In the Court of Appeals of the State of Alaska

Christopher Cleveland, Appellant, v. **State of Alaska**, Appellee.	Court of Appeals No. **A-13181/A-13182**
Calvin D Akeya, Appellants, v. **State of Alaska,** Appellee.	**Order** Date of Order: **6/14/2019**

Trial Court Case No. **2KB-15-00419CR & 2NO-14-00193CR**

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges.

Christopher Cleveland and Calvin Akeya have filed motions requesting that this Court accept their late-filed appeals based on the ineffective assistance of their trial counsel, Robert Noreen. Mr. Noreen has admitted under oath that he failed to file a timely notice of appeal in both cases despite being requested to do so by each defendant.

In our prior order dated April 22, 2019, this Court concluded that Cleveland and Akeya had set forth a *prima facie* case of ineffective assistance of counsel under *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). The Court further concluded that Cleveland and Akeya were entitled to the relief they sought, assuming that the assertions of fact contained in the pleadings remained uncontested. We also concluded that we had the

authority to grant that relief, notwithstanding the 60-day window contemplated by Alaska Appellate Rule 521.

The Court then informed the parties that absent notice from the State that it intended to contest the underlying facts regarding the attorney's neglect in these cases (as contained in the pleadings in Cleveland's and Akeya's motions to accept late appeals), the Court intended to accept these late-filed appeals.

In response, the State filed a notice that it intends to contest the underlying facts, and the State requests that we remand the cases to the superior court with instructions to convert the motions to accept late-filed appeal into applications for post-conviction relief so that those facts may be litigated through the post-conviction relief process.

Accordingly, **IT IS ORDERED**:

1. Referral to the Superior Court. These cases are remanded to the superior court with directions to convert the motions to accept late-filed appeals into applications for post-conviction relief. We direct the Appellate Clerk's Office to transmit a copy of the files in these cases to the superior court.

At the request of Cleveland and/or Akeya, the superior court shall bifurcate the attorney neglect issue (*i.e.*, whether attorney neglect resulted in the late-filed appeals) from any other post-conviction relief issues that Cleveland or Akeya may wish to pursue, and the court shall stay litigation on the remaining claims. The court shall expedite action on the attorney neglect claims related to the late-filed appeals.

This Court anticipates that these claims will proceed directly to an evidentiary hearing without additional motion practice. Unless the superior court

otherwise orders, no additional filings shall be required.

2. Additional guidance. Because these applications for post-conviction relief need to be litigated and resolved on an expedited basis, we provide the following additional guidance to the superior court.

Under *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), it is *per se* ineffective assistance of counsel for an attorney to fail to file a notice of appeal in a criminal case if the defendant timely requested an appeal. Because filing a notice of appeal is a "purely ministerial task," a defendant who instructs counsel to initiate an appeal "reasonably relies upon counsel to file the necessary notice." *Id.* at 477.

The remedy for this *per se* ineffective assistance of counsel is to reinstate the appeal. *Id.* at 484; *see also Broeckel v. State*, 900 P.2d 1205, 1208 (Alaska App. 1995). To obtain this remedy, a defendant need not demonstrate that he would have been able to raise meritorious issues on appeal. *Flores-Ortega*, 528 U.S. at 486.

The right at stake in these cases is a defendant's right to first-tier appellate review. *See Stone v. State*, 255 P.3d 979, 982 (Alaska 2011) ("[F]irst-tier review differs from subsequent appellate stages 'at which the claims have once been presented by [appellate counsel] and passed upon by an appellate court.'") (quoting *Halbert v. Michigan*, 545 U.S. 605, 609-10 (2005)).

Under AS 12.72.020(a)(3)(A), a criminal defendant who does not file a direct appeal has eighteen months after entry of the judgment of conviction to file a post-conviction relief application. This deadline does not present an issue for Cleveland, because his notice of appeal — which we are converting to a post-conviction relief application — was filed within eighteen months after the entry of his judgment of conviction. But the superior court may need to address this issue in Akeya's case.

This Court has previously recognized that due process and fundamental fairness may, under certain circumstances, require relaxation of the post-conviction relief statutory deadline.

Under federal law, a defendant is entitled to equitable tolling if he shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010) (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). The egregious misconduct of an attorney can qualify as "extraordinary circumstances." *Id.* at 652-54. The diligence required for equitable tolling purposes is "reasonable diligence," not "maximum feasible diligence." *Id.* at 653 (quoting *Starns v. Andrews*, 524 F.3d 612, 618 (5th Cir. 2008)).

3. Judicial notice. We take judicial notice that filing a timely notice of appeal in the Alaska Court of Appeals is a simple matter. The trial court may similarly take judicial notice of this fact. Although an appellate attorney must ultimately file a designation of transcript and a notice of points on appeal, those documents are not required to initiate the appellate process and ensure a timely notice of appeal. Instead, a party may lodge an appeal by filing a docketing statement along with a copy of the judgment, and may seek an extension to file the remaining documents. *See* Alaska R. App. P. 204(b). (Indeed, even after filing the notice of points on appeal, the attorney may later amend the points through what is generally considered a *pro forma* motion.) The appeal is deemed to be filed on the date on which it is first docketed.

The superior court may also take judicial notice of Standing Order No. 12, which addresses the significant briefing delays that currently exist at the Court of

Appeals.[1] Currently, the Standing Order No. 12 schedule permits an appellant's attorney to extend the initial 30-day briefing deadline for filing the opening brief by up to 390 days. It also permits the appellee's attorney to extend the appellee's 30-day briefing period for filing the appellee's brief by up to 200 days. Extension requests beyond the limits imposed by Standing Order No. 12 require a showing of extraordinary circumstances.

In a felony merit appeal, an appellant's attorney has the right to file a reply brief within 20 days of the filing of the appellee's brief (with any extension request governed by the standard rule governing extensions of time for filing briefs, Appellate Rule 503.5). *See* Alaska Appellate Rule 212(a)(1)(A).

The superior court should be aware that, given the length of briefing delays and the Court's own backlog, it is not unusual for a criminal appeal to take more than two years to resolve. It is also not unusual for the first substantive brief in an appeal — the appellant's brief — to be filed well over a year after the notice of appeal was docketed.[2]

4. Conclusion. Because we are converting Cleveland's and Akeya's motions to post-conviction relief applications and remanding their cases to the superior

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[1] See Court of Appeals Standing Order No. 12 (Feb. 6, 2015), *available at*: https://public.courts.alaska.gov/web/jord/docs/coa-order12.pdf.

[2] Even before the first due date for the appellant's opening brief, the record and transcript must be prepared — a process that takes up to 40 days. *See* Alaska R. App. P. 210(e)(1). Once the record is certified, the appellant then generally has 30 days to file the opening brief. *See* Alaska R. App. P. 212(a)(1)(A). At that point, the appellant may request an extension, and this extension limit (390 days for the appellant's opening brief) is governed by Standing Order No. 12.

court for this litigation, we direct the Appellate Clerk's Office to close these files. If the superior court grants relief to Cleveland and/or Akeya, they may move to reopen these appeals, or file the necessary paperwork to initiate a new appeal.

WOLLENBERG, Judge, concurring.

The State opposed Cleveland's and Akeya's motions to accept their late-filed appeals. In short, the State argued that this Court has no authority to accept a notice of appeal that is more than 60 days late — and that the question of whether the delay is due to ineffective assistance of counsel must always be litigated in a post-conviction relief proceeding. The logical extension of the State's argument is that this Court lacks the authority to accept a notice of appeal filed even one day beyond the 60-day deadline, even when the attorney neglect is clear — an outcome that is inconsistent with past positions taken by the State and would seemingly add unnecessary additional delay.

Cleveland's and Akeya's cases are distinct, however, by virtue of the length of the delay in filing the notices of appeal. Thus, while it appears that the attorney neglect in this case is egregious and the delay inexplicably inconsistent with the "purely ministerial task" of filing a notice of appeal,[3] I also agree with the Court that, given the State's opposition, it is appropriate in these cases for the factual record related to the delay to be further developed in the superior court.

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[3] *See Garza v. Idaho*, 139 S.Ct. 738, 745 (2019) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000)).

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