7-19-2016

Garza v. State Appellant's Brief Dckt. 44015

IN THE SUPREME COURT OF THE STATE OF IDAHO

GILBERTO GARZA JR.,	)	
	)	**NOS. 44015 & 44016**
Petitioner-Appellant,	)	
	)	**ADA COUNTY NOS. CV 2015-10589 &**
v.	)	**CV 2015-10597**
	)	
STATE OF IDAHO,	)	**APPELLANT'S BRIEF**
	)	
Respondent.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE JASON D. SCOTT
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Eight federal circuit courts have held that the U.S. Supreme Court's decision in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), compels the conclusion that an attorney who ignores his or her client's request for an appeal is ineffective, regardless of whether the client waived his right to appeal as part of a plea agreement. Mr. Garza waived his right to appeal as part of his pleas to aggravated assault and possession of a controlled substance with the intent to distribute, but told his attorney to appeal anyway. His attorney declined to do so. Mr. Garza then filed petitions for post-conviction relief, alleging his attorney was ineffective for failing to appeal. The district court rejected the majority view that a client is prejudiced in such a circumstance, and instead denied Mr. Garza's petitions after concluding that he did not present any non-frivolous grounds for his appeals. Because the only required showing of prejudice is that, but for the attorney's refusal, the client would have appealed, the court erred by dismissing Mr. Garza's petitions. This Court should remand to the district court with an order that it grant Mr. Garza's petitions so that he can pursue his appeals.

Statement of Facts and Course of Proceedings

This consolidated appeal involves two underlying convictions and two post-conviction petitions. In Ada County Case No. CR-2014-9960, Mr. Garza entered an *Alford*[1] plea to aggravated assault (the "assault case"). (R., pp.101–12.) In the binding Idaho Criminal Rule 11(f)(1)(C) plea agreement, Mr. Garza "waive[d] his right to appeal and waive[d] his right to request relief pursuant to ICR 35." (R., p.104.) In the guilty plea advisory form, Mr. Garza

[1] *See North Carolina v. Alford*, 400 U.S. 25 (1970).

checked "yes" when asked if he had waived his right to appeal his judgement of conviction and sentence as part of his plea agreement. (R., p.109.) At the entry of plea hearing, the court did not discuss whether Mr. Garza was waiving his right to appeal. (*See generally* R., pp.124–27.)

In Ada County Case No. CR-2014-18183, Mr. Garza pled guilty to possession of a controlled substance with the intent to distribute (the "possession case").[2] (R., pp.89–100.) In the binding Idaho Criminal Rule 11(f)(1)(C) plea agreement, Mr. Garza "waive[d] his right to appeal and waive[d] his right to request relief pursuant to ICR 35." (R., p.91.) In the guilty plea advisory form in this case, unlike in the assault case, Mr. Garza checked "no" after the question "[h]ave you waived your right to appeal your judgement of conviction and sentence as part of your plea agreement?" (R., p.97.) At the entry of plea hearing, the court did not discuss whether Mr. Garza was waiving his right to appeal. (*See generally* R., pp.128–30.)

At a joint sentencing hearing on both cases, the district court accepted the plea agreements and sentenced Mr. Garza to consecutive sentences of five years, with two years fixed, in the assault case, and five years, with one year fixed, in the possession case. (R., pp.89, 101, 113–21, 132 (Tr., p.32, L.9–p.45, L.1)). The court acknowledged that Mr. Garza had waived his right to appeal, but both the prosecutor and the court agreed that the court should still advise Mr. Garza of his appeal rights, and the court did so. (R., p.132 (Tr., p.35, Ls.6–21).) The court also informed Mr. Garza of his right to appeal in the judgments of conviction. (R., pp.115, 118, 121.)

[2] These pleas were part of a global agreement which included a third case, Ada County Case No. CR-2014-9959, and other unfiled charges. Mr. Garza was to plead guilty to three misdemeanors in Case No. CR-2014-9959; the State dismissed part II of the informations in the assault and possession cases, agreed not to file a new case charging Mr. Garza with burglary and grand theft, and agreed not to proceed on any persistent violator enhancements; and an agent with the Bureau of Alcohol, Tobacco, and Firearms agreed not to refer Mr. Garza for federal prosecution for possessing ammunition. (R., pp.90, 102.)

Mr. Garza then filed two petitions for post-conviction relief.[3] (R., pp.5, 205.) Among other things, both petitions alleged his trial attorney was ineffective for not filing notices of appeal. (R., pp.6–7, 10–11, 206–07, 210.) He asserted in his affidavit related to the possession case that he asked his attorney to appeal the case (R., p.10), and in his affidavit related to the aggravated assault case he said his attorney "failed to file an appeal within 42 day limit after I continuously reminded him via phone calls and letters" (R., p.210). As relief, he asked that the court run his sentences concurrently. (R., pp.7, 207.)

The court appointed an attorney to represent Mr. Garza and issued a notice of its intent to dismiss all but one of Mr. Garza's claims. (R., pp.26–34, 226–235.) After both parties responded to the court's notice (R., pp.42–44, 57–60, 243–44, 258–61), the court dismissed all of Mr. Garza's claims except the claim of ineffective assistance regarding the notices of appeal. (R., pp.62–65, 263–66.) The dispute from that point forward focused on (1) whether Mr. Garza's attorney was deficient for failing to file the appeal; (2) whether Mr. Garza needed to present non-frivolous grounds for appeal in order to prove prejudice; and (3) what issues Mr. Garza could raise on appeal. (R., pp.75–85, 158–62, 172–82, 273–89, 367–77.) The parties appear to have agreed on the important facts. (R., pp.148, 352 (an affidavit of Mr. Garza's trial counsel, submitted by the State, explaining: "Mr. Garza indicated to me that he knew he agreed not to appeal his sentence(s) but he told me he wanted to appeal the sentence(s) of the court. Mr. Garza received the sentence(s) he bargained for in his ICR 11(f)(1)(c) Agreement. I did not file the appeal(s) and informed Mr. Garza that an appeal was problematic because he waived his right to appeal in his Rule 11 agreements.").)

[3] The petitions are largely identical, and their differences do not matter to this appeal. The two petitions were never consolidated, but it appears that, with the exception of the initial petitions filed on June 22, 2015, the filings in each case are identical.

The court decided that Mr. Garza needed to present non-frivolous grounds for appeal in order to show prejudice, and therefore had not shown his attorney was ineffective. (R., pp.183–92.) It began by explaining that:

> The parties agree on the following key facts: (i) Garza entered into I.C.R. 11(f)(1)(C) plea agreements in which he waived the right to appeal; (ii) he asked his trial counsel to file appeals, despite having received the bargained-for consecutive sentences and despite having waived his right to appeal; and (iii) because of the appeal waivers, his trial counsel declined to act on his request to file appeals.

(R., pp.187, 382.) Therefore, there was no factual dispute for the court to resolve. (*Id.*)

The court's decision focused on the second prong of *Strickland v. Washington*, 466 U.S. 668 (1984): Whether Mr. Garza needed to present non-frivolous grounds for appeal in order to prove prejudice, or whether he could prove prejudice by merely showing that, absent his attorney's refusal to file a notice of appeal, he would have done so.[4] (R., pp.188–91, 383–84.) The court next recognized that the question is undecided in Idaho;[5] eight federal circuit courts have concluded that a client is prejudiced when his attorney ignores his request for an appeal, even if the client waived his right to appeal; and two federal circuit courts, as well as the district courts within a third circuit, had concluded that it is not ineffective assistance for an attorney to refuse to file a notice of appeal when the client had waived that right. (R., pp.188–89, 383–84.) But the court believed that the minority rule was "better reasoned" and therefore held that a client who has waived his appellate rights must affirmatively show non-frivolous grounds for

[4] The court noted that typically it is deficient performance for an attorney to fail to file a notice of appeal when the client requests one. (R., p.189 n.2, 384 n.2.)

[5] The Court of Appeals, in an unpublished decision, has held that an attorney was not ineffective for not filing a notice of appeal where the plea agreement waived the right to appeal, there was no evidence that the State breached the plea agreement, and the plea was knowing, intelligent, and voluntary. *Garcia v. State*, No. 41248, 2014 WL 7013214 (Idaho Ct. App. Dec. 12, 2014); *see also* R., pp.188, 383.

appeal to prove prejudice. (R., pp.190–91, 384–86.) The court went on to explain that Mr. Garza had not met that burden (R., pp.191, 386), and denied his petitions (R., pp.194, 389).

Mr. Garza timely appealed. (R., pp.196–97, 391–92).

ISSUE

Did the district court err by denying Mr. Garza's petition because, regardless of the appeal waiver in this case, Mr. Garza's attorney was ineffective by refusing to file an appeal even though Mr. Garza requested one?

ARGUMENT

The District Court Erred By Denying Mr. Garza's Petition Because, Regardless Of The Appeal Waiver In This Case, Mr. Garza's Attorney Was Ineffective By Refusing To File An Appeal Even Though Mr. Garza Requested One

A petition for post-conviction relief is civil in nature. *State v. Dunlap*, 155 Idaho 345, 361 (2013). The district court can summarily dismiss or grant a petition for post-conviction relief if "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." I.C. § 19-4906(b), (c). This Court freely reviews whether the facts meet constitutional standards. *Dunlap*, 155 Idaho at 361.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. "[T]he right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). For a client to succeed on an ineffective assistance of counsel claim, he must generally show that (1) his attorney's performance did not meet "an objective standard of reasonableness," and (2) his attorney's substandard performance prejudiced him. *Id.* at 687–88.

Neither the Idaho Supreme Court nor the U.S. Supreme Court have squarely decided whether an attorney is ineffective for failing to appeal a case in which the defendant requested an appeal despite having waived the appeal as part of a plea agreement. But the U.S. Supreme Court's decision in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), indicates that, in such a situation, the attorney is deficient and prejudice is presumed. Indeed, eight of the ten federal circuit courts that have considered this question have held that, regardless of a waiver, *Flores-Ortega* compels that conclusion.

The district court erred by denying Mr. Garza's petition. It is undisputed that Mr. Garza told his attorney to appeal, but his attorney declined to do so. Therefore, Mr. Garza's attorney performed deficiently and prejudiced Mr. Garza. Because there is no factual dispute for the district court to resolve, Mr. Garza asks that this Court remand to the district court with an order that it grant Mr. Garza's petition.

A. Mr. Garza's Attorney Performed Deficiently By Failing To File An Appeal When Mr. Garza Instructed Him To Do So

The *Flores-Ortega* Court set forth the framework for determining whether an attorney was ineffective for failing to appeal a case. As to the first *Strickland* prong, the Court reiterated that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable," and thus performs deficiently. *Flores-Ortega*, 528 U.S. at 477; *see also Beasley v. State*, 126 Idaho 356 (Ct. App. 1994). Although the client in *Flores-Ortega* had not waived his right to appeal, eight federal circuit courts have concluded that it is deficient performance for an attorney to ignore his or her client's desire to appeal, regardless of an appeal waiver. *See Campbell v. United States*, 686 F.3d 353, 357–59 (6th Cir. 2012); *Watson v. United States*, 493 F.3d 960, 963–64 (8th Cir. 2007); *United States v. Tapp*, 491 F.3d 263, 265–66 (5th Cir. 2007); *United States v. Poindexter*, 492 F.3d 263, 269 (4th Cir. 2007); *Campusano v. United States*, 442 F.3d 770, 773 (2d Cir. 2006); *Gomez-Diaz v. United States*, 433 F.3d 788, 791–93 (11th Cir. 2005); *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1196–98 (9th Cir. 2005); *United States v. Garrett*, 402 F.3d 1262, 1265–67 (10th Cir. 2005).

As explained by the Fourth Circuit,

> [T]he Court in *Flores-Ortega* stated that, once an attorney is unequivocally instructed to file a timely notice of appeal, he is under an obligation to do so.

> *Flores-Ortega*, 528 U.S. at 477. Under the Court's holding in that case, it is only when the defendant either does not make his appellate wishes known or does not clearly express his wishes that an attorney has some latitude in deciding whether to file an appeal. *Id.* at 478–80. *Simply put, Flores-Ortega reaffirms the time-honored principle that an attorney is not at liberty to disregard the appellate wishes of his client*. *See Peguero v. United States*, 526 U.S. 23, 28 (1999) ("[W]hen counsel fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit."); *Rodriquez v. United States*, 395 U.S. 327 (1969) (holding that an attorney who disregards his client's instruction to file a timely notice of appeal acts in a professionally unreasonable manner).

Poindexter, 492 F.3d at 269 (internal citations reformatted, emphasis added); *see also Sandoval-Lopez*, 409 F.3d at 1197 (explaining that if a client "explicitly told his lawyer to appeal his case and his lawyer refused, then we are required by *Flores-Ortega* to conclude that it was deficient performance not to appeal."). Indeed, many of these circuit courts, citing to *Flores-Ortega*, treated deficient performance as foregone conclusion. *See Watson*, 493 F.3d at 963; *Tapp*, 491 F.3d at 265–66; *Campusano*, 442 F.3d at 773; *Gomez-Diaz*, 433 F.3d at 792–93; *Garrett*, 402 F.3d at 1267. Admittedly, "[t]his proposition may amount to saying 'it is ineffective assistance of counsel to refuse to file a notice of appeal when your client tells you to, even if doing so would be contrary to the plea agreement and harmful to your client,' but that is the law on filing a notice of appeal." *Sandoval-Lopez*, 409 F.3d at 1197.

In this case, it is undisputed that Mr. Garza asked his attorney to file a notice of appeal and that his attorney did not do so. (R., pp.186–87, 352, 381–82.) Under *Flores-Ortega*, and the vast majority of federal circuits applying *Flores-Ortega* to cases involving appeal waivers, that was deficient performance.

B. Mr. Garza Was Prejudiced Because, Absent His Attorney's Refusal To File A Notice Of Appeal, He Would Have Appealed His Case

As to the second *Strickland* prong, the *Flores-Ortega* Court held that a client need only show that, "but for counsel's deficient conduct, he would have appealed." *Flores-Ortega*, 528 U.S. at 486. This is because, in such situations, "the violation of the right to counsel rendered the proceeding presumptively unreliable or entirely nonexistent." *Id.* at 484. "[I]t is unfair to *require* an indigent, perhaps *pro se,* defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal." *Id.* at 486. Therefore, a client need not make any additional showing of prejudice. He instead satisfies the second prong by merely showing that he actually requested that his attorney appeal, or by "demonstrat[ing] that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.* at 484.

Relying on *Flores-Ortega*, eight federal circuit courts have held that a client who waived his right to appeal must only show that he instructed his attorney to appeal in order to prove prejudice under the second prong of *Strickland*.[6] *See Campbell*, 686 F.3d at 357–60; *Watson*,

[6] A handful of these cases involved partial waivers, but it does not appear that their conclusion would have been different if the client waived the right to appeal generally. *See Poindexter*, 492 F.3d at 269–73 (in which the defendant waived the right to challenge only his sentence, but the court framed its holding and explained its reasoning in terms of appeal waivers generally, not just limited waivers); *Gomez-Diaz*, 433 F.3d at 793 ("If the evidence establishes either that Petitioner's attorney acted contrary to his client's wishes, or that he failed to fulfill his duty to attempt to determine his client's wishes, prejudice is to be presumed, and Petitioner is entitled to an out-of-time appeal, regardless of whether he can identify any arguably meritorious grounds for appeal that would fit one of the exceptions contained in his appeal waiver."); *Garrett*, 402 F.3d at 1266 ("[m]ost courts . . . have held that a defense attorney does not render ineffective assistance by failing to file a notice of appeal where the defendant has effectively waived his right to appeal. This proposition cannot be reconciled with the Supreme Court's holding in *Flores-Ortega* . . . . In fact, whether or not Mr. Garrett instructed his attorney to file a notice

493 F.3d at 964; *Tapp*, 491 F.3d at 265–66; *Poindexter*, 492 F.3d at 269–72; *Campusano*, 442 F.3d at 774–75; *Gomez-Diaz*, 433 F.3d at 793–94; *Sandoval-Lopez*, 409 F.3d at 1197–98; *Garrett*, 402 F.3d at 1266–67. In other words, "[t]he prejudice in failure to file a notice of appeal cases is that the defendant lost his chance to file the appeal, not that he lost a favorable result that he would have obtained by appeal." *Sandoval-Lopez*, 409 F.3d at 1197. This is because

> the presumption of prejudice in post-waiver cases "is not a matter of formalistic compliance with a technical rule merely postponing the inevitable denial of relief on the merits. Rather, it serves to safeguard important interests with concrete and potentially dispositive consequences which can be guaranteed only by the direct-appeal process and the concomitant right to counsel."

Campusano, 442 F.3d at 776 (quoting *Garrett*, 402 F.3d at 1265–66). This showing of prejudice applies regardless of the scope of the waiver. *See Campbell*, 686 F.3d at 358 ("even the broadest waiver does not absolutely foreclose some degree of appellate review"); *Sandoval-Lopez*, 409 F.3d at 1195 (granting the client's request for relief, even though the waiver before it was "about as solid a waiver of the right to appeal as can be imagined"); *Tapp*, 491 F.3d at 266 ("[T]he rule of *Flores-Ortega* applies even where a defendant has waived his right to direct appeal and collateral review."); *Campusano*, 442 F.3d at 775 ("Our precedents take very seriously the need to make sure that defendants are not unfairly deprived of the opportunity to appeal, even after a waiver appears to bar appeal.").

Further, the various policy justifications for the two different standards of prejudice favor requiring only a showing that the client would have appealed but for the attorney's failure to file a notice of appeal. First, it is a client's decision whether to appeal, regardless of whether the attorney believes it is in the client's best interest. *See* I.R.P.C. 1.2(a). Declining to find

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of appeal is the crux of his [28 U.S.C] § 2255 case.") (internal citation and quotation marks omitted).

prejudice in such a situation would undermine "the principles of the Sixth Amendment by allowing attorneys who believe their clients' appeals to be frivolous simply to ignore the clients' requests to appeal." *Campusano*, 442 F.3d at 776. Second, the slim odds of a client who had waived his right to appeal actually prevailing on that appeal does not justify denying collateral relief. As the Second Circuit explained,

> applying the *Flores–Ortega* presumption to post-waiver situations will bestow on most defendants nothing more than an opportunity to lose. . . . But rare as they might be, such cases are not inconceivable, and we do not cut corners when Sixth Amendment rights are at stake. A defendant who executes a waiver may sign away the right to appeal, but he or she does not sign away the right to the effective assistance of counsel.
>
> We decline to adopt a rule that would allow courts to review hypothetical appeals as a substitute for real appeals that have been blocked by attorney error.

Campusano, 442 F.3d at 777; *see also Poindexter*, 492 F.3d at 272 ("At the time he executed the plea agreement, it cannot be said that, by agreeing to waive his right to appeal his sentence, Poindexter was agreeing to waive the right to the effective assistance of counsel in pursuing an appeal."). Third, holding an evidentiary hearing to determine whether a client in fact instructed his attorney to file a notice of appeal is less complicated and more efficient than having a collateral-review court attempt to determine the merits of every possible ground for appeal. *See Poindexter*, 492 F.3d at 272–73. That duty should be left to the appellate court. Finally, the State still gets the benefit of its bargain if a defendant who waived his right to appeal nevertheless files a notice of appeal. The State can hold the waiver against the defendant to dismiss the appeal, or can argue that the defendant breached the plea agreement thus relieving the State of its obligations under the plea. *See id.* at 271.

Flores-Ortega indicates, and the majority of federal circuit courts have held, that an attorney who ignores a client's request for an appeal is ineffective, regardless of whether the client waived his right to appeal. Mr. Garza met his burden of proving deficient performance

and prejudice because, but for his attorney's refusal, he would have appealed his cases. The district court erred by requiring a greater showing of prejudice, and by in turn denying Mr. Garza's petitions.

CONCLUSION

Mr. Garza respectfully asks this Court to remand to the district court with an order that it grant Mr. Garza's petitions so that he can appeal his cases.

DATED this 19th day of July, 2016.

_____/s/_____
MAYA P. WALDRON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of July, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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_____/s/_____
EVAN A. SMITH
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MPW/eas»