

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

v.) No. 22-764 (Kanawha County 08-F-566)

Desmond Demetrius Clark,
Defendant Below, Petitioner

MEMORANDUM DECISION

The petitioner, Desmond Demetrius Clark, appeals the order of the Circuit Court of Kanawha County, entered September 15, 2022, denying his motion for resentencing and for the appointment of appellate counsel.¹ Upon our review of this case, the Court is of the opinion that the circuit court erred in denying the petitioner’s motion for resentencing without first conducting an evidentiary hearing to address his allegation that his trial counsel failed to assist him in filing a direct appeal. Accordingly, this case satisfies the “limited circumstance” requirement of Rule 21(d) of the West Virginia Rules of Appellate Procedure and is appropriate for a memorandum decision rather than an opinion.

The petitioner chased a woman into a Taco Bell and shot her six times, killing her. Pursuant to a plea agreement, the petitioner pled guilty to first-degree murder, and the question of mercy (the possibility of parole) was left to the circuit court. A final order was entered on July 6, 2009, sentencing the petitioner to life without the possibility of parole. The petitioner filed a motion for a reduction of his sentence under Rule 35(b) of the West Virginia Rules of Criminal Procedure in 2009, which was denied.

Although the petitioner has filed three separate unsuccessful petitions for habeas corpus relief with this Court in the past, the petitioner has not filed a direct appeal from his underlying criminal case. On April 17, 2020, the petitioner, without the assistance of counsel, filed a motion with the circuit court seeking to be resentenced so that he could pursue a direct appeal and requesting the appointment of appellate counsel. In his motion, the petitioner claimed his defense counsel failed to consult with him about an appeal after his verbal request. He also claimed that he was never informed by the circuit court or his trial defense counsel of his right to appeal despite his guilty plea. The petitioner represented that his trial counsel told him that if he pled guilty, she could do nothing further for him other than file a motion for reconsideration of sentence. Additionally, the petitioner claimed that he recently discovered “substantial” defects in his

¹ The petitioner is a self-represented litigant, and the State appears by Attorney General Patrick Morrissey and Assistant Attorney General R. Todd Goudy.

criminal proceeding, including the denial of his lawyer’s motion for a continuance and more than 100 pages of newly discovered mental health records; he asserted that these things forced him to be sentenced at a time when his trial counsel was unprepared. He argued that, if not for the erroneous advice of his trial counsel, he would have pursued an appeal regarding the voluntariness of his plea. In a supplemental filing with the circuit court, the petitioner submitted *State v. Gregory F.*, No. 20-0411, 2022 WL 1165359 (W. Va. Apr. 20, 2022) (memorandum decision), a decision in which this Court reversed a circuit court order that denied a defendant’s motion for resentencing and remanded for an evidentiary hearing on the issue of whether defense counsel failed to file an appeal after being directed to do so.

Without holding a hearing, the circuit court entered its September 15, 2022, order denying the petitioner’s motion for resentencing and for appointment of counsel. The circuit court found that the petitioner failed to assert “any available grounds on appeal, as he does not challenge the voluntariness of his plea, nor does he challenge the legality of his sentence.” The petitioner appeals that order and asserts three assignments of error. In short, the petitioner argues that the circuit court abused its discretion and infringed on his state and federal constitutional rights by (1) failing to resentence him; (2) denying his motion without conducting an evidentiary hearing; and (3) denying his motion without making requisite findings and conclusions of law. We review the petitioner’s assignments of error under the following standard:

“In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court’s underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.” Syl. Pt. 2, *Walker v. West Virginia Ethics Commission*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

Syl. Pt. 1, *State v. Meadows*, 231 W. Va. 10, 743 S.E.2d 318 (2013).

The petitioner alleges that his trial counsel failed to act on his instruction to file an appeal. In a similar case, *State v. Higgins*, No. 19-0893, 2020 WL 5092917, at *2 (W. Va. Aug. 28, 2020) (memorandum decision), we determined that remand for an evidentiary hearing was necessary where a criminal defendant alleged that his counsel failed to file an appeal after having been directed to do, but the record was insufficient to evaluate this claim. The rationale behind our decision was explained as follows:

“One convicted of a crime is entitled to the right to appeal that conviction and where he is denied his right to appeal such denial constitutes a violation of the due process clauses of the state and federal constitutions and renders any sentence imposed by reason of the conviction void and unenforceable.” Syllabus, *State ex rel. Bratcher v. Cooke*, 155 W.Va. 850, 188 S.E.2d 769 (1972).

Syl. Pt. 1, *Billotti v. Dodrill*, 183 W. Va. 48, 394 S.E.2d 32 (1990). “The constitutional right to appeal cannot be destroyed by counsel’s inaction or by a criminal defendant’s delay in bringing such to the attention of the court, but such

delay on the part of the defendant may affect the relief granted.” Syl. Pt. 8, *Rhodes v. Leverette*, 160 W. Va. 781, 239 S.E.2d 136 (1977). Ordinarily, the appropriate relief for the denial of the right to appeal is a resentencing, to begin anew the four-month appeal time pursuant to Rule 5(f) of the West Virginia Rules of Appellate Procedure and West Virginia Code § 58-5-4, and the appointment of appellate counsel. *See Carter v. Bordenkircher*, 159 W. Va. 717, 726, 226 S.E.2d 711, 717 (1976).

Higgins, 2020 WL 5092917, at *2.

In this case, there is no record on which to evaluate the petitioner’s claim that he instructed his defense counsel to file a direct appeal. For the foregoing reasons, we reverse the order denying the petitioner’s motion for resentencing and we remand this case to the Circuit Court of Kanawha County to conduct an evidentiary hearing. The circuit court shall then enter an order setting forth detailed findings of fact and conclusions of law sufficient to permit meaningful appellate review, should the petitioner choose to appeal that order. If the circuit court determines that the petitioner requested that his attorney file an appeal, the circuit court should resentence the petitioner for purposes of appeal and appoint appellate counsel.

Reversed and remanded, with directions.

ISSUED: April 30, 2024

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Elizabeth D. Walker
Justice John A. Hutchison
Justice William R. Wooton
Justice C. Haley Bunn