

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERARD SZUBIELSKI,	§	
	§	No. 300, 2011
Defendant Below-	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE	§	ID No. 0605023366
	§	
Plaintiff Below-	§	
Appellee.	§	

Submitted: December 12, 2011

Decided: January 24, 2012

Before **HOLLAND**, **BERGER**, and **RIDGELY**, Justices.

ORDER

This 24th day of January 2012, it appears to the Court that:

(1) Appellant Gerard Szubielski appeals from a Superior Court decision denying his third motion for postconviction relief. Szubielski contends that the Superior Court abused its discretion by denying his motion for postconviction relief that alleged, *inter alia*, ineffective assistance of counsel based on trial counsel's failure to file an appeal. The State agrees that Szubielski has been denied his right to effective assistance counsel under the Sixth Amendment and submits that the matter should be remanded for resentencing and appointment of new counsel. We find merit to Szubielski's appeal and remand for resentencing to

allow Szubielski an opportunity to file a direct appeal and for appointment of new counsel to represent Szubielski in any direct appeal.

(2) On January 9, 2007, a jury found Szubielski guilty of Assault in the First Degree. Szubielski was sentenced as a habitual offender to life imprisonment. Trial counsel did not docket any appeal with this Court after sentencing. Six months after sentencing, Szubielski filed his first *pro se* motion for post-conviction relief. Szubielski claimed that his trial attorney failed to file a notice of appeal with this Court and failed to advise Szubielski of his right to appeal. Szubielski also sent a letter to the Superior Court requesting appointment of new counsel for appeal.

(3) The Superior Court granted Szubielski's motion after trial counsel admitted that he failed to advise Szubielski in writing of his right to appeal.¹ Thus, the Superior Court vacated Szubielski's original sentence and resentenced him to the same terms and conditions, effective October 22, 2007.²

(4) According to Szubielski, he never received a copy of the order through the state mail system for incarcerated defendants. Nor was he present for the proceeding. Thus, Szubielski filed a second, *pro se* motion for postconviction relief alleging that he never received a copy of the resentence order and raising the same grounds for relief as in his prior motion. Szubielski stated that he only

¹ *State v. Szubielski*, 2007 WL 3105080 (Del. Super. Oct. 22, 2007).

² *Id.* at *2.

received the order after his mother wrote a second letter to the Superior Court on January 18, 2008. The Superior Court held that Szubielski's claim was procedurally barred, and that Szubielski could not overcome the presumption that the order was properly mailed to him.³ This Court denied Szubielski's untimely appeal pursuant to Supreme Court Rule 29(b).⁴

(5) On April 27, 2010, Szubielski filed his third motion for postconviction relief, which is now at issue. He re-raised his ineffective assistance of counsel argument from his previous motions, and claimed that the failure to appoint counsel violated his Sixth Amendment rights. He also alleged that he never received the October 2007 resentencing order. In response, the State took the position that Szubielski should be appointed counsel and resentenced to allow for direct appeal. After the State filed its response, Szubielski wrote to the Superior Court enclosing a letter and mail log from prison support services at the James T. Vaughn Correctional Center. These documents showed that Szubielski did not receive any legal mail in October 2007 or November 2007.

(6) The Superior Court trial judge referred the matter to a commissioner for proposed findings of facts and conclusions of law pursuant to Superior Court Rule 62. The commissioner recommended that Szubielski's motion for postconviction relief be denied. The trial judge adopted this recommendation and

³ *State v. Szubielski*, 2008 WL 2582888 (Del. Super. June 20, 2008).

⁴ *Szubielski v. State*, 2008 WL 5191812 (Del. Dec. 11, 2008).

denied the motion for postconviction relief.⁵ This appeal followed. The State responded to Szubielski's motion for appointment of new counsel on appeal with evidence that neither Szubielski nor his trial counsel received a copy of the 2007 resentencing order.

(7) We review the denial of a motion for post-conviction relief for abuse of discretion.⁶ A criminal defendant has a Sixth Amendment right to effective assistance of counsel on direct appeal.⁷ Supreme Court Rule 26(a) provides in relevant part:

(1) Every trial attorney, whether privately retained, court appointed or provided by the Office of the Public Defender, shall in every case in which the client has been convicted or adjudged delinquent; and (2) every attorney appointed by the trial court to represent a criminal defendant or juvenile at State expense in postconviction proceedings shall in every case in which postconviction relief is denied:

(i) Advise client. Advise the client of any right to appeal, the possible grounds for appeal and counsel's opinion of the probable outcome of an appeal;

(ii) Docket appeal. Docket an appeal whenever the client desires to appeal, whether or not the appeal appears meritorious; . . .⁸

⁵ *State v. Szubielski*, I.D. No. 0605023366 (Del. Super. May 31, 2011).

⁶ *Wilson v. State*, 834 A.2d 68, 72 (Del. 2003) (citing *MacDonald v. State*, 778 A.2d 1064, 1070 (Del. 2001)).

⁷ *Evitts v. Lucey*, 469 U.S. 387 (1985); *Douglas v. California*, 372 U.S. 353 (1963).

⁸ Del. Supr. Ct. R. 26(a).

(8) This Court has held that where defendant desires an appeal, counsel's failure to file a timely, direct appeal pursuant to Supreme Court Rule 26(a) constitutes ineffective assistance of counsel and requires a remand.⁹

(9) Here, trial counsel failed to advise Szubielski of his right to direct appeal pursuant to subsection (i). The Superior Court properly vacated Szubielski's sentence to allow for a direct appeal, but the record shows that neither Szubielski nor his trial counsel received notice of the re-sentencing. Specifically, a letter from the Delaware Department of Correction states that Szubielski did not receive any legal mail in October 2007, and the prison log shows no record that Szubielski received any legal mail the following month. Szubielski's trial counsel also represented to Szubielski's mother that counsel did not receive a copy of the October 22, 2007 resentencing order and did not file an appeal with this Court. Given the evidentiary showing and the State's concession that Szubielski was denied effective assistance of counsel and the opportunity to pursue a direct appeal, we conclude that this matter should be remanded for the appointment of counsel and resentencing.

⁹ *Dixon v. State*, 581 A.2d 1115, 1117 (Del. 1990).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **REVERSED** and this matter is **REMANDED** for the appointment of counsel and resentencing.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice