IN THE SUPREME COURT OF THE STATE OF DELAWARE

ERIC GARNETT,	§	
	§	
Defendant Below- Appellant,	§	No. 123, 2000
	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for Kent County
	§	Cr.A. Nos. K95-12-0289
Plaintiff Below- Appellee.	§	thru 0294
	§	

Submitted: June 5, 2000
Decided: June 30, 2000

Before **VEASEY**, Chief Justice, **WALSH** and **BERGER**, Justices

O R D E R

This 30th day of June 2000, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Eric Garnett, filed this appeal from an order of the Superior Court denying his motion for postconviction relief pursuant to Superior Court Criminal Rule 61. We find that the Superior Court abused its discretion in not holding an evidentiary hearing concerning whether Garnett's counsel consulted with him about filing an appeal. Accordingly, we REVERSE the judgment of the Superior Court and REMAND for an evidentiary hearing.

(2) In August 1996 Garnett was convicted by a jury of burglary in the first degree, possession of a deadly weapon during the commission of a felony, carrying a concealed deadly weapon, possession of burglar's tools and misdemeanor theft. Garnett was adjudged an habitual offender and sentenced to life in prison for the burglary conviction.[1] He did not file a direct appeal of his convictions or sentences. The Superior Court's denial of Garnett's subsequent pro se motion for correction of sentence[2] was affirmed on appeal by this Court.[3]

(3) Garnett's claims of error can be summarized as follows: a) the Superior Court failed to rule on his motion for reargument; b) there was no valid waiver of indictment by the grand jury; and c) he received ineffective assistance of counsel both at sentencing and on appeal.

(4) Garnett contends that his trial counsel failed to advise him of his right to appeal, the time limits for taking an appeal, the procedure for taking an appeal and any possible grounds for an appeal. He does not contend that he instructed his counsel to file an appeal on his behalf. Garnett's trial counsel's

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[1]Garnett received additional sentences on the other charges, to be served consecutively.

[2]Super. Ct. Crim. R. 35(a).

[3]*Garnett v. State*, Del. Supr., No. 529, 1997, Berger, J., 1998 WL 184489 (Apr. 9, 1998) (ORDER).

affidavit states: "During the tenure of my service I spoke about the appeal procedure without any feedback from the Defendant. However, I was told by the Defendant, he did not want me to do anything for him and did not want my help when I brought up the appeal option following the verdict and sentencing."

(5) In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's representation fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different.[4] This standard applies to claims that counsel was constitutionally ineffective by failing to file a notice of appeal.[5] "In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, . . . 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."[6] "Consulting" means "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to

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[4]*Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

[5]*Roe v. Flores-Ortega*, 120 S.Ct. 1029, 1034 (2000).

[6]*Roe v. Flores-Ortega*, 120 S. Ct. at 1035.

discover the defendant's wishes."[7] If counsel has consulted with the defendant, he performs in a professionally unreasonable manner "only by failing to follow the defendant's express instructions with respect to an appeal."[8] If counsel has not consulted with the defendant, the question is "whether counsel's failure to consult with the defendant itself constitutes deficient performance."[9]

(6) In this case, there is a factual dispute between the defendant and his counsel regarding whether counsel "consulted" with the defendant about filing an appeal. The Superior Court resolved the issue by crediting counsel's sworn affidavit rather than the contentions contained in the defendant's briefs.[10] However, while the affidavit states that counsel "spoke about" and "brought up" an appeal, it does not offer any specifics concerning what was said, when it was said and what Garnett's response was. Counsel's conclusory statements, even if contained in a sworn affidavit, are an insufficient basis for determining that

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[7] *Id.*

[8] *Id.*

[9] *Id.* Regarding the "prejudice" prong of the *Strickland* test, we note that, under *Roe v. Flores-Ortega*, the defendant must demonstrate that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed. If such a showing is made, the defendant has made out a successful ineffective assistance of counsel claim, entitling him to an appeal. *Roe v. Flores-Ortega*, 120 S.Ct. at 1038-39.

[10] The Superior Court adopted the Report and Recommendations of the Commissioner, which accepted counsel's affidavit over the defendant's contentions, and further noted in its decision that "counsel did speak to the defendant about the appeal procedure." In its decision denying the defendant's motion for reargument, the Superior Court again noted its reliance on Garnett's counsel's affidavit.

counsel fulfilled his obligation to "consult" with the defendant about his right to appeal in a manner consistent with constitutional requirements.[11] Under the circumstances presented in this case, it was an abuse of discretion for the Superior Court not to hold an evidentiary hearing to resolve this issue.[12]

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is REVERSED and the case is REMANDED to the Superior Court for proceedings in accordance with this Order. Jurisdiction is retained.

BY THE COURT:

/s/ E. Norman Veasey
Chief Justice

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[11] *Roe v. Flores-Ortega*, 120 S.Ct. at 1035.

[12] Super. Ct. Crim. R. 61(h).