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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re CESAR PAZ

on Habeas Corpus.

G051954

(Super. Ct. No. 14CF1341)

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.

Melanie K. Dorian for Petitioner.

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

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THE COURT:*

Petitioner, Cesar Paz, seeks relief from the failure to file a timely notice of appeal. The petition is granted.

Following a jury trial, Cesar Paz was sentenced to three years in state prison. At the sentencing hearing on November 14, 2014, the court deferred the issue of Paz's ability to pay attorney fees and the cost of the probation and sentencing report until December 12, 2014. Before the hearing to determine Paz's ability to pay, Paz filed a timely notice of appeal from the judgment on November 21, 2014.

At the hearing on December 12, 2014, to determine Paz's ability to pay court costs, the trial court ordered Paz to pay \$2,762.17 for the probation and sentencing report. According to trial counsel's declaration, he did not file a separate notice of appeal from the court's determination of Paz's ability to pay costs because he believed that since the hearing had been calendared before he filed the notice of appeal on November 21, the notice of appeal would include the trial court's ruling on December 12, 2014. According to counsel's declaration, he "intended to appeal the court's order regarding the cost of the probation and sentencing report."

Paz attempted to file a notice of appeal from the hearing on December 12, 2014, but on April 20, 2015, the superior court stamped his notice of appeal "Received but not filed," and thereafter transmitted a letter to Paz explaining the last day to file a timely notice of appeal was February 10, 2015.

The principle of constructive filing of the notice of appeal should be applied in situations where a criminal defendant has asked 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.) 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, trial counsel

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

states he intended to appeal the court's order regarding the cost of the probation and sentencing report, but failed to do so on Paz's behalf. Based on the principles set forth in *In re Benoit*, Paz is entitled to the relief requested.

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.)

The petition is granted. On Paz's behalf, Attorney Melanie K. Dorian is directed to prepare and file a notice of appeal from the court's order entered on December 12, 2014, in Orange County Superior Court case No. 14CF1341, 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.