

No. **21-7539**

Supreme Court, U.S.
FILED

DEC 27 2021

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN PHILLIP HIGLEY – PETITIONER

vs.

KEVIN HARVANEK (WARDEN) – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

ORIGINAL

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QUESTIONS PRESENTED

- 1) Did the Oklahoma Court of Criminal Appeals violate Mr. Higley's 14th Amendment right to Due Process by:
 - a) Affirming the District Court's decision denying Mr. Higley's Application for Appeal Out of Time without holding an evidentiary hearing to afford Mr. Higley the opportunity to present evidence that he was denied the opportunity for a Direct Appeal through no fault of his own?
 - b) Concurring with the District Court's opinion in which the Court did not present any finding of facts or case law to refute Mr. Higley's allegations that he was denied a Direct Appeal through no fault of his own?
- 2) Did the Oklahoma Court of Criminal Appeals violate Mr. Higley's 6th Amendment right to Counsel by:
 - a) Affirming the District Court's decision denying Mr. Higley's Application for Appeal Out of Time without addressing the merits to Mr. Higley's claim to ineffective assistance of counsel?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page

RELATED CASES

Higley v. State, CF-2017-371, Delaware Country District Court, Judgment entered May 20, 2021. (Order Denying Application for Post-Conviction Seeking an Order for Recommendation of an Appeal Out of Time)

Higley v. State, PC-2021-663, Oklahoma Court of Criminal Appeals, Judgment entered September 28, 2021. (Oklahoma Court of Criminal Appeals Order Denying Application for Post-Conviction Seeking an Order for Recommendation of an Appeal Out of Time)

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals appears at Appendix A to the petition and is unpublished.

The opinion of the Delaware County District Court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the Oklahoma Court of Criminal Appeals decided my case was September 28, 2021.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 1257 (Jurisdiction)

22 O.S. § 1080

STATEMENT OF THE CASE

Petitioner was interviewed on November 27, 2017 by Det. Tracy Shaw of the Delaware County Sheriff's Department and Trooper Bobby Raines of the Oklahoma Highway Patrol in regards to the reported accusations of sexual abuse of R.F. Petitioner was arrested on the alleged rape of Brook Johnson. Petitioner was advised there were more charges pending based on the accusations of the sexual abuse of R.F. Approximately 4 days later, Petitioner was met by Det. Shaw whom presented Petitioner with a charge of First Degree Rape of R.F., this charge was later changed to Lewd Molestation without explanation.

Petitioner went to Preliminary hearing in March of 2018 where the charge of Second Degree Rape against Brook Johnson was dismissed by the state. The State requested the hearing to be rescheduled due to the unavailability of Trooper Bobby Raines, to which Petitioner's indigent counsel agreed. At the second preliminary hearing, Petitioner's indigent defense counsel advised Mr. Higley he should waive the preliminary hearing due to the fact that he "was just going to be bound over for trial." Mr. Higley being ignorant of law, agreed with indigent defense counsel, waived the preliminary hearing, and continued towards trial. Petitioner's mother, Ann Higley, hired attorney Jason Smith (counsel) in an attempt to prevent a miscarriage of justice, before Mr. Higley's Felony docket hearing. Petitioner attended the Felony Disposition Docket in January of 2019, where he was scheduled for a Bench Trial in April 2019. Petitioner's counsel rescheduled the Bench Trial from April to July for reasons unknown to Petitioner.

Mr. Higley attended Bench Trial proceedings on July 2, 2019. On the second day of trial, Mr. Higley was advised by counsel to waive the rest of the proceedings and proceed with a Blind Plea or accept the state's offer of 15 years in D.O.C. custody with 10 years suspended. Mr.

Higley reluctantly agreed to the blind plea hearing after extremely minimal deliberation. On August 29, 2019, Petitioner was sentenced after the presentence investigation hearing, to 25 years D.O.C. custody with all but the first 20 years suspended.

Mr. Higley filed an Application for Recommendation for an Appeal Out of Time to the Delaware County District Court on March 25, 2021. The State of Oklahoma responded to Mr. Higley's application on May 17, 2021. The Court denied Mr. Higley's application on May 20, 2021. Mr. Higley filed an Application for Recommendation for an Appeal Out of Time to the Oklahoma Court of Criminal Appeals on June 17, 2021, in accordance with Rule 4.2(D) of the Oklahoma Court Rules and Procedures. The Oklahoma Court of Criminal Appeals affirmed the state Courts denial on Sept. 28, 2021. Mr. Higley now petitions this Court.

REASONS FOR GRANTING THE WRIT

The Oklahoma Court of Criminal Appeals, herein after OCCA, affirmed the District Court of Delaware County's decision denying Mr. Higley his Application for Post-Conviction Seeking an Order for Recommendation of an Appeal Out of Time concurring with the Trial Court that, "The trial court did not find any support for Petitioner's claim he was denied an appeal through not fault of his own."¹ The OCCA cites a slew of State cases and Oklahoma Statutes supporting its argument that the issues presented in Mr. Higley's application could have been brought up on Direct Appeal. Mr. Higley was never afforded the opportunity to have a Direct Appeal. Mr. Higley was also never afforded the opportunity to present evidence of how he was denied a Direct Appeal through no fault of his own via an Evidentiary Hearing.

¹ OCCA Denial Order P.2, ¶ 1, Sept. 28, 2021.

REASONS FOR GRANTING THE PETITION

The proper procedure for filing an appeal after conviction in the State of Oklahoma is governed by Oklahoma Court of Criminal Appeals Rules 1.14(D)(1), 2.1(B), and 4.2(A). Rule 1.14(D)(1) states in part: "The trial attorney in all cases shall be responsible for completing and filing the Notice of Intent to Appeal and Designation of Record required by Rule 1.14(C)..." Rule 2.1(B) states in part: "An appeal is commenced by the trial counsel's filing with the trial court a written notice of intent to appeal and a designation of record as prescribed in Rule 1.14(C) within 10 days from the date the Judgment and Sentence is imposed in open court. The filing of the Notice of Intent to Appeal and Designation of Record in the District Court is jurisdictional and failure to timely file constitutes waiver of the right to appeal..."

After Mr. Higley's trial counsel advised him to accept a blind plea of nolo contendere, Mr. Higley was sentenced. Immediately preceding sentencing, Mr. Higley advised his trial counsel he would be appealing the trial court's decision. Trial counsel failed to file the Notice of Intent to Appeal and Designation of record informing Mr. Higley that a public defender would initiate the appeal effectively rendering Mr. Higley's right to appeal waived. The next step would be governed by Rule 4.2(A) which states in part: "In all cases, to appeal from any conviction on a plea of guilty or nolo contendere, the defendant must have filed in the trial court clerk's office an application to withdraw the plea within 10 days from the date of the pronouncement of the Judgment and Sentence...."

Mr. Higley filed a Post-Conviction Application Seeking A Recommendation for Appeal Out of Time with the Delaware County Court Clerk on March 25, 2021, which was apparently misconstrued as an Application for Post-conviction Relief. The State of Oklahoma responded on

May 17, 2021. Before Mr. Higley was afforded the chance to traverse the response, the district court hastily denied the application for recommendation three days later on May 20, 2021. In its response, the State of Oklahoma did not cite any statute or case law that refutes his request for recommendation or explains why it believes that the Petitioner's failure to withdraw his plea in a timely manner was his own fault.

Mr. Higley sent a reply to the States response on May 20, 2021, before receiving the Order denying his application on May 24, 2021. The District Court, in its order denying recommendation, did not give a proper finding of fact and conclusion of law and goes on to state events and opinions which have no relevance to the facts laid out in Petitioner's application. The Court simply states that Mr. Higley "showed no remorse for his crime and that Petitioner has never expressed any interest in appealing the conviction."² During the sentencing hearing, trial counsel verbally informed the court that Petitioner wished to appeal the conviction. The Court in this instance is making argumentum ad hominem.

Mr. Higley mailed his Application for Post-Conviction Seeking an Order for Recommendation of an Appeal Out of Time to the OCCA on June 17, 2021. On Sept. 28, 2021, the OCCA affirmed the denial of Mr. Higley's Application citing the Oklahoma Statute governing Post-Conviction Relief applications, 22 O.S. § 1080.

In the OCCA's denial order, it is stated that "Petitioner did not move to withdraw his plea or otherwise appeal his conviction."³ At Mr. Higley's sentencing hearing, immediately following sentencing, Mr. Smith, petitioner's trial counsel, **advised the court on record** that his client, Mr. Higley, was going to appeal the judgment and sentencing. Trial counsel advised Mr. Higley that he would need to fill out a Public Defender application and new counsel would initiate the

² District Court of Delaware County Denial Order P.3, ¶ 1-, May 20, 2021.

³ OCCA Denial Order P.1, ¶ 1, Sept. 28, 2021.

appeals procedure by filing a Motion to Withdraw Plea. “Criminal defense attorney’s failure to file notice of appeal when requested by client deprives defendant of Sixth Amendment right to assistance of counsel, notwithstanding that lost appeal may not have had reasonable probability of success.” *United States v. Peak*, 992 F.3d 39 (CA 4 1993) (Emphasis added)

In *Roe v. Flores-Ortega*, 528 U.S. 470, 145 L.Ed.2d 985, 120 S.Ct. 1029 (2000), this Court states, “we have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. [Omitted.] This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel’s failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant’s wishes.”

“[C]ounsel generally has a duty to consult with the defendant about an appeal.” See *Flores-Ortega*, 528 U.S. at 481, 120 S.Ct. 1029 (expecting that courts “will find, in the vast majority of cases, that counsel had a duty to consult with the defendant about an appeal.”). This Court has defined the term “consult” specifically to mean “advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant’s wishes,” *id.* at 478, 120 S.Ct. 1029, to assure that any waiver of the right to appeal is knowing and voluntary. Citing *Thompson v. U.S.*, 504 F.3d 1203 (CA 11 2007)


The “[a]ctual or constructive denial of the assistance of counsel altogether,” whether at the trial level or in a first appeal as of right, is constitutional error. *Penon v. Ohio*, 488 U.S. at 88 [.] Thus, if there has ... been no timely-direct appeal from a conviction because of the court’s failure to grant counsel, the state’s enforcement of the appeal deadline “would ... abridge [the defendants] constitutional right to counsel on appeal.” *Coleman v. Thompson*, 501 U.S. at 742,

111 S.Ct. 2546; Or “[I]f the defendant told his lawyer to appeal” from the conviction, “and the lawyer dropped the ball, then the defendant has been deprived, not of effective assistance of counsel, but of any assistance of counsel on appeal. Abandonment is a per se violation of the sixth amendment.” *Castellanos v. United States*, 26 F.3d at 718 (original); *id.* at 720 (“a lawyer’s abandonment of his client is ineffective per se.”). Citing *Restrepo v. Kelly*, 178 F.3d 634 (1999).

Defense counsel’s advising defendant of his right to appeal his conviction during sentencing proceedings was not sufficient to satisfy defendant’s right to counsel during ten-day period for filing notice of appeal, but rather counsel must explain advantages and disadvantages of appeal, provide defendant with advice about whether there are meritorious grounds for appeal and about probabilities of success, and inquire whether defendant was to appeal and if client so wishes, counsel must perfect appeal. U.S.C.A. Const.Amend. 6. *Baker v. Kaiser*, 929 F.2d 1495 (1991)

Conclusion

Mr. Higley now petitions this Court to review the previous proceedings for the possibility of constitutional violations. Mr. Higley asks this Honorable Court to Reverse and Remand with Instructions for the District Court to hold an Evidentiary Hearing to address the merits of Mr. Higley’s Ineffective Assistance of Counsel claim and be afforded the opportunity for a Direct Appeal.

/s/ 
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