

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

IN RE: DAVID D. EWING,

PETITIONER,

**v.
LARRY DENNEY
SUPERINTENDENT, CRCC,**

RESPONDENT.

DOCKET NUMBER WD74807

DATE: March 6, 2012

Appellate Judges:

Writ Division: James M. Smart, Presiding Judge, Mark D. Pfeiffer, Judge and Cynthia L. Martin, Judge

Attorneys:

Rosemary E. Percival, Kansas City, MO, for Petitioner.

Michael Spillane, Jefferson City, MO, for Respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

IN RE: DAVID D. EWING,

PETITIONER,

v.

**LARRY DENNEY,
SUPERINTENDENT, CRCC,**

RESPONDENT.

No. WD74807

Before Writ Division: James M. Smart, Presiding Judge, Mark D. Pfeiffer, Judge and Cynthia L. Martin, Judge

David Ewing seeks a writ of habeas corpus and asks that he be resentenced as to reinstate the time frame within which he can timely appeal his convictions. Ewing claims his trial counsel failed to perfect the filing of a timely notice of appeal and failed to inform Ewing that his appeal had been dismissed, a fact about which Ewing did not learn until it was too late to seek leave to an appeal out of time, and until his time to file a Rule 29.15 motion had expired. The State does not contest the factual allegations giving rise to Ewing's petition for writ of habeas corpus and agrees that resentencing Ewing is appropriate under the facts and circumstances of this case.

Writ of Habeas Corpus issued

(1) Though habeas corpus is not a substitute for a procedurally defaulted post-conviction remedy, there are exceptions to this rule. One such exception is "cause and prejudice."

(2) "Cause" can be demonstrated by establishing an objective factor external to the defense which impeded a defendant's efforts to comply with the procedural constraints associated with filing a timely post-conviction motion.

(3) "Prejudice" can be demonstrated by showing that errors created not just the possibility of prejudice, but worked to the actual and substantial disadvantage of the defendant, infecting his trial with error of constitutional proportion.

(4) A criminal defendant is entitled to effective assistance of counsel on appeal. The failure of counsel to take the steps to file and/or perfect the filing of an appeal when instructed by his client to do so constitutes ineffective assistance of counsel.

(5) Ewing's trial counsel's failure to perfect Ewing's appeal, or to notify Ewing that his appeal had been dismissed though not technically an objective factor external to the defense, is nonetheless sufficient to constitute "cause" under the facts of this case. Where the procedural default is the result of ineffective assistance of counsel, the responsibility for that default is

imputed to the State, rendering it, effectively, "cause" external to the defense. Ewing thus established "cause" under the cause and prejudice exception.

(6) Ineffectiveness of counsel as a means of establishing "cause" to overcome the procedural default of post-conviction remedies is necessarily limited to scenarios where the ineffectiveness of *trial* counsel results in a procedural default of those remedies. This must be distinguished from claims of ineffective assistance of *post-conviction* counsel which are categorically unreviewable except to the extent abandonment can be established.

(7) Ewing established "prejudice" simply by the fact he was denied an appeal in a criminal case.

(8) Though a writ of habeas corpus is appropriate under these circumstances, the relief should be limited to vacating Ewing's previous sentences, and to ordering the trial court to resentence Ewing by imposing the same sentences Ewing originally received with credit for time served. Upon resentencing, a new period for filing an appeal from Ewing's convictions will begin to run.

Opinion by Cynthia L. Martin, Judge

March 6, 2012

This summary is UNOFFICIAL and should not be quoted or cited.
