

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7674
Summary Calendar

ROBERT T. NICHOLS,

Petitioner-Appellant,

VERSUS

J.B. TORRENCE, Sheriff,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA-J88-0498(W))

(July 18, 1994)

Before GARWOOD, SMITH, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Robert Nichols appeals the dismissal, for failure to exhaust state-law remedies, of his petition for writ of habeas corpus. We vacate and remand.

I.

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Nichols was convicted of malicious mischief and driving under the influence (DUI) (third offense) in municipal court in January 1986. He filed appeal bonds for each offense in the Rankin County Court. He did not file a notice of appeal in either case. The county court dismissed both cases for lack of jurisdiction because of Nichols's failure to file a notice of appeal.

The state circuit court affirmed the dismissal of both cases. Nichols contended to the circuit court that his appeal bonds should have been construed as notices of appeal. Nichols argued to the Supreme Court of Mississippi, which consolidated his appeals, that his appeal bonds should have served as notices of appeal and, in the alternative, that counsel had been ineffective for having failed to file notices of appeal. That court affirmed without a written opinion. Nichols v. City of Richland, 532 So. 2d 1003 (Miss. 1988).

II.

Nichols filed a petition for federal habeas corpus relief, contending that counsel had been ineffective in failing to file notices of appeal and that counsel's failure had deprived him of his right to trial by jury in the county court. The respondent moved for dismissal because Nichols had failed to exhaust state-law remedies and was procedurally barred from raising his contentions in state court.

The magistrate judge recommended that the district court deny the respondent's motion to dismiss because Nichols would complete

his concurrent thirty-day jail terms before the state courts could consider post-conviction relief. The magistrate judge also recommended that the court grant habeas relief. The district court rejected the magistrate judge's recommendations, holding that Nichols had failed to exhaust his state-law remedies and that he had not received ineffective assistance of counsel.

III.

Nichols first contends that he has exhausted his state-law remedies because he may not seek relief under the Mississippi Uniform Post-Conviction Collateral Relief Act, MISS. CODE ANN. §§ 99-39-1 to 99-39-29 (Supp. 1993). We need not address whether Nichols may pursue collateral remedies, as he exhausted his state-law remedies when he presented his constitutional contention to the state supreme court.

To exhaust his state-law remedies, a habeas petitioner generally must present his contentions to the state courts in a procedural posture in which they ordinarily will be considered on their merits. Castille v. Peoples, 489 U.S. 346, 351 (1989). Generally, the Supreme Court of Mississippi will not consider issues raised initially on appeal. Patterson v. State, 594 So. 2d 606, 609 (Miss. 1992). That court, however, will entertain contentions regarding the deprivation of the right to effective assistance of counsel that are raised initially on appeal. Read v. State, 430 So. 2d 832, 838 (Miss. 1983).

The Supreme Court of Mississippi, however, will consider

appeals from cases originating in municipal courts only when those cases involve constitutional questions and when a circuit judge or supreme court justice allows the appeal. Barrett v. State, 491 So. 2d 833, 833 (Miss. 1986); MISS. CODE ANN. § 11-51-81 (1972). Ordinarily, the state high court will dismiss a municipal-court appeal for lack of jurisdiction when the appellant fails to satisfy the criteria of § 11-51-81. See Sumrall v. City of Jackson, 576 So. 2d 1259, 1262 (Miss. 1991).

Nichols's supreme court appeal involved a constitutional question. The record does not reflect that he sought or obtained the permission of a circuit judge or supreme court justice, though such permission could be inferred from that court's affirmance of his conviction.

The state supreme court affirmed Nichols's convictions without providing reasons; it therefore appears that the court considered the merits of Nichols's appeal. Because the court evidently considered the merits, because Nichols was not procedurally barred from raising ineffective assistance of counsel as an issue for the first time before that court, and because Nichols perhaps implicitly received the court's permission to appeal, he is excused from further state-court proceedings. See Castille, 489 U.S. at 351 (holding that further state proceedings would be useless when state courts have ruled on the merits of the claim). The district court therefore erred by dismissing Nichols's petition for failure to exhaust his state-law remedies.

IV.

Nichols next contends that counsel was ineffective for failing to file notices of appeal from the municipal-court convictions. The district court found that Nichols had not received ineffective assistance. Because the court considered the merits of Nichols's claims and indicated what he would hold if the merits were before him, we will address Nichols's ineffective-assistance contention.

To prevail on an ineffective-assistance-of-counsel claim, a petitioner must show "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984). To prove deficient performance, the petitioner must show that counsel's actions "fell below an objective standard of reasonableness." Id. at 688. To prove prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," id. at 694, and that "counsel's deficient performance render[ed] the result of the trial unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. Washington, 466 U.S. at 694. To prove unreliability or unfairness, the petitioner must show the deprivation of a "substantive or procedural right to which the law entitles him." Fretwell, 113 S. Ct. at 844.

Mississippi court rules contemplate that an appellant from a municipal-court conviction will file a notice of appeal and an

appeal bond in separate documents. See MISS. UNIF. CRIM. RULES OF CIRCUIT COURT PRACTICE RULE 7.03 (1993). Although an argument can be made that a failure to file a notice of appeal is not jurisdictional in Mississippi, see Johnson v. Evans, 517 So. 2d 570-71 (Miss. 1987), and thus could be waived as a defect, constitutionally effective counsel would not risk dismissal by failing to take the simple step of filing a notice. Prejudice is presumed, as counsel's failure to perfect an appeal is deemed equivalent to the total denial of counsel on appeal. Penson v. Ohio, 488 U.S. 75, 85-89 (1988).

Nichols's appeals to the county court were appeals of right. MISS. CODE ANN. § 99-35-1 (Supp. 1993). Nichols therefore had a right to the assistance of counsel on appeal. Perez v. Wainwright, 640 F.2d 596, 598 (5th Cir. Mar. 1981), cert. denied, 456 U.S. 910 (1982). Prejudice is presumed when the defendant's reliance upon counsel's advice results in loss of the right to appeal. United States v. Gipson, 985 F.2d 212, 215 (5th Cir. 1993). The remedy for ineffective assistance for failure to perfect an appeal is an out-of-time appeal in state court. Schwander v. Blackburn, 750 F.2d 494, 501 n.4 (5th Cir. 1985).

Additionally, counsel swore that he had failed to file the required notices of appeal as a result of oversight or neglect, and Nichols himself signed the appeal bonds. It therefore appears that Nichols wished to appeal his convictions to the county court and that he relied upon counsel to perfect the appeal. Counsel's ineffective performance thus prejudiced Nichols by denying him his

right to appeal.

V.

Nichols next contends that he was denied his right to a jury trial in the municipal court and, because of counsel's failure to perfect his appeal, in the county court as well. Nichols's contention is unavailing.

A defendant who faces a maximum prison term of six months or less is not entitled by the Constitution to a jury trial in the absence of other penalties indicating that the legislature considers the offense "serious." Blanton v. City of North Las Vegas, Nev., 489 U.S. 538, 543-44 (1989). Municipal courts in Mississippi may impose maximum prison terms of six months and maximum fines of \$1,000 in criminal cases. MISS. CODE ANN. §§ 21-13-19, 21-23-7(1) (1972 & Supp. 1993). Nichols has not demonstrated additional statutory penalties that rendered the charges against him "serious" within the meaning of Blanton. Nichols therefore did not face a sentence that entitled him to a jury trial in the municipal court.

The judgment of the district court is VACATED, and this matter is REMANDED to that court for further appropriate proceedings in light of the ineffective assistance of counsel that Nichols received. Habeas relief should be granted unless the state grants Nichols an out-of-time appeal within a reasonable time.