	O P I N I O N

Original proceedings; petition for a writ of habeas corpus to file a late notice of appeal. Petition granted.

Neil Auwarter under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, and Julie L. Garland, Senior Assistant Attorney General, for Respondent.

* * *

THE COURT:*

Following a jury trial, petitioner Mark Alan Ring was convicted of possession for sale and possession of a controlled substance. An enhancement that Ring suffered a prior conviction for possession for sale was also found true, and Ring was sentenced to five years in state prison. According to Ring's declaration, he discussed his desire to appeal his conviction with his retained trial counsel at the sentencing hearing on June 9, 2011, but counsel did not agree to file a notice of appeal on his behalf. Counsel's declaration confirms that Ring stated he wanted to appeal his conviction but counsel did not agree to file a notice of appeal for his client.

According to Ring, while at the prison law library researching how to file a notice of appeal, he was given a form for a petition for a writ of habeas corpus, which he thought was the correct form to file a notice of appeal. He was aware of the requirement that the notice of appeal had to be filed within 60 days from the judgment and mailed the habeas petition on July 18, 2011. The habeas petition was filed in the superior court on August 2, 2011 and denied on August 10, 2011. When the habeas petition was denied, Ring believed that he had filed the correct form to appeal his conviction but in the wrong court. He contacted the California Appellate Project in August and was advised that he needed to file a specific form for a notice of appeal. He completed and mailed the notice of appeal form on August 24, 2011. The superior court received Ring's notice of appeal on August 31, 2011, and advised Ring by letter that the notice of appeal was marked "[r]eceived" but not filed because the last day to file a timely notice of appeal in his case was August 8, 2011.

The Attorney General does not oppose granting the petition without the issuance of an order to show cause. (*People v. Romero* (1994) 8 Cal. 4th 728.)

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* Before Bedsworth, Acting P.J., Aronson, J., and Fybel, J.

The principle of constructive filing of the notice of appeal is applied in situations where a criminal defendant asks trial counsel to file a notice of appeal on his behalf and counsel fails to do so in accordance with the law. (*In re Benoit* (1973) 10 Cal.3d 72, 87-88.) Subdivision (b) of Penal Code section 1240.1 states that "[i]t shall be the duty of every attorney representing an indigent defendant in any criminal, juvenile court, or civil commitment case to execute and file on his or her client's behalf a timely notice of appeal when the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of the judgment or orders to be appealed from, and where, in the attorney's judgment, it is in the defendant's interest to pursue any relief that may be available to him or her on appeal; or when directed to do so by a defendant having a right to appeal." *In re Benoit* explains that a "'trial attorney is under a duty either to file the notice of appeal, or to instruct the defendant as to the proper procedure, or to see that the defendant has counsel to do these things for him.'" (*In re Benoit*, *supra*, 10 Cal.3d 72, 88.) Based on the principles set forth in *Benoit*, Ring was entitled to advice from counsel explaining how to file a timely notice of appeal. Therefore, he is entitled to the relief requested.

The petition is granted. The Clerk of the Superior Court is directed to file the notice of appeal that was received but not filed on August 31, 2011. Further proceedings, including preparation of the record on appeal, are to be conducted according to the applicable rules of court. In the interest of justice, the opinion in this matter is deemed final as to this court forthwith.