

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

Plaintiff,

vs.

SCOTT D. CADWELL,

Defendant.

Case No. 20360

**MEMORANDUM OPINION
AND ORDER**

DATE OF HEARING: September 7, 2000.

DATE OF RENDITION: September 13, 2000.

DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).

APPEARANCES:

For plaintiff:

Thomas P. Herzog, Holt County Attorney.

For defendant:

Rodney W. Smith, Holt County Public Defender, without defendant.

SUBJECT OF ORDER: Defendant’s motion for postconviction relief.

PROCEEDINGS: At the hearing, these proceedings occurred:

Opening statements were waived. The defendant adduced evidence by exhibits offered and received without objection. The plaintiff offered no additional evidence. Arguments of counsel were heard. On the court’s own motion, judicial notice was taken of undisputed facts and records of the court without objection. Additional arguments of counsel were waived. The matter was taken under advisement.

MEMORANDUM:

1. The defendant’s motion for postconviction relief alleged three grounds. This court ordered an evidentiary hearing only on the third ground, alleging that “[d]efendant timely instructed his counsel to file an appeal to the Nebraska Supreme Court and counsel failed to follow [d]efendant’s instructions.” This court determined that the first two grounds failed to allege facts, rather than conclusions, to sustain the first two allegations.

2. The evidence disclosed on the issue is very limited.

a. The defendant testified by deposition that he had no recollection of ever asking trial counsel (who is not the defendant’s present appointed counsel) to appeal. Exhibit 13 at 12:2-4. The

defendant admitted he could not unequivocally say that trial counsel did not advise the defendant of the defendant's right to appeal. Exhibit 13 at 20:8-12. Further, the defendant testified that he did not remember telling anyone that the defendant had instructed trial counsel to appeal or that trial counsel had failed to follow instructions. Exhibit 13 at 21:1-22:4.

b. However, the defendant adduced an exhibit constituting a letter from the defendant to trial counsel dated Friday, November 14, 1997, and stamped "received" on Monday, November 17, 1997. Exhibit 14. In the letter, the defendant states:

I would like it, if it will not hurt me in any way, would you try to appeal [sic] for me, for less time and or to get out anything would be good. Michelle ask, o.k. I told her I would ask you, thank you for your concern for me.

Exhibit 14 (emphasis in original).

c. Trial counsel responded by letter dated Wednesday, November 19, 1997, stating:

Received your letter of November 14, 1997. As for an appeal, I really think it would be a waste of time and energy and probably would not do you one iota of good. Length of sentence just isn't adequate grounds for an appeal. If at a later time we come up with something you can always petition the court for "post conviction or leave".

Exhibit 15.

d. The evidence does not show any further correspondence or communication between the defendant and his trial counsel. The court took judicial notice that sentence was pronounced and trial docket entry made on Thursday, October 23, 1997. Under the statutes then effective, judgment was deemed as rendered by the pronouncement and entry upon the trial docket. The time for appeal began to run on that date. Thus, the last day for filing of an appeal was Monday, November 24, 1997. No appeal was filed.

3. In the recent case of *State v. Trotter*, 259 Neb. 212, ___ N.W.2d __ (2000), the Nebraska Supreme Court considered the threshold issues.

a. The Supreme Court recognized that a criminal defendant's right to effective assistance of counsel is one of the foundations upon which our criminal justice system is built. *Id.*

b. The Supreme Court held that after a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will

be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief. *Id.*

c. The Supreme Court also observed that it is fundamental to a claim of ineffective assistance of counsel based on failure to appeal that the defendant directed that such appeal be filed. *Id.* The defendant must show, by a preponderance of the evidence, that he was denied his right to appeal due to the negligence or incompetence of counsel, and through no fault of his own. *Id.* (citing *State v. Halsey*, 195 Neb. 432, 238 N.W.2d 249 (1976)). In *Trotter*, trial counsel admitted that he had been directed to appeal and failed to do so; thus, the factual issue did not apply.

4. In *State v. McCracken*, 260 Neb. 234, ___ N.W.2d ___ (2000), the district court granted a “reinstated” direct appeal because trial counsel failed to timely appeal. See *State v. McCracken*, 248 Neb. 576, 537 N.W.2d 502 (1995). Again, no issue arose concerning the requirement that the defendant directed an appeal to be taken. See also *State v. Toof*, 9 Neb. App. 535, ___ N.W.2d ___ (2000).

5. In *State v. Halsey*, *supra*, the defendant established nothing other than the fact that no appeal was taken. The Supreme Court stated that “[t]he mere fact alone that no appeal has been taken from a criminal proceeding does not raise any presumptions that this was due to the negligence or incompetence of counsel.” *Id.* at 433, 238 N.W.2d at ___.

6. The United States Supreme Court, in *Roe v. Flores-Ortega*, ___ U.S. ___ (February 23, 2000) (No. 98-1441) (slip op.), recently considered the proper framework for evaluating the ineffective assistance claim relating to failure to appeal.

a. The Court observed that the rules at each end of the spectrum are clear. Counsel acts unreasonably by failing to appeal when specifically directed. *Id.* at 5. Conversely, counsel following explicit instructions not to appeal does not act deficiently. *Id.* at 5-6. In *Roe v. Flores-Ortega*, the Court addressed the question: “Is counsel deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other?” *Id.* at 6.

b. The Court rejected the “bright-line” rules of the First and Ninth Circuits requiring counsel to appeal unless the defendant expressly directs otherwise. *Id.* at 6.

c. The Court then considered the specific question applicable here:

In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, we believe the question whether counsel has performed deficiently by not filing a notice of appeal is best answered by first asking a separate, but antecedent, question: whether counsel in fact consulted with the defendant about an appeal. We employ the term “consult” to convey a specific meaning – advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant’s wishes. If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant’s express instructions with respect to an appeal. [citation omitted] If counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel’s failure to consult with the defendant itself constitutes deficient performance. That question lies at the heart of this case: Under what circumstances does counsel have an obligation to consult with the defendant about an appeal.

...

We . . . hold that counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known.

Id. at 6-8.

7. This court concludes that the defendant’s letter did not specifically direct that an appeal be taken. This court must then consider the underlying issue of consultation.

8. The court next considers whether circumstances activated the duty to consult.

a. The defendant failed to adduce evidence of nonfrivolous grounds for appeal or any other reason that a rational defendant would want to appeal. This is objective standard that the defendant failed to prove.

b. However, the defendant’s letter met the alternative requirement, which constitutes a subjective standard based on the defendant’s conduct. The defendant reasonably demonstrated an interest in taking an appeal. Indeed, trial counsel’s reply shows that counsel understood that defendant expressed that interest. Thus, the constitution imposed a duty on counsel to consult with the defendant regarding the possible appeal.

9. The court then consider whether trial counsel “consulted” with the defendant as defined by the Supreme Court. The written correspondence constitutes the only evidence of “consultation.”

a. Trialcounsel’s letter perhaps arguably advised the defendant of the advantages and disadvantages of taking an appeal. It is not, however, a model of thoroughness.

b. However, it does not make a reasonable effort to discover the defendant’s wishes. The only portion of the letter which might conceivably apply was the closing invitation: “If I can do any thing [sic] further let me know.” Exhibit 15. This simply does not meet the standard of making a reasonable effort to discover the defendant’s wishes. Perhaps a letter could meet the standard of a “reasonable effort.” But at the very least, the letter must specifically inquire of the defendant’s wishes regarding an appeal. And in view of the short time then remaining to perfect an appeal, this court doubts that a mere letter constitutes the required “reasonable effort.”

c. The court concludes that trial counsel did not fulfill the constitutional duty to consult.

10. The time for taking an appeal had not expired. Trial counsel had the duty to “consult” explained by the Supreme Court. The evidence shows that he failed to do so, and consequently, the defendant satisfied his burden to show that counsel’s performance was deficient.

11. However, the Supreme Court also requires a showing of prejudice. The Court held that “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.” *Id.* at 12.

12. The *only* evidence bearing on this issue is the defendant’s deposition testimony that he would have filed an appeal. Exhibit 13 at 23:20-24:3. The plaintiff did not call trial counsel to testify at the evidentiary hearing, or otherwise adduce any evidence to the contrary. On the state of this record, the court concludes that the defendant met his burden to show that he would have timely appealed.

13. The Nebraska Supreme Court decisions dictate that these circumstances require this court to grant proper relief by granting a new direct appeal. *State v. McCracken*, 260 Neb. 234, 244-45, ___ N.W.2d ___, ___ (2000). Such relief will be granted.

ORDER: IT IS THEREFORE ORDERED that:

1. The defendant’s motion for postconviction relief is granted to the extent of the following relief: The defendant is granted a new direct appeal to the Nebraska Court of Appeals within 30 days from the date of entry of this order.

2. Except to the extent granted above, the defendant’s motion is denied.

Signed in chambers at Ainsworth, Nebraska, on September 13, 2000.
DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

- : Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 20__ by ____.
- 9** Enter judgment on the judgment record.
Done on _____, 20__ by ____.
- : Mail postcard/notice required by § 25-1301.01 within 3 days stating “Motion for postconviction relief granted in part and denied in part. Defendant granted new direct appeal within 30 days from date of entry.”
Done on _____, 20__ by ____.
- : Note the decision on the trial docket as: [date of filing] Signed “Memorandum Opinion and Order” entered granting postconviction motion in part and otherwise denying motion; defendant granted new direct appeal within 30 days.
Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge