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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re JUAN MANUEL HERNANDEZ

on Habeas Corpus.

G052255

(Super. Ct. No. 13CF0258)

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 Jean Matulis for Petitioner.

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

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THE COURT: \*

Petitioner, Juan Manuel Hernandez, seeks relief from the failure to file a timely notice of appeal. The petition is granted.

Following a jury trial in superior court case No. 13CF2483, Juan Manuel Hernandez, admitted a probation violation in superior court case No. 13CF0258. According to a declaration from trial counsel, it was always Hernandez's intention to appeal from both his sentence on the probation violation, but when counsel prepared the notice of appeal, he inadvertently failed to include the case number from the probation violation. Petitioner is asking this court to construe the timely filed notice of appeal from the jury trial, as a timely filed notice of appeal from the probation violation as well. In addition to constructive filing the notice of appeal from the probation violation, petitioner is also asking this court to consider the appeal from the admitted probation violation as an appeal from a contested probation violation because it took place after the trial that was the basis for the violation.

The principle of constructive filing of the notice of appeal should be applied in situations where trial counsel advises a criminal defendant that he, or she, will file a notice of appeal on their 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 him or herself. In this case, Hernandez relied on trial counsel to file a timely notice of appeal from the jury trial and the probation violation. His reasonable reliance on counsel to file a timely notice of appeal in both cases entitles Hernandez to the relief requested.

Although 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 Rylaarsdam, Acting P. J., Moore, J., and Fybel, J.

*In re Chavez* (2003) 30 Cal.4th 643, states “a defendant seeking appellate review following a plea of guilty or no contest must *fully and timely comply* with *both* section 1237.5 and [formerly] rule 31(d) [currently rule 8.304(b) of the California Rules of Court]. A ‘defendant may not obtain review of certificate issues unless he has complied with section 1237.5 and rule [8.304(b)], first paragraph, fully, and, specifically, in a timely fashion . . . .’ [Citations.] When a defendant has failed to comply with the requirements of section 1237.5 and rule [8.304(b)], the Court of Appeal ‘generally may not proceed to the merits of the appeal, but must order dismissal . . . .’ [Citations.]” (*Id.*, at 651.)

The petition is granted. On petitioner’s behalf, counsel is directed to prepare and file an amended notice of appeal that includes case No. 13CF0258 and a request for a certificate of probable cause. The clerk of the superior court is directed to accept the amended notice of appeal and request for certificate of probable cause if presented within 30 days of this opinion becoming final. The superior court shall comply with rule 8.304(b)(2) of the California Rules of Court and rule on the request for certificate of probable cause within 20 days from the date the request is filed in superior court.

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.