Filed 9/12/13 In re Dambra CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re KELLY RONALD DAMBRA on Habeas Corpus.	G048930 (Super. Ct. No. 12NF1885) O P I N I O N

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

Appellate Defenders, Inc., and Patrick DuNah for Petitioner.

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

* * *

THE COURT: *

Petitioner, Kelly Ronald Dambra, seeks relief from the failure to file a timely notice of appeal. The petition is granted.

Following a jury trial, Dambra was convicted of two counts of second degree robbery. A five-year enhancement for a prior serious felony conviction was also found true and on March 29, 2013, Dambra was sentenced to a total of seven years in prison. On June 26, 2013, counsel filed a notice of appeal in superior court case number 12NF1885. This court advised Dambra that it was considering dismissing the appeal on the basis that the appeal was untimely. In lieu of filing a petition for writ of habeas corpus, counsel filed a "motion to request constructive filing of [the] notice of appeal." In support of the motion, counsel prepared a declaration stating that Dambra wanted to appeal the verdict, and he advised Dambra that he would file a notice of appeal on his behalf. According to counsel, Dambra relied on his assurance that he would file a timely notice of appeal, but he inadvertently failed to file the notice of appeal within 60 days from the date of the sentencing hearing.

The principle of constructive filing of the notice of appeal should be applied in situations where trial counsel advises a criminal defendant that he will file a notice of appeal on his client's behalf, and then fails to do so in accordance with the law. (*In re Benoit* (1973) 10 Cal.3d 72, 87-88.) This is because a trial attorney is under a duty to either file the notice of appeal, or tell the client how to file it himself. In this case, Dambra relied on trial counsel to file a timely notice of appeal on his behalf. His reasonable reliance on counsel to file a timely notice of appeal entitles him to the relief requested.

Because the jurisdictional requirement to file a timely notice of appeal cannot be cured by motion, the court advised the parties that it is considering treating the

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

motion as a petition for writ of habeas corpus. 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.)

On the court's own motion and for good cause, the court treats the motion to request constructive filing of the notice of appeal as a petition for writ of habeas corpus, (*Escamilla v. Department of Corrections and Rehabilitation* (2006) 141 Cal.App.4th 498; *People v. Picklesimer* (2010) 48 Cal.4th 330, 345) and the petition is granted. The stay previously issued is DISSOLVED. Further proceedings, including the 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.