STATE OF MINNESOTA

IN SUPREME COURT

A16-1647

Hennepin County

Lillehaug, J.
Dissenting, Stras, McKeig, JJ.

State of Minnesota,

Respondent,

vs.

Filed: January 24, 2018
Office of Appellate Courts

Jamil Joshua Eason,

Appellant.

Lori Swanson, Attorney General, Saint Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota, for respondent.

Bradford Colbert, Legal Assistance to Minnesota Prisoners, Saint Paul, Minnesota, for appellant.

S Y L L A B U S

Because appellant did not have a "review" on direct appeal, the postconviction court erred when it denied appellant's request for appointed counsel for postconviction proceedings.

Reversed and remanded.

O P I N I O N

LILLEHAUG, Justice.

In 2012, Jamil Joshua Eason was convicted of first-degree felony murder. He appealed his conviction, but voluntarily dismissed the appeal after his brief had been filed but before the date set for oral argument. In 2016, Eason filed a pro se petition for postconviction relief, arguing that his trial counsel was ineffective and that the prosecutor improperly refused to renew her initial plea offer. He asked the postconviction court to appoint counsel. The postconviction court referred Eason's request for counsel to the state public defender, which declined to represent him. The postconviction court then summarily denied Eason's petition.

We reverse and remand for the appointment of counsel.

FACTS

In 2012, the State charged Jamil Joshua Eason with first-degree felony murder, Minn. Stat. § 609.185(a)(3) (2016); and second-degree intentional murder, Minn. Stat. § 609.19, subd. 1 (2016). The parties exchanged several plea offers before trial, but failed to reach an agreement.

At trial, the State presented physical evidence linking Eason to the crime, and testimony from a witness who met Eason in jail to establish that, on November 2, 2012, in the course of a burglary of a Minneapolis home, Eason killed the homeowner by stabbing. The jury returned a guilty verdict on the first-degree felony murder charge and a not-guilty verdict on second-degree intentional murder. The district court sentenced Eason to life in prison with the possibility of release after 30 years.

Eason filed a notice of appeal a few months later, and his attorney—an assistant state public defender—filed a 24-page brief on his behalf. But before the State's brief was due, Eason and his attorney filed a notice of voluntary dismissal. The record does not disclose why Eason made the decision to dismiss his appeal. We granted Eason's motion to dismiss. *See* Minn. R. Crim. P. 28.06.

Almost two years later, Eason filed a pro se petition for postconviction relief. Eason's petition argued that his trial counsel was ineffective and that the prosecutor improperly refused to renew her initial plea offer.[1] Eason asked the postconviction court to appoint counsel to represent him in the postconviction proceedings. *See* Minn. Stat. § 590.05 (2016) ("A person financially unable to obtain counsel . . . may apply for representation by the state public defender."). The state public defender's office declined to represent Eason, noting that the office had represented Eason on direct appeal and that he "chose to terminate our representation." The district court then denied Eason's postconviction petition without holding an evidentiary hearing.

Eason appealed and filed a motion asking us to appoint counsel to represent him on appeal. In November 2016, we issued an order stating, "[w]e have not decided whether an appellant, represented in a direct appeal from a judgment of conviction who voluntarily dismisses the appeal before a decision by the court on the merits of the appeal, has 'had a direct appeal of conviction' for purposes of Minn. Stat. § 611.14(2)." We referred Eason's

[1] Eason also argued that there was insufficient evidence in the record to support his conviction, the district court improperly failed to obtain his consent to instruct the jury about his failure to testify, and the district court improperly inserted itself into plea negotiations.

request for counsel to the Chief Appellate Public Defender. In response, she decided to provide representation for Eason's postconviction appeal.

ANALYSIS

The issue in this case is whether Eason's right to counsel under Minn. Stat. § 590.05 (2016) was fully vindicated. Questions of statutory interpretation are reviewed de novo. *See State v. Leathers*, 799 N.W.2d 606, 608 (Minn. 2011). When interpreting a statute, we begin with its plain meaning. *State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017). "If a statute is unambiguous, then we must apply the statute's plain meaning." *Id.* (quoting *Larson v. State*, 790 N.W.2d 700, 703 (Minn. 2010)).

Eason argues that he is entitled to appointed counsel on his postconviction petition under Minn. Stat. § 590.05. He further contends that the postconviction court erred by failing to determine whether his waiver of counsel on direct appeal was competent and intelligent. We agree with his first argument and need not reach the second.

The statute provides that a person financially unable to obtain counsel, such as Eason, who desires to pursue postconviction relief is entitled to representation by the state public defender "if the person has not already had a direct appeal of the conviction." Minn. Stat. § 590.05. The statute implements the right to appellate counsel under Article I, section 6 of the Minnesota Constitution ("The accused shall enjoy the right . . . to have the assistance of counsel in his defense."). In *Deegan v. State*, we held that "a defendant's right to the assistance of counsel . . . . extends to one review of a criminal conviction, whether by direct appeal or a first review by postconviction proceeding." 711 N.W.2d 89, 98 (Minn. 2006). Conversely, "a defendant who has been represented by counsel on direct

appeal has no right under the Minnesota Constitution to the assistance of counsel . . . in a subsequent postconviction proceeding." *Ferguson v. State*, 826 N.W.2d 808, 816 (Minn. 2013).

The question is whether Eason "had a direct appeal" within the meaning of section 590.05. We conclude that he did not. *Deegan* requires one meaningful "review of a criminal conviction" with the assistance of counsel, 711 N.W.2d at 98. As relevant here, "review" means "judicial reexamination (as of the proceedings of a lower tribunal by a higher)." *Webster's Third New International Dictionary of the English Language* 1944 (2002); *see also Review, Black's Law Dictionary* (10th ed. 2014) (defining "review" as "[c]onsideration, inspection, or reexamination of a subject or thing"); *id*. (defining "appellate review" as "[e]xamination of a lower court's decision by a higher court . . . ."); *The New Oxford American Dictionary* 1458 (2001) (defining "review" as "a formal assessment or examination of something with the possibility or intention of instituting change if necessary … a reconsideration of a judgment, sentence, etc., by a higher court or authority"). Applying these definitions, the plain and unambiguous meaning of "review" means that the appellate court must have the opportunity to *reexamine* the case being appealed. The appellate court has the opportunity to reexamine a case when it has been submitted for decision.

We conclude that an appellant's right to assistance of counsel under section 590.05 has been satisfied when the appeal has been submitted to the appellate court for decision. Typically, in our court, a case is submitted for decision when all briefing has been completed and we take the case under advisement at the conclusion of oral argument. In

cases decided without oral argument, an appellant has had a "review" as of the date scheduled for nonoral consideration. *See, e.g.*, Minn. R. Civ. App. P. 134.06 (explaining that a case is deemed "submitted on the briefs" on the date scheduled for nonoral consideration).

Eason's direct appeal was dismissed before briefing was completed and before we scheduled the appeal for consideration. He has not yet had his conviction reviewed. Therefore, he was entitled to an appointed attorney for postconviction proceedings. The postconviction court erred in not granting Eason's request for counsel.

The dissent would draw the line earlier in the process, reading section 590.05 to forbid appointment of counsel when the indigent person has made a previous "request for such an appeal" as part of a "legal proceeding." But the dissent's dictionary definitions do not squarely answer the question here: precisely when in the legal proceeding has the indigent person actually "had" an appeal? Instead, the dissent extrapolates from its definitions to opine that an appellant has "had" an appeal when he has "done enough for the appeal to be decided," which occurs when counsel has filed a brief.

We disagree. A notice of appeal and an opening brief usually are not enough for a court to decide an appeal. Obviously, the State has an opportunity to submit a brief, to which a reply brief may respond. *See* Minn. R. Crim. P. 28.02, subd. 10. Further, on direct appeal, we usually grant oral argument. *See* Minn. R. Crim. P. 29.04, subd. 9 (explaining that oral argument "must be granted" unless we decide otherwise). We often find oral argument helpful. In deciding when the "one review" contemplated by *Deegan* has been

"had," we draw the line when we have what we typically need to decide the legal proceeding: when the case is submitted to the court.[2]

Given our conclusion, the appropriate disposition of the case is to remand it to the postconviction court so that Eason can pursue, with the assistance of counsel, a first review by postconviction proceeding.

CONCLUSION

For the foregoing reasons, we reverse the decision of the postconviction court and remand for appointment of counsel and further proceedings.

Reversed and remanded.

[2] The likelihood of the dissent's concern that convicted persons will use the resource of appointed counsel to file and dismiss petitions *seriatim* is doubtful. That strategy would prevent judicial *relief* which is, after all, usually the goal of a petition for postconviction *relief*. In any event, the right to appointed counsel ought not be denied when the courts have many other tools to deal with serial, game-playing, litigants.

D I S S E N T

STRAS, Justice (dissenting).

The overarching issue presented in this case is the scope of an individual's statutory right to counsel during postconviction proceedings. Eason's appointed appellate counsel filed a 24-page brief on his behalf as part of the direct appeal of his conviction. Shortly after Eason's counsel filed the brief, Eason voluntarily dismissed his direct appeal. Two years later, Eason sought the appointment of counsel once again, this time to challenge his conviction in a postconviction proceeding. The question is whether "person[s] convicted of a crime" are entitled to serially challenge their criminal convictions with the benefit of appointed counsel. Minn. Stat. § 590.01, subd. 1 (2016); Minn. Stat. § 590.05 (2016). The court concludes that they are, so long as they are clever enough to dismiss their appeals before their cases are submitted for decision. I disagree.

Minnesota Statutes § 590.05 provides a narrow right to counsel, entitling a postconviction petitioner to "representation by the state public defender. . . . if the person has not already had a *direct appeal* of the conviction." (Emphasis added.) Rather than focusing on the language of the statute, which is our typical approach in cases involving a statute, the court substitutes the statutory question for a constitutional one. By doing so, the court has redirected the inquiry from whether the individual requesting counsel has had a direct appeal, which is the actual language in the statute, to whether the direct appeal itself was a "meaningful 'review of a criminal conviction' with the assistance of counsel," which is an entirely different question.

Without this substitution, the court cannot finish in the same place. An individual has had a direct appeal once there has been a "request for such an appeal" as part of a "legal proceeding by which a case is brought from a lower to a higher court for rehearing." *Webster's Third New International Dictionary* 103 (2002) (defining "appeal"). Under the plain and ordinary meaning of the word "appeal," therefore, a person has "had a direct appeal of the conviction" when counsel has done enough for the appeal to be decided, which occurs when appointed counsel has filed a brief on the person's behalf.[1] Only by focusing on the extra-statutory word "review," coupled with another extra-statutory word, "meaningful," can the court reach the conclusion that the statutory right is vindicated only at a later point—often months later—when the case is submitted for decision. The statute therefore does not provide the relief that Eason seeks.

I would end the analysis there because, in my view, this case turns on the plain language of the postconviction appointment-of-counsel statute. But even assuming that this case also presents a constitutional question, the court ventures astray on this question

[1] It is true, as the court notes, that the appellate rules allow both for the filing of a reply brief and oral argument, but neither is a necessary component of a direct appeal. A reply brief is optional and commonly waived. *See* Minn. R. Crim. P. 29.03, subd. 4(f); Minn. R. Crim. P. 28.02, subd. 10 (noting that reply briefs *may* be filed in an appeal). Oral argument is similarly elective: it may be waived by "joint agreement" of the parties, forfeited if a party fails to timely file its brief, or the court may decide that oral argument is unnecessary because neither party has requested it. Minn. R. Crim. P. 29.04, subd. 9; *see* Minn. R. Crim. P. 29.03, subd. 4(j). By definition, neither is *required* for an appeal to be decided. In fact, all that is actually required to decide an appeal is the appellant's brief. *See* Minn. R. Civ. App. P. 142.02 (declaring that, if the appellant fails to file its brief, "the appellate court shall order the appeal dismissed"); Minn. R. Civ. App. P. 142.03 (stating that, if the respondent fails to file its brief, "the case *shall be determined on the merits*" (emphasis added)).

as well by failing to differentiate between the two distinct rights involved: the right to counsel and the right to one meaningful review of a criminal conviction. Article I, Section 6 of the Minnesota Constitution guarantees a criminal defendant the right to "the assistance of counsel in his defense." This court has extended the constitutional right to counsel to include a right to appellate counsel in one review of a criminal conviction, either by direct appeal or by petition for postconviction relief, because appellate review is not meaningful without the assistance of counsel. *Deegan v. State*, 711 N.W.2d 89, 98 (Minn. 2006).

Relying on *Deegan*, the court holds that Eason is entitled to counsel in his postconviction proceeding because he did not have "one review" of his conviction in his direct appeal. But not having had one review does not mean that Eason never vindicated his right to counsel. Indeed, *Deegan* itself recognizes that the two rights are interrelated but distinct: the "right to counsel on appeal may be constitutionally guaranteed even where the right to appellate review is not." *Id.* at 97 (citing *Halbert v. Michigan*, 545 U.S. 605, 609–10 (2005), and *Douglas v. California*, 372 U.S. 353, 355–56 (1963)). *Deegan* further makes clear, through its lengthy discussion of *Douglas v. California*, 372 U.S. 353 (1963), that the reason for providing appointed counsel is to give the defendant the benefit of counsel's expertise—through a full review of the record, comprehensive legal research, and skilled drafting of the appellate brief. *Deegan*, 711 N.W.2d at 98 ("[T]he 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." (citing *Douglas*, 372 U.S. at 355–56)).

Under *Deegan*'s reasoning, Eason vindicated his constitutional right to counsel, even though he opted not to see his direct appeal through to the end. There is no dispute

that, on direct appeal, Eason's appointed counsel examined the record, researched the law, and filed a 24-page brief on his behalf. This is all that *Deegan* requires from counsel to make the review meaningful—nothing more, nothing less. Only by conflating the right to counsel with the right to one review can the court reach the remarkable conclusion that an individual's right to counsel has not been vindicated, no matter how much work appellate counsel has done, until at least one appeal has been submitted for decision.

The court's conclusion is remarkable for another reason. In its search for what it means for a review to be meaningful, the court selects an arbitrary cut-off point: the submission of the case for decision. Before that point, the court reasons, there has been no review, at least not a meaningful one. Yet after that point, even if the reviewing court never makes a decision, the review is somehow meaningful. The court's analysis, however, is inconsistent with the definition of the word "review," which suggests that a review does not occur at all—much less a meaningful one—until an actual "reexamination" takes place. *Webster's Third New International Dictionary* 1944 (2002); *see also The American Heritage Dictionary of the English Language* 1503 (5th ed. 2011) (defining "review" in the legal context as "[a]n *evaluation* conducted by a higher court of a decision made or action taken by a lower court to determine whether any error was made" (emphasis added)). The court's incongruent reasoning suggests that the arbitrary cut-off point it selected—the time of submission—may be more of an effort at cabining the effects of its own rule, including the real possibility of gamesmanship, than a serious examination of when individuals have received a meaningful review of their convictions.

This leads to my final point. The decision here is more than just an academic exercise; it has real-world consequences. By holding that Eason's right to counsel has not been vindicated, the court encourages gamesmanship and strains judicial resources. A person convicted of a crime may now file a brief with the benefit of counsel, dismiss the appeal, and yet proceed to have the benefit of appointed counsel on as many petitions for postconviction relief as he or she would like, so long as each appeal is dismissed prior to submission. In fact, under a time-of-submission rule, one could theoretically wait all the way to the point of oral argument and then dismiss the appeal if the argument is not going well. Such a rule defies common sense.

Accordingly, I would conclude that Eason fully vindicated his right to counsel when his appellate counsel filed a brief on his behalf as part of his direct appeal. He was therefore not entitled to the benefit of appointed counsel again in his postconviction proceeding. *See* Minn. Stat. § 590.05; *Ferguson v. State*, 826 N.W.2d 808, 816 (Minn. 2013) ("[A] defendant who has been represented by counsel on direct appeal has no right under the Minnesota Constitution to the assistance of counsel . . . in a subsequent postconviction proceeding.").

I therefore respectfully dissent.

MCKEIG, Justice (dissenting).

I join in the dissent of Justice Stras.