Prosecuting Attorneys' Council of Georgia

State Prosecution Support Division

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FYI: GARZA v. IDAHO

The United States Supreme Court holds that trial counsel rendered ineffective assistance by failing to file a timely notice of appeal at request of the defendant who pled guilty and as part of the plea, agreed to an "appeal waiver."

In *Garza v. Idaho*, No. 17–1026 (Feb. 27, 2019), Garza signed two plea agreements, each arising from state criminal charges and each containing a clause stating that Garza waived his right to appeal. Shortly after sentencing, Garza repeatedly told his trial counsel that he wished to appeal. But instead of filing a notice of appeal, counsel informed Garza that an appeal would be "problematic" given Garza's appeal waiver. Thereafter, Garza sought post-conviction relief, contending that trial counsel rendered ineffective assistance. The Idaho trial court denied relief, and both the Idaho Court of Appeals and the Idaho Supreme Court affirmed that decision. The Idaho Supreme Court ruled that Garza, given the appeal waivers, needed to show both deficient performance and prejudice and concluded that he could not. However, in ruling that Garza needed to show prejudice, the Idaho Supreme Court acknowledged that it was aligning itself with the minority position among courts and that eight of the ten Federal Courts of Appeals to have considered the question have applied *Roe v. Flores-Ortega*, 528 U. S. 470 (2000) to presume prejudice even when a defendant has signed an appeal waiver. The Supreme Court granted certiorari to resolve the split of authority.

As an initial matter, the Court held that Garza's attorney rendered deficient performance by not filing the notice of appeal in light of Garza's clear requests. 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.

The Court then considered the issue of prejudice. The Court noted that *Flores-Ortega* reasoned that because a presumption of prejudice applies whenever the defendant is denied counsel at a critical stage of the proceedings, it makes greater sense to presume prejudice when counsel's deficiency forfeits an appellate proceeding altogether. Thus, *Flores-Ortega* held that when an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice to the defendant should be presumed "with no further showing from the defendant of the merits of his underlying claims." *Id*., at 484. And here, the Court held, the presumption of prejudice recognized in *Flores-Ortega* applies regardless of whether a defendant has signed an appeal waiver because no appeal waiver serves as an absolute bar to all appellate claims. Consequently, while signing a valid and enforceable appeal waiver means giving up some, many, or even most appellate claims, some claims

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remain nevertheless (e.g. to prevent a miscarriage of justice or a breach of the plea agreement by the State).

In so holding, the Court rejected the argument that to show prejudice a defendant should be required to show — on a case-by-case basis — that he would have presented claims that would have been considered by an appellate court on the merits. The Court stated that it already rejected attempts to condition the restoration of a defendant's appellate rights forfeited by ineffective counsel on proof that the defendant's appeal had merit. See, e.g., *Rodriquez v. United States*, 395 U. S. 327, 330 (1969). Moreover, it is not the defendant's role to decide what arguments to press, making it especially improper to impose that role upon the defendant simply because his opportunity to appeal was relinquished by deficient counsel. Therefore, the Court held, "We accordingly decline to place a pleading barrier between a defendant and an opportunity to appeal that he never should have lost."

Georgia appellate courts have long required a defendant to show an ability to prevail on the merits as a precondition to an out-of-time-appeal. Recently however, our Supreme Court, and Justice Nahmias, in particular, citing *Flores-Ortega*, have called into question this entire body of jurisprudence. See *Ringold v. State*, 304 Ga. 875 (2019) (Nahmias, J., concurring). This decision in *Garza*, which follows *Flores-Ortega*, and rejects any type of pre-showing by a defendant of a meritorious issue on appeal, must be seen by prosecutors as another indication that when the proper case reaches the Supreme Court, much of the law regarding out-of-time appeals will be overruled. See *Cooper v. State*, Case No. A18A1871 (Feb. 19, 2019)