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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re JUAN CARRASCO

on Habeas Corpus.

G051198

(Super. Ct. No. 10NF2522)

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.

Frank S. Davis, Alternate Defender, Derek Bercher and Randy K. Ladisky, Deputy Alternate Defenders for Petitioner.

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

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THE COURT: *

Petitioner, Juan Carrasco, seeks relief from the failure to file a timely notice of appeal from his resentencing hearing. The petition is granted.

After a jury trial, Juan Carrasco was sentenced to 32 years in state prison. Trial counsel filed a timely notice of appeal, and on review, this court remanded the matter for resentencing. At the resentencing hearing, trial counsel waived Carrasco's presence and Carrasco was resentenced to 29 years.

It was not until Carrasco contacted trial counsel to ask when he would be transported to court for the resentencing hearing that Carrasco discovered the hearing had already taken place and no appeal had been filed following the hearing. At the same time Carrasco made his inquiry, counsel entertained the possibility that Carrasco should have been present for the resentencing hearing.

Although more than 60 days had already elapsed from the resentencing hearing, counsel tried to file a late notice of appeal, which the superior court stamped "Received," but did not file. To obtain relief, Carrasco filed a request in this court seeking constructive notice of appeal pursuant to *In re Benoit* (1973) 10 Cal.3d 72 and *Roe v. Flores-Ortega* (2000) 528 U.S. 470 (*Flores-Ortega*). In support of the request, trial counsel prepared a declaration in which he explains that after the original pronouncement of judgment, Carrasco said he wanted to "challenge his conviction and resulting commitment at all opportunities." Based on Carrasco's directive, counsel filed the timely notice of appeal that led to Carrasco being resentenced. Once the remittitur issued, counsel proceeded with the resentencing hearing in Carrasco's absence. Counsel's declaration states, "I never advised [Carrasco] of his appellate rights after resentencing. . . . I also mistakenly believed that an appeal from the re-sentencing would

* Before O'Leary, P. J., Bedsworth, J., and Thompson, J.

not lie. I should have realized that [Carrasco] was desirous of challenging his sentence at every opportunity possible, and that he would have wanted to challenge his sentence after resentencing. I knew that [Carrasco] would rely upon me in filing any notice of appeal. I should have also realized that an appeal from the re-sentence would in fact lie. My suspicions were confirmed when [Carrasco] sent me a communication, on November 9, 2014, asking when he would be brought down for re-sentencing. [Carrasco] would have no way of knowing that I had already calendared the matter for re-sentencing. . . . I did not file the notice of [a]ppeal in a timely fashion, although I should have.”

The court treats Carrasco’s request seeking constructive notice of appeal as a petition for writ of habeas corpus seeking relief pursuant to *Flores-Ortega*. 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.)

To establish ineffective assistance of counsel under the Sixth Amendment, Carrasco must demonstrate both deficient representation under an objective standard of professional reasonableness, and prejudice by demonstrating a reasonable probability of an adverse effect on the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 (*Strickland*)). In the context of a claim of ineffective assistance where counsel has failed to file a notice of appeal, *Flores-Ortega* imposes a duty on trial counsel to file a notice of appeal on the defendant’s behalf “when there is reason to think either (1) that a rational defendant would want to appeal . . . or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.” (*Flores-Ortega, supra*, 528 U.S. at p. 480.) In this case, counsel’s declaration explains he should have realized that Carrasco would have wanted to challenge his sentence after the resentencing hearing when he said he wanted to “challenge his conviction and resulting commitment at all opportunities.” By not filing the notice of appeal after the resentencing hearing, counsel acknowledges that his representation fell below the objective standard of reasonableness articulated in *Strickland* when he failed to comply with the duty imposed

on counsel in *Flores-Ortega* and subdivision (b) of Penal Code section 1240.1, which states an attorney has a duty to file a timely notice of appeal when directed to do so by a defendant having a right to appeal.

With respect to the second prong of *Strickland*, petitioner must demonstrate prejudice as a result of counsel's deficient representation. In the context of a claim of ineffective assistance where counsel has failed to file a notice of appeal, *Flores-Ortega* states, "to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." (*Flores-Ortega, supra*, 528 U.S. at p. 484.)

Based on counsel's declaration, Carrasco not only said he wanted to challenge his conviction at every opportunity, he had already demonstrated that he would, and he did, when he appealed from the original judgment. The fact that counsel misinterpreted Carrasco's directive to challenge his conviction "at [every] opportunit[y]" to mean a challenge limited to the original judgment, is not a mistake that can be assigned to Carrasco, who had made clear his intention to fight his conviction until all avenues are exhausted. According to *Flores-Ortega*, "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." (*Flores-Ortega, supra*, 528 U.S. at p. 484.)

In this case, Carrasco satisfies the two requirements of a *Flores-Ortega* claim of ineffective assistance of counsel. Counsel's declaration leaves no doubt that he did not comply with the mandates of Penal Code section 1240.1, and as a result of counsel's failure to file a timely notice of appeal following the resentencing hearing, Carrasco was deprived of the opportunity to seek further review of his sentence. Carrasco has therefore established a more than reasonable probability that he was deprived "of an appeal that . . . otherwise would have [been] taken" had counsel advised

him of his right to appeal following the resentencing hearing, and he is therefore entitled to relief. (*Flores-Ortega, supra*, 528 U.S. at p. 484.)

The petition is granted. On Carrasco's behalf, the Alternate Defender of Orange County is directed to prepare and file a notice of appeal in Orange County Superior Court case No. 10NF2522, and the clerk of the superior court is directed to accept the notice for filing if presented within 30 days of this opinion becoming final.

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 forthwith.