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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re HUNG LE VO on Habeas Corpus.	G059041 (Super. Ct. No. 98NF0842) 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.

Jill Kent, Appellate, Defenders Inc. for Petitioner.

Xavier Becerra, Attorney General, and Julie L. Garland, Assistant Attorney General for Respondent.

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THE COURT: *

Petitioner, Hung Le Vo, seeks relief from the failure to file a timely notice of appeal. The petition is granted.

On January 8, 2019, Vo filed a petition to vacate his conviction pursuant to Penal Code section 1170.95. According to Vo's declaration filed under penalty of perjury, the court appointed counsel to represent him at the hearing on his petition and he was present in court for the hearing conducted on October 4, 2019. According to Vo, "At no point did [counsel] advise me of the court's November 7, 2019 denial of my section 1170.95 petition. She did not advise me of my right to appeal the decision or tell me there was a 60-day deadline." According to habeas counsel's declaration, she attempted to reach counsel who represented Vo at the hearing on the petition, but her calls were not returned.

According to Vo, he tried to file a notice of appeal, but he received a letter from the superior court stating the notice of appeal had been marked "'Received February 7, 2020, but not filed.'" According to the letter from superior court, the last day to file a timely notice of appeal was January 6, 2020.

Although Vo filed a petition for writ of habeas corpus seeking constructive notice of appeal pursuant to *In re Benoit* (1973) 10 Cal.3d 72, the court treats the petition as seeking relief pursuant to *Roe v. Flores-Ortega* (2000) 528 U.S. 470 (*Flores-Ortega*).

To establish ineffective assistance of counsel under the Sixth Amendment, Vo 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

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* Before Moore, Acting P. J., Fybel, J., and Goethals, J.

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, the order denying Vo's petition to vacate his conviction never reached the merits of the petition and instead, the petition was denied solely on constitutional grounds that have since been rejected. (see *People v. Lamoureux* (2019) 42 Cal.App.5th 241; *People v. Superior Court* (*Gooden*) (2019) 42 Cal.App.5th 270; *People v. Solis* (2020) 46 Cal.App.5th 762, 771; *People v. Bucio* (2020) 48 Cal.App.5th 300; *People v. Prado* (2020) 49 Cal.App.5th 480.) Under the circumstances, a rational defendant would want to seek review of a trial court's ruling that never reached the merits of the petition. Furthermore, Vo would have made this known to counsel if he had an opportunity to do so based on the fact that he filed a motion for reconsideration on December 23, 2019.

With respect to the second prong of *Strickland*, Vo must demonstrate prejudice as a result of counsel's deficient representation. *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.)

In this case Vo also establishes prejudice based on his declaration which states, "On December 23, 2019, after I learned about the opinion in *People v. Superior Court* (*Gooden*), and because I still had not heard from [counsel], I filed a motion for reconsideration. I was unaware of the procedure to appeal or the right language to use to keep challenging my case so I filed what I could."

Accordingly, Vo has established more than a 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 ruling on his petition to vacate his sentence and prejudice, and therefore he is entitled to relief. (*Flores-Ortega, supra*, 528

U.S. at p. 484.) 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." (*Ibid*.)

The Attorney General does not oppose Vo's request for relief to file a late notice of appeal without the issuance of an order to show cause. (*People v. Romero* (1994) 8 Cal.4th 728.)

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 February 7, 2020. 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 in this court and the clerk of this court is directed to issue the remittitur forthwith.