

**FILED: August 29, 2012**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

ROBERT LEWIS HENLEY,  
Petitioner-Appellant,

v.

RICK COURSEY,  
Superintendent,  
Eastern Oregon Correctional Institution,  
Defendant-Respondent.

Umatilla County Circuit Court  
CV101500

A149491

Linda Louise Bergman, Senior Judge.

Submitted on July 19, 2012.

James N. Varner filed the brief for appellant.

John R. Kroger, Attorney General, Anna M. Joyce, Solicitor General, and Doug M. Petrina, Senior Assistant Attorney General, filed the brief for respondent.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Hadlock, Judge.

PER CURIAM

Reversed and remanded.

1 PER CURIAM

2 Petitioner appeals a judgment denying his petition for post-conviction  
3 relief, in which he alleged that he was denied constitutionally adequate assistance of  
4 counsel, in part because trial counsel failed to file a direct appeal despite petitioner's  
5 request to do so. Petitioner asserts on appeal that the post-conviction court erred in  
6 denying post-conviction relief on that ground. In reviewing petitioner's assignment of  
7 error, we are bound by the post-conviction court's findings of fact if they are supported  
8 by evidence in the record. *Snodgrass v. Lampert*, 210 Or App 390, 395, 150 P3d 1109,  
9 *rev den*, 342 Or 633 (2007).

10 In ruling on petitioner's claim for post-conviction relief, the court made the  
11 following finding:

12 "[Petitioner] says to [his trial attorney], 'I want to appeal.' And [the trial  
13 attorney] says, 'You have to call my office. You have to give the  
14 information to the secretary, and she'll get it started.' And then [petitioner]  
15 admits he never made the call. He never called the secretary to get things  
16 started."

17 In view of that finding, the court concluded that petitioner was not entitled to relief and  
18 declined to resolve an additional factual dispute presented by the parties.

19 However, the evidence does not support the post-conviction court's factual  
20 finding. At the end of the sentencing hearing in the underlying criminal proceeding, the  
21 following exchange occurred:

22 "[Trial counsel]: If you do, all you do is -- all you have to do is  
23 appeal.

24 "\* \* \* \* \*

1                    "[Trial counsel]: All you have to do is call my office and tell us that  
2                    you want to appeal. Okay?

3                    "[Defendant]: I want an appeal.

4                    "[Trial counsel]: All right. We'll (INAUDIBLE). Thank you,  
5                    Judge."

6                    Thus, although the post-conviction court found that when petitioner said that he wanted  
7                    to appeal, trial counsel responded by instructing petitioner to call counsel's office, that  
8                    finding is at odds with the evidence in the record. Instead, the evidence is that counsel  
9                    assured petitioner that if he wanted to appeal he just needed to call the office and tell  
10                    them, petitioner immediately informed counsel that he did want to appeal, and counsel  
11                    responded by saying, "All right." Because there is no evidence to support the factual  
12                    finding underlying the post-conviction court's ruling, we must reverse the judgment and  
13                    remand the case to the post-conviction court.

14                    Reversed and remanded.