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SUPREME COURT NO. 94570-5
COA NO. 73098-3-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DALE LIESCHNER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Bruce I. Weiss, Judge

PETITION FOR REVIEW

CASEY GRANNIS
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Dale Lieschner asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Lieschner requests review of the decision in State v. Dale Lieschner, Court of Appeals No. 73098-3-I (slip op. filed April 17, 2017), attached as appendix A.

C. ISSUE PRESENTED FOR REVIEW

Whether the State failed to prove Lieschner knowingly, voluntarily and intelligently waived his constitutional right to appeal because trial counsel provided ineffective assistance in failing to consult with Lieschner about an appeal before the deadline passed?

D. STATEMENT OF THE CASE

1. Background

In November 2013, a jury found Lieschner guilty of possession of a controlled substance with intent to deliver. App. A.[1] (designated Ex. 1 at evidentiary hearing). Sentencing took place on December 24, 2013. Id. Lieschner's criminal history included two Montana convictions, which were used in the offender score. Id. The court imposed 60 months

[1] The cited appendices are attached to the supplemental brief filed by Lieschner's appellate counsel in the Court of Appeals.

confinement. Id. The judgment and sentence contained a section addressing the right to appeal and the 30-day deadline for filing a notice of appeal. Id. The court orally advised Lieschner of these rights at the sentencing hearing. 1RP[2] 8-9.

In May 2014, Lieschner filed a pro se motion to terminate his legal financial obligations (LFOs). App. B. In connection with that request for relief, Lieschner filed a pro se motion for order of indigence pursuant to RAP 15.2 and a supporting declaration. App. C (designated Ex. 3, 4 at hearing). The State opposed the motion. App. D. In January 2015, Lieschner filed a motion to correct or modify his LFO debt. App. E. The State again opposed the motion. App. F. No trial court ruling on either motion appears in the record. Also in January 2015, Lieschner wrote a letter to his trial attorney, Brian Ashbach, asking why his appeal had not yet been heard. App. G (designated Ex. 5 at hearing).

In February 2015, Lieschner filed a pro se notice of appeal, along with a motion to extend time to file the notice of appeal, supporting declaration, and motion for indigency. App. H (declaration designated Ex. 6 at hearing). According to the declaration, Lieschner told his attorney that he wanted to file a notice of appeal immediately after sentencing. Id.

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[2] The verbatim report of proceeding is referenced as follows: 1RP - 12/24/13; 2RP - 2/12/16.

He informed his attorney that he was unhappy with his representation, and that he wanted to argue ineffective assistance of counsel and that the State failed to prove its case. Id. The attorney said he would file the notice of appeal the next Monday. Id. When Lieschner subsequently heard nothing about the appeal, he "assumed it was just taking a long time as usual." Id. Upon inquiry, he learned from the Court of Appeals that no notice of appeal was filed in his case. Id.

In October 2015, a commissioner granted the parties' joint motion and remanded the matter for an evidentiary hearing on whether Lieschner waived his right to appeal. Slip op. at 3.

2. Evidentiary hearing

Assigned counsel for the evidentiary hearing on remand argued in a pre-hearing brief that "there will be no evidence elicited at this fact-finding hearing to establish Mr. Ashbach complied with the ABA standards addressing an attorney's advisement of a criminal defendant's right to appeal. Based on the extremely limited communication between Mr. Lieschner and Mr. Ashbach regarding his appellate rights, as well as Mr. Lieschner's actions in April 2014, January 2015, and February 2015, he respectfully requests that this Court find there was no waiver of his right to appeal." App. I. In its brief, the State contended the evidence would show knowing inaction and Lieschner's affirmative decision not to

appeal, such that he waived his right to appeal knowingly, voluntarily and intelligently. App. J.

At the evidentiary hearing, the State called Ashbach as a witness. 2RP 5. Ashbach testified that he represented Lieschner in the criminal case at issue. 2RP 6. He filed a pre-trial suppression motion, which was denied. 2RP 9; App. K, L. The case proceeded to trial, where the jury returned a guilty verdict after a three-day trial. 2RP 10.

According to Ashbach, the first time he discussed the right to appeal with Lieschner was immediately after the jury verdict. 2RP 6. Ashbach told Lieschner he was sorry. 2RP 6. Lieschner responded he knew they were going to lose based on the job Ashbach did. 2RP 6. Ashbach said "you could appeal if you want, and [Lieschner] said it didn't matter now." 2RP 6. Lieschner did not explain what he meant by "it didn't matter now." 2RP 6-7.

After the verdict but before sentencing, Ashbach learned there were Montana convictions involving a "significant" amount of suspended time. 2RP 7, 41. Ashbach linked that concern to Lieschner's earlier expressed sentiment of "it doesn't matter now." 2RP 7. Ashbach first learned between the verdict and sentencing from the prosecutor that Lieschner would be facing a 20-year sentence in Montana due to a

probation revocation if he was convicted on the Washington offense. 2RP 41. The issue came up in looking into the offender score. 2RP 7, 11.

They talked about how there would be a problem with his Montana probation "sometime between verdict and sentencing. I don't know. I know at some point, like Mr. Lieschner testified, we did speak in a back room, but it could be at that time." 2RP 41. There was discussion about appealing in connection with the 20-year Montana sentence, but "I just don't remember the specifics of it at that time." 2RP 42. His assumption, though he couldn't say for sure, was they talked about how most courts take the position that a conviction is not necessary to trigger a probation violation and that an acquittal can still result in a violation. 2RP 42.

The next time Ashbach mentioned the right to appeal was after sentencing. 2RP 7. Ashbach told him if he changed his mind and wanted to appeal, "he should let me know ASAP, that I think we had 30 days." 2RP 7. When asked what Lieschner's response was, Ashbach answered "I, honestly, I can't remember the response to that. All I know is that he had indicated that he did not want to pursue the appeal." 2RP 7.

Ashbach did not hear from Lieschner again until about 14 or 15 months after sentencing (February 2015), at which time he inquired about the status of his appeal. 2RP 7-8. Ashbach addressed Lieschner's concerns about the appeal in responding to a bar complaint. 2RP 11-12.

Lieschner testified on his own behalf at the evidentiary hearing. 2RP 13. According to Lieschner, he rejected a plea offer because he wanted to go to trial. 2RP 15. Based on what Ashbach told him, he believed would not have the chance to appeal if he pled guilty. 2RP 15. If he pled guilty or was found guilty by a jury, he would be subject to a probation violation in Montana, "which is a 20-year sentence." 2RP 15.

At sentencing, Lieschner told his attorney he wanted to appeal. 2RP 16. Ashbach responded that he would come in Monday and fill out the paperwork. 2RP 16. Lieschner knew he had the right to appeal, that he had 30 days to file, and that he could lose his right to appeal if the deadline passed. 2RP 19. Lieschner denied telling his attorney that he did not want to appeal. 2RP 19. After being transported to prison, he thought the appeal was in progress. 2RP 17. But after a while, he started to wonder what was going on because he had not heard anything about the status of the appeal. 2RP 17-18, 22-23. Lieschner wrote to Ashbach and the Court of Appeals asking about the appeal. 2RP 18. The Court of Appeals informed him there was no appeal pending. 2RP 18.

Lieschner's counsel for the evidentiary hearing argued Ashbach did not fulfill his duty to consult with Lieschner about the appeal, that Lieschner had every motivation to appeal, and Lieschner's actions

following sentencing showed he did not validly waive his right to appeal. 2RP 33-38.

3. Trial court's findings and conclusions

The trial court concluded Lieschner knowingly, intelligently and voluntarily waived his right to appeal. App. M. The court found Lieschner had "brief discussions" with his attorney regarding his right to appeal. Id. Lieschner knew he had the right to appeal and that the notice of appeal needed to be filed within 30 days. Id. The court rejected as not credible Lieschner's testimony that he advised his attorney that he wanted to appeal. Id. The court credited Ashbach's testimony that Lieschner "advised" Ashbach that he did not want to appeal. Id.

The court further found that Lieschner told his attorney there would be no deals taken "because he was looking at 20 years on a probation violation from Montana if he pled or was found guilty of the charge." Id. Lieschner did not advise Ashbach of his Montana conviction. Id. Rather, Mr. Casey, the prosecutor, raised the issue to Ashbach prior to sentencing. Id. At the time of the verdict, Ashbach advised his client that a notice of appeal could be filed. Id. Lieschner said it did not matter. Id. He did not explain to his attorney why it did not matter, but Ashbach later found out it was related to a Montana conviction. Id.

4. Court of Appeals

On appeal, Lieschner argued Ashbach provided ineffective of assistance of counsel in failing to consult with him about the appeal, precluding a determination that he validly waived his right to appeal. See Lieschner's Supplemental Brief. The Court of Appeals rejected this argument and denied his motion to enlarge the time to file a notice of appeal, holding "the State satisfied its burden of demonstrating that Lieschner knowingly, intelligently, and voluntarily waived his right to appeal." Slip op. at 1. Lieschner seeks review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. LIESCHNER DID NOT VALIDLY WAIVE HIS RIGHT TO APPEAL BECAUSE HIS TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO CONSULT WITH HIM ABOUT AN APPEAL.

The Washington Supreme Court recognizes the importance of the constitutional right to appeal enshrined in our state constitution. City of Seattle v. Klein, 161 Wn.2d 554, 567, 166 P.3d 1149 (2007). The only means by which this right may be relinquished is by a voluntary, knowing, and intelligent waiver. Klein, 161 Wn.2d at 556. Ineffective assistance of counsel is a basis to challenge an alleged waiver of the right to appeal: "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant

has made out a successful ineffective assistance of counsel claim entitling him to an appeal." Roe v. Flores-Ortega, 528 U.S. 470, 484, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). Lieschner did not knowingly or intelligently waive his right to appeal. His attorney was ineffective for failing to advise him of the consequences of the conviction or the advantages and disadvantages of filing an appeal.

The Washington Supreme Court has not addressed an ineffective assistance of counsel claim in the context of whether the right to appeal has been waived. Lieschner's case provides an opportunity for this Court to do so. This case raises the specific issue of whether prejudice in this context is measured under an objective standard or a subjective one. Review is warranted because this case presents a significant question of constitutional law. RAP 13.4(b)(4).

a. Defendants have the right to effective assistance of counsel to ensure the right to appeal is protected.

RAP 5.2(a) requires the filing of a notice of appeal within 30 days of the entry of the judgment and sentence. Under RAP 18.8(b), extensions of time to file a notice of appeal are limited to extraordinary circumstances and to prevent a gross miscarriage of justice. Despite the strong language in RAP 18.8(b), the decision to grant an extension of the time to file an appeal must be balanced against the constitutional right to appeal. State v.

Kells, 134 Wn.2d 309, 314, 949 P.2d 818 (1998). The "right to appeal in all cases" is expressly guaranteed by article I, section 22 of the Washington Constitution. Klein, 161 Wn.2d at 556. A criminal appeal may not be dismissed as untimely unless the State affirmatively proves the defendant voluntarily, knowingly, and intelligently waived his appeal right. State v. Sweet, 90 Wn.2d 282, 283-84, 286, 581 P.2d 579 (1978); Kells, 134 Wn.2d at 313.

The trial court found Ashbach credible and Lieschner not credible. Even so, the court erred in determining Lieschner's waiver of his right to appeal was knowing, voluntary, and intelligent. There is no dispute Lieschner knew about the right to appeal and knew about the 30-day deadline for filing the notice of appeal. But that does not end the inquiry. Whether counsel was ineffective must also be considered. State v. Chetty (Chetty I), 167 Wn. App. 432, 439-40, 272 P.3d 918 (2012).

Every defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). The constitutional right to effective assistance of counsel attaches to an appeal as of right. Chetty I, 167 Wn. App. at 440 (citing Evitts v. Lucey, 469 U.S.

387, 397, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985)). "[T]he effectiveness of counsel is a circumstance that bears on the validity of a defendant's waiver of the right to appeal and, in turn, on this court's ultimate determination whether to extend the time to file a notice of appeal under RAP 18.8(b)." Chetty I, 167 Wn. App. at 444.

There is a "constitutional duty to consult where counsel has reason to believe either '(1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.'" Id. at 441 (quoting Roe, 528 U.S. at 480). "The failure to consult under these circumstances constitutes deficient performance." Id. Prejudice is established by showing "a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." Roe, 528 U.S. at 484.

b. Trial counsel was ineffective in failing to consult with Lieschner about the appeal, resulting in a waiver that was not knowing, voluntary and intelligent.

The trial court found Ashbach had "brief discussions" with Lieschner about an appeal. App. M. Those "brief discussions" were cursory. They do not satisfy the requisite standard for consultation. "Counsel's obligation, once it arises, is not satisfied by a cursory reference to the right to an appeal." State v. Chetty (Chetty II), 184 Wn. App. 607,

614, 338 P.3d 298 (2014). To "consult" in this context means to "convey a specific meaning — advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." Roe, 528 U.S. at 478. This meaning of consultation is consistent with the American Bar Association Standards Relating to the Prosecutor Function and Defense Function. Chetty I, 167 Wn. App. at 441-42. The ABA standard provides: "After conviction, the lawyer should explain to *the defendant the meaning and consequences of the court's judgment* and his right of appeal. The lawyer should give the defendant his professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal. He should also *explain to the defendant the advantages and disadvantages of an appeal."* Id. (quoting Sweet, 90 Wn.2d at 290 (quoting Project on Standards for Criminal Justice, ABA, Standards Relating to the Prosecution Function and the Defense Function: Approved Draft § 8.2, at 289 (1971)).

Ashbach had nothing in his file regarding discussion about the appeal. 2RP 9. According to his testimony, the conversation at the time of the verdict consisted of Ashbach telling Lieschner he could appeal. 2RP 6, 11. Lieschner said "it didn't matter now." 2RP 6. Ashbach made no inquiry as to what Lieschner meant by this. 2RP 6-7. Ashbach did not

advise Lieschner about the advantages and disadvantages of an appeal and did not make a reasonable effort to discover Lieschner's wishes based on such a discussion.

They next talked "sometime between verdict and sentencing. I don't know. I know at some point, like Mr. Lieschner testified, we did speak in a back room, but it could be at that time." 2RP 41. There was discussion about appealing in light of facing a 20-year Montana sentence, but Ashbach did not "remember the specifics of it." 2RP 42. His assumption, though he couldn't say for sure, was that the conversation was about how most courts take the position that a conviction is not necessary to trigger a probation violation. 2RP 42. Ashbach's testimony about their discussion is vague and uncertain. It is insufficient to show Ashbach advised Lieschner about the advantages and disadvantages of taking an appeal. At this juncture, Ashbach did not make a reasonable effort to discover Lieschner's wishes.

The last time Ashbach mentioned the right to appeal was after sentencing. 2RP 7. Ashbach told him if he wanted to appeal, "he should let me know ASAP, that I think we had 30 days." 2RP 7. When asked what Lieschner's response was, Ashbach answered "I, honestly, I can't remember the response to that. All I know is that he had indicated that he

did not want to pursue the appeal." 2RP 7. There was no discussion about the advantages and disadvantages of taking an appeal.

"In assessing counsel's performance, courts consider 'all the information counsel knew or should have known.'" Chetty II, 184 Wn. App. at 614 (quoting Roe, 528 U.S. at 480). Ashbach knew or should have known that Lieschner's conviction endangered his Montana probation, increasing the likelihood of revocation and imposition of a 20-year sentence. Yet Ashbach did not discuss the advantage of appealing the Washington conviction. The appeal, if successful, would markedly lessen the likelihood of having his Montana probation revoked.

A highly relevant factor in the "would want to appeal" inquiry is "whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings." Roe, 528 U.S. at 480. Lieschner's case was resolved by jury trial, which exponentially expands the universe of potential issues for appeal.

The State conceded Lieschner's counsel "may have" rendered deficient performance based on the record, and otherwise offered no argument that counsel performed competently. State's Brief in Opposition at 17. The concession is appropriate.

The Court of Appeals wrote "Lieschner does not challenge the trial court's factual findings that he . . . told defense counsel that he did not want to appeal." Slip op. at 6. This is misleading. The trial court found Lieschner "advised" Ashbach not to file an appeal and described "verbal instructions to Mr. Ashbach that he did not want to file an appeal." App. M. Ashbach testified that Lieschner "indicated" that he did not want to appeal. 2RP 7. In the appellate brief, Lieschner argued if "advised" and "verbal instructions" were construed as "indicated," then substantial evidence supports the trial court's findings. But if "advised" and "verbal instructions" meant something more than "indicated," then the findings are unsupported by substantial evidence. Lieschner's Supplemental Brief at 15-16.

Either way, the critical point is that the trial court did not find Lieschner *clearly* told Ashbach not to file an appeal, and the record would not support such a finding. The wish to not file an appeal must be "clearly conveyed." Roe, 528 U.S. at 477; Chetty II, 184 Wn. App. at 614. Ashbach was only able to testify in vague terms that Lieschner "indicated" he did not want to appeal. 2RP 7. Even then, Ashbach could not remember Lieschner's response when Ashbach told him to let him know whether he wanted to appeal. 2RP 7. Telling his attorney following the verdict that "it doesn't matter" without explaining what he meant is not the

same as telling his attorney not to file an appeal. 2RP 6-7. The record does not show Lieschner explicitly told or "clearly conveyed" a desire not to appeal to his attorney. See Roe, 528 U.S. at 477 ("a defendant who *explicitly tells* his attorney not to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently") (emphasis added).

Given the prospect of a 20-year sentence for his Montana probation revocation following Lieschner's conviction and the presence of a non-frivolous issue for appeal (at minimum, the suppression motion), the record establishes that a rational defendant in Lieschner's position would have wanted to appeal. Trial counsel's failure to consult with Lieschner about the advantages and disadvantages of filing an appeal constituted deficient performance. Chetty II, 184 Wn. App. at 615.

To show prejudice, Lieschner need only show "a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." Roe, 528 U.S. at 484. In this context, the performance and prejudice prongs often overlap. Id. at 486. Lieschner's expressed concern about revocation of the Montana probation upon conviction and the presence of a non-frivolous issue for appeal support a reasonable inference that but for counsel's failure to

consult, Lieschner would have filed an appeal. Chetty II, 184 Wn. App. at 616.

Evidence of a "nonfrivolous" ground for appeal is one circumstance that can be highly relevant to this determination. Roe, 528 U.S. at 485-86. The State did not claim trial counsel's pre-trial suppression challenge was frivolous. From Lieschner's standpoint, the fact that the issue was good enough for his lawyer to raise would signal to the client that the issue was not frivolous and worth considering for appeal. Rather, the State suggested the suppression issue would not prevail on appeal. State's Brief in Opposition at 18-19.

But that is not the standard. In assessing whether counsel was ineffective in failing to advise a client about the right to appeal, "[p]rejudice does not require that the defendant show that he had meritorious grounds for appeal." United States v. Sandoval-Lopez, 409 F.3d 1193, 1196 (9th Cir. 2005). It would be unfair to require an indigent 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." Roe, 528 U.S. at 486. As undersigned counsel was only appointed to litigate whether Lieschner's right to appeal was validly waived, Lieschner has not yet enjoyed the benefit of an advocate appointed to comb through the entire

record to determine whether meritorious issues for appeal exist. Moreover, a defendant's inability to "specify the points he would raise were his right to appeal reinstated" does not foreclose a showing of prejudice where there are other substantial reasons to believe he would have appealed. Roe, 528 U.S. at 486 (quoting Rodriquez v. United States, 395 U.S. 327, 330, 89 S. Ct. 1715, 23 L. Ed. 2d 340 (1969)).

Lieschner's expressed concern about revocation of the Montana probation if the conviction was left to stand by itself supports a reasonable inference that, but for counsel's failure to consult, Lieschner would have filed an appeal in an attempt to overturn that conviction and avoid serving an additional 20 years in prison. When Ashbach mused at the evidentiary hearing that the prospect of a 20-year sentence in Montana supposedly explained "why it didn't matter now and why there was no appeal to be filed," the judge responded "That doesn't make sense to me. Why would that be the reason why you wouldn't file an appeal if the only way to avoid the 20 years was to win on appeal?" 2RP 42. That sums up the situation nicely. Given an appeal was the means to avoid the 20-year sentence in Montana, there is a reasonable probability that Lieschner would have appealed but for counsel's failure to consult with him. Lieschner shows he was prejudiced by his attorney's deficiency.

The Court of Appeals nonetheless rejected Lieschner's prejudice argument. According to the Court of Appeals, "Lieschner's current claim that he would have appealed had counsel consulted with him about the advantages and disadvantages of filing an appeal rests on nothing more than speculation." Slip op. at 9. The Court of Appeals faulted Lieschner for not explaining at the evidentiary hearing why he might have told counsel not to file an appeal or how further consultation with counsel would have persuaded him to file an appeal. Id. Rather, Lieschner maintained he told Ashbach to file an appeal and "expressed no uncertainty about his actions or his intentions." Id.

In this manner, the Court improperly heightened the standard for showing prejudice. The Court of Appeals essentially rejected Lieschner's argument by substituting the objective standard of prejudice for a subjective one. The standard for showing prejudice is an objective one. Bonney v. Wilson, 754 F.3d 872, 884 (10th Cir. 2014). The question is what a rational defendant would have done under the circumstances. Roe, 528 U.S. at 486. Where counsel is deficient in failing to consult, a defendant demonstrates prejudice by showing that a rational defendant would want to appeal. Frazer v. South Carolina, 430 F.3d 696, 707-08 (4th Cir. 2005). The Court of Appeals did not apply an objective standard. The Court of Appeals did not give any weight to the presence of a

nonfrivolous issue for appeal, contrary to U.S. Supreme Court precedent. Roe, 528 U.S. at 485-86. Even in the absence of identifying a nonfrivolous issue for appeal, Lieschner need only show there was a substantial reason why he would have appealed. Id. at 486. The consequence of not appealing on the Montana probationary sentence is a substantial reason why a rational defendant in Lieschner's position would have appealed had counsel properly consulted with him.

The only means by which the constitutional right to appeal may be relinquished is by a voluntary, knowing, and intelligent waiver. Klein, 161 Wn.2d at 556. Ineffective assistance due to counsel's failure to consult about the appeal renders Lieschner's waiver less than knowing, voluntary and intelligent.

F. CONCLUSION

For the reasons stated above, Lieschner requests that this Court grant review.

DATED this 17th day of May 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DALE RUSSELL LIESCHNER, Appellant.	DIVISION ONE No. 73098-3-I UNPUBLISHED OPINION FILED: April 17, 2017

DWYER, J. — Dale Lieschner filed a notice of appeal more than a year after the entry of his judgment and sentence. He claimed that he told defense counsel that he wanted to file an appeal and that despite agreeing to do so, counsel failed to file a notice of appeal. After an evidentiary hearing, the trial court rejected Lieschner's account as not credible and found that Lieschner advised counsel that he did not want to appeal. Because the State satisfied its burden of demonstrating that Lieschner knowingly, intelligently, and voluntarily waived his right to appeal, we deny his motion to enlarge the time to file a notice of appeal.

I

In November 2013, a jury found Lieschner guilty of possession of a controlled substance with intent to deliver. At sentencing, on December 24, 2013, the court imposed a standard-range term of 60 months confinement.

Section 5.8 of the judgment and sentence advised Lieschner of his right to appeal. The court also advised Lieschner orally of his right to appeal:

> You have the right to appeal the decision. You have to file a notice of appeal within 30 days. Your time to file a notice of appeal would start tomorrow. If you need assistance, the clerk's office can assist you in filing a notice of appeal. If you can't afford an attorney, an attorney could be appointed for you to represent you on the appeal. You can also get copies of transcripts and whatever portion of the record is necessary at no cost to you for purposes of appeal if it's determined that you are indigent.

Lieschner did not file a notice of appeal within 30 days.

On May 7, 2014, Lieschner filed a pro se motion in the trial court to terminate his legal financial obligations (LFO) in this case. Lieschner also filed a supporting affidavit and motion for order of indigence, requesting preparation of a verbatim report of the sentencing hearing. On January 16, 2015, Lieschner filed a motion to correct or modify his LFO debt.[1]

On January 17, 2015, Lieschner wrote to his trial attorney, Brian Ashbach, asking about the status of his appeal. In the letter, Lieschner claimed that "right after sentencing" he told Ashbach to file a notice of appeal and that Ashbach said he would file the appeal the following Monday. On January 22, 2015, in response to Lieschner's inquiry, this court advised him that no appeal was pending.

On February 6, 2015, Lieschner filed a notice of appeal and a motion to enlarge the time to file the notice of appeal. In his supporting declaration,

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[1] Nothing in the record indicates that the trial court ruled on these motions.

Lieschner asserted that "[i]mmediately after being found guilty and then after sentencing also," he told Ashbach that he wanted to file an appeal and that Ashbach said he would file the notice of appeal and a motion for an order of indigence on the following Monday. Lieschner claimed that because Ashbach said an appeal could take more than a year, he had checked on the status of the appeal only after another inmate told him he should have received materials related to an appeal. Lieschner also asserted that "I've never done an appeal before."

In October 2015, a commissioner granted the parties' joint motion and remanded the matter for an evidentiary hearing on whether Lieschner waived his right to appeal.

At the evidentiary hearing in February 2016, Brian Ashbach testified that immediately after the jury's verdict, Lieschner expressed his dissatisfaction with Ashbach's representation. When Ashbach told Lieschner that he could appeal, Lieschner responded, "it didn't matter now." Ashbach later learned that Lieschner was referring to a suspended sentence for a Montana conviction. Lieschner indicated that he faced a potential 20-year sentence if his probation was revoked because of the Washington conviction.

Ashbach discussed with Lieschner the fact that his Washington conviction "would be a problem for his probation in Montana." Ashbach could not recall for certain, but assumed the discussion involved the possibility that an appeal of the

Washington conviction would have no effect on the probation decision in Montana.

After sentencing, Ashbach asked Lieschner to let him know as soon as possible if he had changed his mind and wanted to appeal. Ashbach could not recall Lieschner's precise response, but asserted that "he had indicated that he did not want to pursue the appeal." Ashbach denied that Lieschner said he wanted to file an appeal.

Lieschner testified that at the time of trial, he was facing a "20-year sentence" in Montana if his probation was revoked. For this reason, he refused to accept a plea offer and insisted that he go to trial in order to preserve his opportunity to appeal. Lieschner maintained that he told Ashbach after sentencing that he wanted to appeal and that Ashbach said he would file the appeal on the following Monday.

While in prison, Lieschner testified, he believed that "the appeal was in progress." In December 2014, another inmate told Lieschner that he should have by then communicated with an appellate attorney and received transcripts. Lieschner then wrote to Ashbach and eventually learned that no appeal had been filed.

At the reference hearing, during cross-examination, Lieschner acknowledged that he knew that he had the right to appeal, that he had to file an appeal within 30 days, and that he would lose his right to appeal if he did not file it within that time. Lieschner also conceded that he knew by May 2014, when he

requested a sentencing transcript for his motion to set aside legal financial obligations, that no transcript had been prepared. Contrary to the assertion in his supporting declaration, Lieschner also admitted that he had pursued a pro se appeal on an earlier occasion.

At the conclusion of the evidentiary hearing, the State argued that Lieschner's undisputed knowledge of the right to appeal, his understanding of the need to file an appeal within 30 days, and his subsequent inaction, established his waiver of the right to appeal. Counsel for Lieschner argued that Ashbach's two brief discussions with Lieschner about his right to appeal were insufficient to establish a waiver given the multiple contested trial issues and Lieschner's motivation for filing an appeal.

The trial court found that Ashbach's testimony was credible and that Lieschner's testimony was not credible. In particular, the court found that Lieschner was aware of his right to appeal, how to perfect an appeal, and gave "verbal instructions" to Ashbach not to file an appeal. The court rejected as not credible Lieschner's testimony that he had initially misunderstood the question about whether he had ever pursued a pro se appeal and that he had told Ashbach from the beginning about facing a 20-year sentence on a Montana conviction.

After the evidentiary hearing, the superior court transmitted its findings to this court, and the parties filed supplemental briefs.

II

Generally, a criminal defendant seeking review must file a notice of appeal within 30 days after the entry of the judgment and sentence. RAP 5.2(a). An appellate court will extend the time to file a notice of appeal

> "only in extraordinary circumstances and to prevent a gross miscarriage of justice." RAP 18.8(b). But in a criminal case, we must balance strict application of that filing deadline with the defendant's state constitutional right to an appeal. State v. Kells, 134 Wn.2d 309, 314, 949 P.2d 818 (1998); see CONST. art. 1, § 22 (amend. 10). The State bears the burden of showing that the decision to waive the constitutional right to appeal was knowing, intelligent, and voluntary. State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). Consequently, the State must demonstrate that "a defendant understood his right to appeal and consciously gave up that right before a notice of appeal may be dismissed as untimely." Kells, 134 Wn.2d at 314.

State v. Chetty, 184 Wn. App. 607, 613, 338 P.3d 298 (2014) (Chetty II). Under certain circumstances, however, "inaction on the part of a defendant may be used by the State to prove the defendant waived the right to appeal." State v. Tomal, 133 Wn.2d 985, 990, 948 P.2d 833 (1997).

III

Lieschner contends that this court should accept his untimely notice of appeal because the State failed to demonstrate that he knowingly, intelligently, and voluntarily waived his right to appeal. Lieschner does not challenge the trial court's factual findings that he knew he had a right to appeal, knew how to perfect an appeal, and told defense counsel that he did not want to appeal. Rather, he argues that he was denied effective assistance of counsel when

Ashbach failed to consult with him about the advantages and disadvantages of filing an appeal.

In certain circumstances, we may consider the effectiveness of counsel when determining whether a defendant validly waived the right to appeal and whether to enlarge the time to file a notice of appeal. State v. Chetty, 167 Wn. App. 432, 444, 272 P.3d 918 (2012) (Chetty I) (the effectiveness of counsel is a circumstance that bears on the validity of defendant's waiver of the right to appeal and, in turn, on the determination whether to extend time to file notice of appeal under RAP 18.8(b)); see also Chetty II, 184 Wn. App. at 614-15 (defendant did not validly waive right to appeal when defense counsel failed to advise defendant of adverse immigration consequence and failed to consult about the advantages and disadvantages of filing an appeal); State v. Wicker, 105 Wn. App. 428, 431-33, 20 P.3d 1007 (2001) (an attorney who fails to timely comply with a client's request to file a notice of appeal is 'professionally unreasonable' and prejudice is presumed).[2]

The United States Supreme Court has adopted the framework of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), for analyzing whether defense counsel's failure to file a notice of appeal constitutes ineffective assistance. Roe v. Flores-Ortega, 528 U.S. 470, 478, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). Lieschner acknowledges that he

[2] The State mischaracterizes the scope of Chetty I and its effect on the State's burden to establish a valid waiver of the right to appeal. We decline the State's invitation to reconsider Chetty I.

therefore bears the burden of demonstrating both deficient performance and resulting prejudice. See Strickland, 466 U.S. at 687; State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). To establish prejudice in this context, Lieschner must show that "'but for counsel's deficient conduct, he would have appealed.'" Chetty II, 184 Wn. App. at 614 (quoting Roe, 528 U.S. at 486).

As evidence of deficient performance, Lieschner relies on the fact that Ashbach had only brief discussions with him about an appeal and that the trial court made no finding that he "explicitly" told Ashbach not to file an appeal. Lieschner also suggests several reasons why he would have wanted to pursue an appeal and notes his counsel's conclusory arguments at the evidentiary hearing about the American Bar Association guidelines for advising defendants about the right to appeal.

The trial court found that Lieschner "advised" Ashbach and gave "verbal instructions" that he did not want to appeal. Viewed in context, the record and findings establish that Lieschner clearly conveyed to Ashbach that he did not want to file an appeal. See Roe, 528 U.S. at 477 ("a defendant who explicitly tells his attorney *not* to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently"). But we need not decide whether counsel's failure to consult further with Lieschner, despite instructions not to file an appeal, constituted deficient performance because Lieschner has failed, in any event, to demonstrate prejudice.

Lieschner's motion to enlarge the time to file his notice of appeal and the resulting evidentiary hearing were based exclusively on his repeated assertions

that he told Ashbach to file an appeal and Ashbach agreed to file the appeal. Lieschner had every opportunity at the evidentiary hearing to explain why he might have told counsel not to file an appeal or how further consultation with counsel would have persuaded him to file an appeal.

But Lieschner steadfastly maintained that he intended to preserve his right to appeal from the beginning of trial, that he told Ashbach to file an appeal, that Ashbach said he would file an appeal, and that he patiently waited in prison, believing that the appeal was proceeding. Lieschner expressed no uncertainty about his actions or his intentions. The trial court found this account not credible. Under the circumstances, Lieschner's current claim that he would have appealed had counsel consulted with him about the advantages and disadvantages of filing an appeal rests on nothing more than speculation. Because Lieschner failed to establish prejudice, his ineffective assistance claim fails. See State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995) (claims of ineffective assistance must be based "on the record established in the proceedings below").

There is no dispute that Lieschner understood he had a right to appeal and the failure to file a notice of appeal within 30 days could result in the waiver of his right to appeal. He told defense counsel that he did not want to file an appeal and then waited more than a year to file a notice of appeal. On this record, the State satisfied its burden of demonstrating that Lieschner knowingly, intelligently, and voluntarily waived his right to appeal.

We deny Lieschner's motion to enlarge the time to file a notice of appeal.

Dwyer, J.

We concur:

Spearman, J.

Cox, J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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