

DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

Somchai Miller v. State of Florida

183 So. 3d 474 (Fla. Dist. Ct. App. 2016) · No. 1D15-4374 · Decided January 24, 2016

SUMMARY

The Florida First District Court of Appeal dismissed Somchai Miller’s petition for a belated appeal as legally insufficient. The court held that Miller failed to allege that counsel misadvised him about the availability of appellate review and failed to specify when the relevant advice was given, but dismissed without prejudice to filing a new, legally sufficient petition.

CASE DETAILS

COURT	District Court of Appeal of Florida, First District
WRITING FOR THE COURT	Per Curiam; Wetherell; Makar; Winokur
JURISDICTION	Florida
DECIDED	January 24, 2016
DOCKET	1D15-4374
DISPOSITION	dismissed
PROCEDURAL POSTURE	Original-jurisdiction petition seeking a belated appeal from an order denying Miller's second amended motion for postconviction relief.
STANDARD OF REVIEW	The court reviewed the petition for a prima facie basis for granting belated appellate relief and legal sufficiency under Florida Rule of Appellate Procedure 9.141(c).
PRECEDENTIAL VALUE	Published Florida First District Court of Appeal opinion
PARTIES	Somchai Miller v. State of Florida

TOPICS

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PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether Miller's petition established a prima facie basis for a belated appeal when he alleged advice concerning the advisability of pursuing another postconviction remedy but did not allege misadvice concerning the availability of appellate review.
2. Whether the petition was legally sufficient when it failed to identify when counsel provided the allegedly erroneous advice, preventing a showing that the advice prejudiced Miller's appellate rights.

HOLDINGS

1. A petition seeking a belated appeal is legally insufficient unless it affirmatively alleges that the petitioner was misadvised as to the availability of appellate review, rather than merely alleging that counsel gave unreasonable advice about whether pursuing an appeal was advisable.
2. A petition for belated appeal must identify when the alleged misadvice occurred because advice to pursue another remedy would not establish prejudice to appellate rights if it was given after the time for appeal had already expired.

KEY QUOTATIONS

“Absent an affirmative allegation of misadvice as to the availability of an appeal as opposed to the advisability of pursuing an appeal, his present claim is legally insufficient to establish a basis for granting relief.” (at 2)

“Moreover, by failing to specifically allege when the interaction with counsel occurred, petitioner has failed to set forth a prima facie basis for relief since even if erroneous, the advice to pursue another potential remedy would not have prejudiced him with respect to his appeal rights if that advice was solicited and given after the time for appealing had already expired.” (at 2)

FACTUAL BACKGROUND

Miller retained counsel to pursue postconviction remedies after the denial of his second amended motion and a timely motion for rehearing. He alleged that counsel advised him to file a second or successive motion in the trial court instead of pursuing an appeal. Miller did not allege that counsel misadvised him about the availability of appellate review, and he did not specify when the relevant interaction with counsel occurred.

PROCEDURAL HISTORY

Miller sought a belated appeal after counsel allegedly advised him to pursue a second or successive postconviction motion rather than an appeal. A special master recommended dismissal for failure to establish a prima facie basis for relief. The First District adopted that recommendation and dismissed the petition without prejudice.

DISPOSITION

dismissed

REMAND INSTRUCTIONS

None. The dismissal was without prejudice to Miller filing a new petition curing the identified deficiencies and otherwise complying with Florida Rule of Appellate Procedure 9.141(c).

OPINION

PER CURIAM.

IN THE DISTRICT COURT OF APPEAL FIRST DISTRICT, STATE OF FLORIDA SOMCHAI MILLER, NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND Petitioner, DISPOSITION THEREOF IF FILED v. CASE NO. 1D15-4374 STATE OF FLORIDA, Respondent. _____/ Opinion filed January 20, 2016. Petition for Belated Appeal -- Original Jurisdiction. Somchai Miller, pro se, Petitioner.

Pamela Jo Bondi, Attorney General, and Samuel Steinberg, Assistant Attorney General, Tallahassee, for Respondent. PER CURIAM. Somchai Miller timely seeks a belated appeal of an order denying his second amended motion for postconviction relief.

We adopt the recommendation of the special master to dismiss the petition for failure to set forth a prima facie basis for relief, but do so without prejudice to Miller filing a new petition stating a legally sufficient claim, if he is able to do so. Miller alleges that he retained counsel to pursue postconviction remedies, and at some unspecified time following the denial of his second amended motion and a timely motion for rehearing, he and his family discussed with counsel “what should be done.” Counsel is alleged to have advised that the best course of action was to file a second or successive motion with the trial court, advice that Miller now characterizes as “entirely unreasonable” under the circumstances.

He therefore requests that he be granted a belated appeal. Florida Rule of Appellate Procedure 9.141(c)(4)(F)(i) provides in relevant part that “a petition seeking belated appeal must state whether the petitioner requested counsel to proceed with the appeal and the date of any such request, or if the petitioner was misadvised as to the availability of appellate review or the status of filing a notice of appeal.” Miller does not allege that he asked counsel to pursue an appeal, but we do not view that omission as material because he readily concedes that as a consequence of counsel’s allegedly erroneous advice, no such request was made.

However, while he does assert that he was misadvised as to the proper course of action following the denial of his second amended motion, he does not allege that he was “misadvised as to the availability of appellate review.” Absent an affirmative allegation of misadvice as to the availability of an appeal as opposed to the advisability of pursuing an appeal, his 2 present claim is legally insufficient to establish a basis for granting relief.

Moreover, by failing to specifically allege when the interaction with counsel occurred, petitioner has failed to set forth a prima facie basis for relief since even if erroneous, the advice to pursue

another potential remedy would not have prejudiced him with respect to his appeal rights if that advice was solicited and given after the time for appealing had already expired.

Accordingly, the petition seeking belated appeal is DISMISSED as legally insufficient. This disposition is without prejudice to the filing of a new petition curing the deficiencies identified herein and otherwise complying with the requirements of Florida Rule of Appellate Procedure 9.141(c). WETHERELL, MAKAR, and WINOKUR, JJ., CONCUR. 3