STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2031

Joseph Mims Weldon, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 29, 2009
Reversed and remanded
Shumaker, Judge
Dissenting, Lansing, Judge

Ramsey County District Court
File No. 62-K3-03-003988

Joseph Mims Weldon, OID #213827, 7525 Fourth Avenue, Lino Lakes, MN 55014 (pro se appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, 50 West Kellogg Boulevard, St. Paul, MN 55102 (for respondent)

Considered and decided by Lansing, Presiding Judge; Shumaker, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

SHUMAKER, Judge

Appellant argues that the postconviction court erred in dismissing his petition for postconviction relief as untimely because he was denied the assistance of a public defender for a timely direct appeal. We agree, and reverse and remand.

FACTS

On January 12, 2004, appellant Joseph Mims Weldon pleaded guilty to attempted second-degree murder. He was sentenced on March 5, 2004. Five days later, Weldon contacted the state public defender's office requesting their assistance with appealing his conviction. The public defender declined to file an appeal on Weldon's behalf, telling him that "[b]ecause you entered a knowing, valid, and binding plea, there is nothing our office can do to undo the conviction. Your file will therefore be closed."

On August 5, 2008, Weldon brought a pro-se petition for postconviction relief in which he argued, among other things, that he had received ineffective assistance of appellate counsel because the public defender refused to file an appeal on his behalf. Respondent State of Minnesota argued that Weldon's time for filing postconviction petitions had expired under Minn. Stat. § 590.01, subd. 4 (2008), and further that there was no merit to Weldon's contentions. The district court dismissed Weldon's petition for postconviction relief as untimely, and Weldon appealed.

D E C I S I O N

The district court dismissed Weldon's petition for postconviction relief as untimely, and did not address the merits of his arguments. Weldon argues that his petition for postconviction relief was improperly dismissed because the state public defender's office refused to file a direct appeal on his behalf, thereby depriving him of the assistance of counsel in appealing his case and causing the delay in bringing his petition. The decisions of a postconviction court will not be disturbed unless the court abused its discretion, but we review the postconviction court's legal determinations de novo. *Stutelberg v. State*, 741 N.W.2d 867, 872 (Minn. 2007). Because the record supports Weldon's claim that the public defender refused to file his direct appeal, and because Minnesota law entitles a defendant to one review of his case with the assistance of counsel, we address this argument in the interests of justice, and reverse and remand.

Within a few days after being sentenced, Weldon wrote to the public defender, stating: "This is Mr. Weldon, Joseph, OID 213827 writing this letter for an appeal lawyer (PD)[.] It is my acknowledgement [sic] that your office does appeals and I'm very certain that I would like to appeal my unjust[] case." On March 16, the public defender responded, informing Weldon that if he successfully challenged his plea of guilty he would risk incurring a longer prison sentence, but that if he was still interested in having the public defender's office review his case, he should fill out and return certain intake forms. Apparently, Weldon did so. The public defender then wrote to Weldon on April 7, 2004, stating "[w]e received your letter asking our office to review your file to see whether there is any basis for challenging the validity of the guilty plea you entered."

The letter concluded by notifying Weldon that nothing could be done by the public defender's office to help his case and that his file would be closed. Nevertheless, Weldon continued to request assistance. In November of 2004, he wrote the public defender again, stating "I've already written your office numorous [sic] times. My concern is that I'm able to get your office support, and to help me get back in the court system . . . ." The district court file does not contain a response to this letter. No appeal was ever filed on Weldon's behalf, and the time for him to appeal as of right expired.

"[A] convicted defendant is entitled to at least one right of review by an appellate or postconviction court." *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). It is uncontested that Weldon was an indigent defendant convicted of a felony who attempted to appeal his case within 90 days. A defendant may appeal "as of right" from a felony judgment and conviction against him within 90 days. Minn. R. Crim. P. 28.02, subds. 2(1), (3), 4(3). By statute, indigent defendants are entitled to the assistance of the state public defender's office on their direct appeal from a felony conviction. Minn. Stat. § 611.14 (2002) ("[P]ersons who are financially unable to obtain counsel are entitled to be represented by a public defender" when "appealing from a conviction of a felony.") The public defender is without discretion to decline representation. Minn. Stat. § 611.25, subd. 1(a)(1) (2002) (stating "state public defender *shall represent*, without charge: (1) a defendant or other person appealing from a conviction of a felony or gross misdemeanor") (emphasis added). The language of these statutes is unambiguous and mandatory. The legislature has granted indigent defendants a right to representation to assist them with their direct appeals, and the public defender is without discretion to

refuse such representation. Thus, by statutory mandate, Weldon was entitled to the assistance of the public defender in filing his direct appeal.

Without citing any authority, the state asserts that the public defender's refusal to represent Weldon "was authorized by statute that allowed their office to decline representation of indigent prisoners who had pleaded guilty and received either the presumptive sentence or less." Presumably, the state is referring to one of two provisions which permitted the public defender to decline representation of indigent defendants *seeking postconviction relief* who had pleaded guilty and received the presumptive sentence. *See* Minn. Stat. §§ 590.05, 611.25, subd. 1(2) (2004); *Deegan v. State*, 711 N.W.2d 89, 91 (Minn. 2006) (stating that Minn. Stat. § 590.05 "provides that a petitioner who pleaded guilty, received no greater than the presumptive sentence, and *did not pursue a direct appeal* is not entitled to representation by the state public defender") (emphasis added). Of course, Weldon was not seeking postconviction relief but rather assistance in filing his direct appeal, and the statute, by its express terms, had no application to Weldon at that stage. Furthermore, the supreme court held unconstitutional those provisions that denied indigent defendants the assistance of counsel on first review, *Deegan*, 711 N.W.2d at 98, and these statutes are no longer in effect. 2007 Minn. Laws ch. 61, §§ 2, 10 at 492, 497. Thus, in 2004 Weldon was, and presently is, entitled by statute to representation by the public defender.

Our caselaw has also held that an indigent defendant has the right to the assistance of counsel when seeking the first review of the merits of his case. In *Paone v. State*, we concluded that a pro se defendant's petition for postconviction relief was erroneously

dismissed because the defendant "was entitled to the assistance of a public defender." 658 N.W.2d 896, 898-99 (Minn. App. 2003). We based our decision on our commitment to vindicating a defendant's right to at least one substantive review as a matter of due process, and reasoned that "[t]he right to counsel is deeply engrained in our society's notions of fairness and justice. It is both statutory and constitutional. Had the proper procedure been followed in this instance, and counsel been assigned, the merits of appellant's argument may have been viewed differently in the postconviction proceedings." *Id.* at 899. We reversed and remanded "so that appellant may begin again, this time properly represented by counsel and better able to present his . . . claims to the court." *Id.* at 900. *See also Bonga v. State*, 765 N.W.2d 639, 643 (Minn. 2009) (reversing the district court's dismissal of a postconviction petition because a defendant's denial of the right to counsel at the postconviction stage is structural error).

We find no principled distinction between *Paone* and Weldon's case. Weldon was similarly entitled to representation by the public defender for his first substantive review on the merits of his case under Minnesota law. Our supreme court has concluded that the right to counsel under article 1, section 6, of the Minnesota Constitution "extends to one review of a criminal conviction, whether by direct appeal or a first review by postconviction proceeding" because "a defendant's access to the other protections afforded in criminal proceedings cannot be meaningful without the assistance of counsel." *Deegan*, 711 N.W.2d at 98; *see also Barnes v. State*, 768 N.W.2d 359, 364 (Minn. 2009) (stating "the emphasis in *Deegan* is on the right to assistance of counsel for one meaningful review of a criminal conviction"). The state implies that *Deegan* should

not apply to Weldon's case because it was issued three years after Weldon was convicted, but *Deegan* did not create a right to counsel on appeal. Rather, it *extended* the right of counsel to postconviction proceedings where there had been no prior appeal. *Deegan*, 711 N.W.2d at 97-98. In doing so, our supreme court followed the reasoning of the United States Supreme Court's decision in *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814 (1963), which dealt only with direct appeals, stating that "the quality of a defendant's one review as of right of a criminal conviction should not hinge on whether a person can pay for the assistance of counsel." *Id.* at 98. "The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal." *Douglas*, 372 U.S. at 358, 83 S. Ct. at 817. Thus, our supreme court broke no new ground regarding the right to assistance of counsel on direct appeal when it decided *Deegan*. Furthermore, absent special circumstances, our supreme court's decisions are given retroactive effect. *State v. Baird*, 654 N.W.2d 105, 110 (Minn. 2002).

The dissent urges that the state public defender's office did fulfill its duty to Weldon because it "provided [him] with representation . . . ." That office did in fact consider Weldon's case and it concluded that it lacked merit. Certainly, there was "representation" of sorts. But, as discussed above, Weldon is entitled to *appellate review* and to the public defender's assistance in obtaining appellate review. To conclude that the public defender has provided assistance in obtaining appellate review when the public defender unilaterally decides the question of merit we think is not what the statutes and caselaw intend.

If a defendant's entitlement to representation by a public defender only extends to the receipt of the public defender's opinion on the merits of defendant's case, and not to active representation in court, then the public defender's office has essentially unlimited discretion to refuse in-court representation. The frivolity or lack thereof of a defendant's case is a matter for judicial determination, not the public defender's; if the public defender believes the appeal is frivolous, he or she may withdraw from representation so long as "certain safeguards are observed," including an independent judicial review of the defender's reasons for so concluding. *Penson v. Ohio*, 488 U.S. 75, 80, 109 S. Ct. 346, 350 (1988) (discussing *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967)).

The dissent also notes that the rules of criminal procedure provide for the public defender's "evaluation of the merits of a judicial review" under Minnesota Rule of Criminal Procedure 28.02, subdivision 5 (5), and outlines procedures for the defendant to proceed pro se on appeal. However, "[a] defendant may proceed pro se on appeal only after the State Public Defender has first had the opportunity to file a brief on behalf of the defendant." Minn. R. Crim. P. 28.02, subd. 5(13). Furthermore, if a defendant elects to proceed pro se on appeal, the public defender's office "shall confer with the defendant about the reasons for choosing to do so and advise the defendant concerning the consequences and ramifications of that choice." *Id.*, subd. 5(14). Here, the public defender's office informed Weldon that it was closing his file because it believed he raised no meritorious issue for appeal. At that moment, the door to Weldon's right to a review of his conviction with the assistance of counsel was shut. Permitting the public defender to refuse, at-will, assistance to an indigent defendant would directly undermine

the plain language contained in Chapter 611, and our Supreme Court's determination that a right to appellate review is meaningless without the aid of counsel. *See Douglas v. California*, 372 U.S. 353, 357-58, 83 S. Ct. 814, 816-17 (1963) ("When an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure . . . . The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.")

It is not our intent to suggest that the public defender has an obligation to pursue a frivolous appeal and to thereby breach ethical standards. Rather, simply put, an indigent criminal defendant has a *right* to have an appellate court review his case and a *right* to the assistance of the public defender in getting his case to the appellate court. That appears to us to be what the caselaw and rules cited herein require. We are not at liberty to ignore or to change the law in order to ameliorate the public defender's workload. We are compelled to conclude that the law requires the public defender to do *something* to *assist* Weldon in getting his case to the court of appeals on its merits, whatever they might be. If full legal representation is not appropriate, at least the public defender must provide a level of assistance and guidance to facilitate a pro se appeal. The public defender stopped short of such assistance here and Weldon was not able to obtain an appellate review of his case on the merits.

Finally, the dissent concludes that Weldon did not demonstrate that he received ineffective assistance of counsel because he did not order the public defender's office to file an appeal on his behalf after it told him it was closing his file and would not represent

him on appeal. We believe that this asks too much of a defendant. It is uncontested that Weldon requested an appeal, filled out the paperwork requested by the public defender in order to do so, and then, when he was told that the office was closing his file, *continued* to contact the public defender's office to seek its assistance. The public defender's consultation and ultimate opinion that Weldon's case lacked merit does not amount to representation on appeal, much less effective representation.

Weldon has never had the benefit of a single review on the merits of his case with the aid of counsel. This court does not apply a harmless-error standard to the denial of counsel in postconviction proceedings because the right to counsel is fundamental. *See Paone*, 658 N.W.2d at 899 ("We are not prepared to say that it was harmless error for appellant not to have the services of an appointed criminal defense attorney. The right to counsel is one of the most fundamental.") Weldon was entitled to appeal his case with the assistance of the public defender. That assistance was denied. Thus, we are compelled to conclude that Weldon's case must be remanded for postconviction review on the merits, with the assistance of counsel. *See Deegan*, 711 N.W.2d at 98-99 (reversing and remanding for appointment of counsel); *Paone*, 658 N.W.2d at 900 (reversing and remanding for a new hearing with assistance of counsel).

Reversed and remanded.

LANSING, Judge (dissenting)

The majority opinion is premised on two conclusions: (1) the State Public Defender's Office failed to provide Joseph Weldon with representation, and (2) the district court abused its discretion by determining that the postconviction relief petition, filed more than four years after Weldon's conviction, was untimely. Because I believe that neither conclusion is supported by the law and the facts, I respectfully dissent.

First, the record establishes that the State Public Defender's Office provided Weldon with representation. Within a week of Weldon's first inquiry about a direct appeal to challenge denial of his motion for plea withdrawal, an attorney from the public defender's office responded, explained the challenges and risks of plea withdrawal, and offered to review Weldon's case further at Weldon's request. Weldon filled out and returned the forms that initiated the further review. An attorney from the public defender's office then reviewed the district court record, including the transcripts from Weldon's plea and sentencing hearings. The attorney provided Weldon with the attorney's professional opinion that Weldon's grounds for plea withdrawal lacked merit and that, in fact, Weldon had made the right choice by accepting the plea offer because he had received a favorable sentence in light of the gravity of the offense. The attorney informed Weldon that he was closing his file because he could not undo a "knowing, valid, and binding plea."

The majority concludes that these actions resulted in a denial of representation. But this conclusion equates representation to filing an appeal. To accept this narrow equation negates the evaluation and consultation stage of representation and ignores those

cases in which effective and ethical representation results in *not* filing an appeal. Our rules of professional conduct state that, "in representing a client, a lawyer shall exercise independent professional judgment and render candid advice." Minn. R. Prof. Conduct 2.1. An attorney "shall not bring or defend a proceeding, or assert or controvert an issue . . . unless there is a basis in law and fact for doing so that is not frivolous." Minn. R. Prof. Conduct 3.1. And the applicable rule of criminal procedure contemplates that the public defender will not file an appeal in every case, when it states that the duty to an indigent person convicted of a crime entails "representation regarding a judicial review *or an evaluation of the merits of a judicial review*." Minn. R. Crim. P. 28.02, subd. 5(5) (emphasis added). The rules further provide for the public defender's consultation and cooperation if the appellant decides to proceed pro se notwithstanding the public defender's position on the case. *Id.*, subd. 5(13)-(20). Because the public defender provided Weldon with representation consistent with our rules, the public defender did not violate the statute requiring representation of indigent defendants who have been convicted of a crime.

Second, the record does not support a conclusion that the district court erred by ruling that Weldon's petition was untimely. Anyone whose conviction became final before August 1, 2005 was required to file a petition for postconviction relief by July 31, 2007. 2005 Minn. Laws ch. 136, art. 14, § 13, at 1098. Weldon's conviction was final in 2004 and he filed his petition for postconviction relief on August 5, 2008—more than one year after the statutory deadline. The statute codifying the time limits for filing postconviction petitions includes several exceptions and allows a postconviction court to

hear a petition otherwise time barred if "the petitioner establishes to the satisfaction of the court that the petition is not frivolous and is in the interests of justice." *Id.* (codified at Minn. Stat. § 590.01, subd. 4(b)(5) (2008)); *see Nestell v. State*, 758 N.W.2d 610, 614 (2008) (holding that statutory exceptions apply to petitions governed by uncodified filing deadline).

The majority apparently concludes that the district court can reach the merits of Weldon's claim in the interests of justice. I believe that we are constrained by the caselaw that interprets section 590.01, subdivision 4, and provides strict pleading requirements for petitions based on any exception to the statute. *See Nestell*, 758 N.W.2d at 614 (holding that petitions must "expressly [] identify the applicable exception" to avoid summary dismissal as untimely). In *Nestell*, this court found that the postconviction court did not abuse its discretion by summarily dismissing a petition that did not meet the pleading requirement. *Id.* In light of this court's decision in *Nestell*, the district court's summary dismissal of Weldon's petition was not an abuse of discretion.

Even if I were able to navigate through these limitations on the interests-of-justice exception, the record on appeal is insufficiently developed to show "that the petition is not frivolous and is in the interests of justice," and, if that exception is met, that the state public defender's office—which has thus far not had an opportunity to respond to these allegations—provided ineffective assistance of counsel. Consequently, I believe that the majority's proposed remedy of a full review on the merits is overbroad. Even if the pleading requirement does not bar consideration of Weldon's petition, the case should be remanded to allow the postconviction court to determine whether Weldon's petition falls

under an exception to the time limit. To do so, the postconviction court would make an initial assessment of Weldon's claim that he received ineffective assistance of appellate counsel. If it concluded that the claim is not frivolous and is in the interests of justice, the postconviction court would proceed to the merits.

The record on appeal is insufficient for us to make either determination. The U.S. Supreme Court has held that it can be per se ineffective assistance if counsel "disregards specific instructions . . . to file a notice of appeal." *Roe v. Flores-Ortega*, 528 U.S. 470, 477, 120 S. Ct. 1029, 1035 (2000) (noting that filing notice of appeal is " purely ministerial task"). The record, however, does not indicate that Weldon directed the public defender's office to file a notice of appeal. The record also fails to show whether the state public defender's office advised Weldon of how to file a pro se appeal. A failure to advise Weldon of this alternative may be the basis for a claim for ineffective assistance of counsel. *See* ABA Standards for Criminal Justice 4-8.3(d) (3d ed. 1993) (stating that counsel "should inform the client of his or her pro se briefing rights"); *see also* Minn. R. Crim. P. 28.02, subd. 5(13)-(20) (providing that public defender must provide consultation and cooperation if appellant decides to proceed pro se). If the public defender's office was unreasonably deficient in not advising Weldon about the option of, and requirements for, proceeding pro se, Weldon must then show that the absence of this advice resulted in his failure to file a timely appeal. *See Flores-Ortega*, 528 U.S. at 484, 120 S. Ct. at 1038 (defining prejudice in this context). The current record is insufficient to determine the consequences of the public defender's actions.

I am unable to find any basis in our constitution, statutes, or rules that requires the state public defender's office to pursue a frivolous appeal rather than give professional consultation, review, and advice in order to provide representation. I am also unable to conclude, taking into account this court's precedent, that the district court abused its discretion by dismissing Weldon's claim as untimely. I would therefore affirm the district court's denial of postconviction relief.