2018

State of Utah, Plaintiff/Petitioner, v. Calvin Paul Stewart, Defendant/Respondent : Brief of Appellee

Utah Supreme Court

Case No. 20180847-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Petitioner,

v.

CALVIN PAUL STEWART,
Defendant/Respondent.

Brief of Petitioner

On Writ of Certiorari to the Utah Court of Appeals

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INTRODUCTION

The court of appeals improperly granted Stewart a new appeal under rule 4(f), Utah Rules of Appellate Procedure, after Stewart defaulted his original appeal. Its decision conflicts with this Court's precedent and improperly expands rule 4(f) beyond its clear confines.

Rule 4(f) allows a trial court to reinstate the time to appeal if a defendant can meet the heavy burden of showing that he was denied the right to appeal through no fault of his own. A defendant is denied his right to appeal only if he is "prevented…from proceeding with [an] appeal." This Court has held that "proceeding" with an appeal means "filing a notice of appeal, not more" and that a "defendant who actually files an appeal…has

not been prevented from proceeding with an appeal." Thus, the remedy described in rule 4(f) is intentionally narrow and available only to those defendants who did not appeal because something beyond their control prevented them from doing so.

Stewart filed a timely *pro se* notice of appeal following his 2003 conviction and sentence. He later defaulted the appeal by failing to file his brief. Based on this Court's precedent, he clearly was not denied his right to appeal.

Nevertheless, over a decade after Stewart defaulted his appeal, he filed a rule 4(f) motion, arguing that he was deprived of his right to appeal because he was not told that he could have had counsel on appeal. At an evidentiary hearing, because transcripts of the sentencing were not available, Stewart offered only his own self-serving testimony twelve years after the fact to support his claim. But Stewart's memory was considerably incomplete. Although the trial court did not expressly find his testimony unreliable, the court described it as a "mere claim" that did not meet the preponderance of the evidence standard required by rule 4(f) and denied the motion.

The court of appeals reversed. Its opinion erroneously broadens rule 4(f) relief beyond the clear confines this Court has established, both through its rule making power and in its precedent.

The court of appeals held that a defendant who files an appeal is still deprived of his right to appeal if he is not informed that he had the right to counsel on appeal. That holding contradicts this Court's clear precedent. It also impermissibly expands the narrow purpose of rule 4(f) by allowing a criminal defendant to challenge the quality of his appeal, rather than take those challenges to post-conviction review—an error that this Court has had to correct before.

The court of appeals also erred when it reversed the trial court's ruling that Stewart failed to prove that he had not been advised of his right to counsel. To get there, the court improperly reassessed the evidence in a way that conflicted with the trial court's outcome, holding that because the trial court made no findings as to Stewart's credibility his testimony had to be accepted as true.

Longstanding Utah law foreclosed that course. When presented with an inadequate factual finding, an appellate court has only two options: it may assume that specific findings would have been consistent with the trial court's decision and affirm; or it may remand for additional findings if such an assumption would be unreasonable. The law does not allow the court of appeals to make its own factual findings and reverse the outcome, as the court did here.

STATEMENT OF THE ISSUES

This Court granted certiorari review on the following questions:

1. Whether the Court of Appeals erred in concluding that Rule 4(f) of the Utah Rules of Appellate Procedure permits reinstatement of an appeal, based on a convicted defendant's claim that he was not informed of his right to counsel on appeal, after the defendant filed a timely *pro se* appeal.

2. Whether the Court of Appeals erred in reversing the district court's determination that Stewart failed to meet his burden of demonstrating he was not informed of his right to counsel on appeal.

Standard of Review. On certiorari, this Court reviews a decision of the court of appeals for correctness. *Manning v. State*, 2005 UT 61, ¶10, 122 P.3d 628.

STATEMENT OF THE CASE

A. Summary of relevant facts.

Stewart Filed a Timely Notice of Appeal

When Stewart was first charged with securities fraud in August 2001, he retained private counsel. R1–14, 18. Later, when Stewart could no longer afford his attorney, the trial court appointed counsel. R111–12, 134–36. However, Stewart soon became dissatisfied with his public defender and chose to represent himself after he was "fully advised of his right to have

counsel." R210–12. Upon electing to proceed *pro se*, the trial court informed Stewart that he could change his mind and have counsel appointed up until about eight weeks before the trial was scheduled to begin. R212.

Stewart did not change his mind and represented himself at trial, where he was convicted on seventeen counts of securities fraud and related crimes. R568–70, 625–27. He also represented himself at sentencing. R678–83.[1]

Stewart filed a timely *pro se* notice of appeal and a docketing statement. R689–90; *see* R1120–21. When he did not file a timely appellate brief, his appeal was involuntarily dismissed with the caveat that he could resurrect his appeal with the filing of a brief within ten days. R719. Despite this additional opportunity, Stewart still failed to file a brief. *See* R1121–22.

Over the next few years, Stewart filed several motions and requests with the trial court, including two motions for appointment of counsel. R737–38, 762–67, 771, 774–75, 780–81. The trial court determined that it lacked subject matter jurisdiction over the case following sentencing and dismissed Stewart's motions. R801, 804–06. Stewart appealed and the court of appeals affirmed in a memorandum decision. R808, 818–19. Stewart sought certiorari review, which was denied. R827.

[1] The transcript of the sentencing hearing is not part of the record and the recording is no longer available.

Stewart also filed "several" petitions for post-conviction relief related to this case, although the record is silent as to the substance or result of those petitions. *See* R729–30, 936.

B. Summary of proceedings and disposition of the court.

Stewart's Motion to Reinstate His Appeal

Over a decade after he defaulted his first appeal, Stewart moved to restart the time to file a first appeal under rule 4(f), Utah Rules of Appellate Procedure. R874–81, 920–31. Stewart argued that he was deprived of his right to appeal because the trial court did not inform him at sentencing that he had a right to counsel on appeal. R920–31. Because transcripts and recordings of the August 2003 sentencing were no longer available, Stewart claimed that he would rely on witness testimony to support his claim. R924.

Twelve and a half years after sentencing, the trial court held an evidentiary hearing. R1105–26 (Addendum D). Stewart was the only witness. He testified that he did not remember what the trial court told him when he elected to represent himself: "To be straightforward, honest, I really can't remember a whole lot of exactly what he asked me." R1119. He claimed, nevertheless, that the court, at that time, did not inform him of his right to counsel on appeal. R1119. He also testified that the court at sentencing did not inform him of his right to counsel on appeal. R1120.

On cross-examination, Stewart admitted that his memory about what the court told him over twelve years earlier was incomplete: "There's some things I remember, some things I don't." R1123. He claimed that there were "certain things" he wanted to remember, which he wrote "in a notebook when [he] got back in prison so that [he] could remember them." R1123. Stewart did not produce the purported notes, nor did he elaborate on what the "certain things" were, or if they had anything to do with his appeal or his right to counsel. *See* R1123. And he again admitted that he did not have a "full memory of everything that was said," just "that which was written down." R1123. All he could say was that nothing in his notebook indicated that the trial court informed him of his right to counsel on appeal. R1125.

The trial court denied the motion, ruling that Stewart's right to appeal was not denied "for several reasons." R1145–57 (Addendum C).

First, it ruled that Stewart waived his right to counsel on appeal by requesting to represent himself at trial and sentencing and choosing to proceed in his appeal *pro se*: "He repeatedly was notified of his right to counsel, and he repeatedly declined to be represented by counsel." R1154–55.

Second, the trial court ruled that Stewart was at fault for his failure to file a brief and perfect his appeal. R1155.

Finally, the trial court ruled that even if the right to appeal includes notification of the right to counsel on appeal, Stewart could not show that he was not so notified. R1154–57. The court reasoned that Stewart failed to meet his burden because he could provide nothing to support his "mere claim" many years later that he was not informed of his right to counsel on appeal. R1156. The trial court concluded that Stewart "clearly failed to establish, by a preponderance of the evidence, that he has been deprived, through no fault of his own, of his right to appeal." R1157.

Stewart timely appealed the trial court's ruling. R1159.

The Court of Appeals' Decision

The Utah Court of Appeals held that the trial court erroneously denied Stewart's rule 4(f) motion to reinstate the time to appeal. *See State v. Stewart*, 2018 UT App 151, --- P.3d --- (Addendum A).

First, it held that "a defendant is entitled to be informed of his right to counsel on appeal," and that "[i]f an indigent defendant is not made aware of the right to counsel, he 'has been prevented in some meaningful way from proceeding with a first appeal of right.'" *Id.* ¶¶13–14 (quoting *Manning v. State*, 2005 UT 61, ¶26, 122 P.3d 628).

The court rejected in a single footnote the State's argument, based on this Court's precedent, that "Stewart was not deprived of his right to appeal,

because he filed a notice of appeal." *Id.* ¶10 n.1. The court reasoned that the precedent was "inapplicable" because it "did not contemplate a situation in which a defendant was denied the right to appeal by being denied the right to counsel." *Id.*

Having concluded that the "failure to inform a defendant of the right to counsel on appeal" deprives him of the right to appeal, the court next held that the district court clearly erred by concluding that Stewart was not so informed. *Id.* ¶¶15–23. While admitting that Stewart's "testimony was self-serving and not detailed," the court credited his testimony despite acknowledging that the trial court characterized it as a "mere claim" that did not meet the preponderance of the evidence standard. *Id.* ¶¶21–22.

The court concluded that because the State did not present its own evidence to rebut Stewart's claim and because the trial court "did not make findings that Stewart's testimony was incredible or unreliable," Stewart's testimony must be given some weight, which, the court of appeals concluded, meets the preponderance standard. *Id.* It thus held that the trial court "clearly erred" in ruling Stewart "was not informed of the right to counsel on appeal." *Id.* ¶22. The court of appeals reversed and remanded with instructions to reinstate the period for Stewart to file a direct appeal. *Id.* ¶24.

SUMMARY OF ARGUMENT

I. Rule 4(f), Utah Rules of Appellate Procedure, has a single, narrow purpose—to reinstate the period to file an appeal for those defendants who were prevented from filing a notice of appeal during the original thirty-day period. The court of appeals, however, erroneously held that a defendant who filed a timely notice of appeal may have the period to file another notice of appeal reinstated under rule 4(f) if he is not told that he could have had counsel on his first appeal.

The court of appeals' decision contradicts this Court's clear holdings that a defendant is not denied the right to appeal, and therefore is ineligible for reinstatement relief, if he does nothing more than file a timely notice of appeal. This remains true even if a defendant is not told of his right to counsel on appeal and subsequently defaults his *pro se* appeal, because rule 4(f) is not intended to address the quality of an appeal. Such challenges are consigned to post-conviction review.

Moreover, the court of appeals' decision relied on an erroneous view of what it means to "properly advise" a defendant of the right to appeal. At the time of Stewart's sentencing, rule 22(c), Utah Rules of Criminal Procedure, required a trial court to inform a defendant that he had the right to appeal and that he must do so within thirty days by filing a notice of

appeal. But it did not require a trial court to also inform a defendant that he could have counsel on appeal. And no other authority did either. Thus, even if the trial court did not tell Stewart that he could have had counsel on appeal, that omission does not mean that Stewart was not "properly advised" of his right to appeal.

II. The trial court ruled that even if Stewart were entitled to have the period to appeal reinstated by proving that he was not informed of his right to counsel on appeal, he had failed to meet his burden of proof. It was implicit in the trial court's ruling that the court did not credit Stewart's self-serving testimony, which was replete with memory deficiencies, of what occurred at his sentencing hearing twelve years earlier.

The court of appeals, however, disregarded that implicit finding and determined that the trial court made no finding at all about Stewart's credibility. It then continued to make its own finding that because the State offered no evidence to contradict Stewart's "self-serving and not detailed" testimony, the testimony had to be credited as true. The court of appeals erred because it is not authorized to make factual findings. Instead, when an appellate court determines that a trial court failed to make adequate factual findings it has only two options: affirm by assuming the trial court would

have made findings consistent with its decision; or remand for explicit findings.

The court of appeals should have affirmed because the record supports the inference that the trial court did not credit Stewart's testimony. At a minimum, the court of appeals should have remanded so the trial court could enter findings on the record as to Stewart's credibility. But it erred when it did neither, choosing instead to make its own findings and to reverse.

ARGUMENT

I.

RULE 4(f), UTAH RULES OF APPELLATE PROCEDURE, DOES NOT PERMIT REINSTATING THE PERIOD TO APPEAL FOR A DEFENDANT WHO ALREADY APPEALED AND WHO ONLY CHALLENGES THE DENIAL OF HIS RIGHT TO COUNSEL ON THE APPEAL THAT HE ALREADY FILED AND LOST

Rule 4(f), Utah Rules of Appellate Procedure, permits reinstating the thirty-day period to appeal only if a defendant can prove that he was prevented from filing a timely notice of appeal. *See State v. Collins*, 2014 UT 61, ¶¶31, 42, 342 P.3d 789; *State v. Rees*, 2005 UT 69, ¶¶17–18, 125 P.3d 874. Departing from this Court's clear precedent, the court of appeals held that rule 4(f) authorizes reinstating the period to appeal to a defendant who already timely appealed if he could prove that he was not told that he could have had counsel on appeal. *State v. Stewart*, 2018 UT App 151, ¶¶11–14 &

n.1, —P.3d—. The court of appeals' decision should be reversed for two reasons.

First, the sole purpose of rule 4(f) is restore the right to appeal to a defendant who was "deprived" of that right because he was "prevented" from filing a timely notice of appeal. *Collins*, 2014 UT 61, ¶31 (cleaned up); *Rees*, 2005 UT 69, ¶¶17–18. The court of appeals' decision erroneously extends reinstatement relief to defendants who already appealed.

Second, rule 4(f) provides no remedy to a defendant who is unsatisfied with the quality of his appeal, even if the quality of the appeal is affected by the lack of counsel. *See Rees*, 2005 UT 69, ¶¶19–20. The court of appeals' concern with whether Stewart was informed of his right to counsel to prosecute his timely filed appeal is irrelevant to whether he was prevented from timely filing the appeal in the first place.

The court of appeals' decision stands in opposition to this Court's precedent and the plain language and purpose of rule 4(f) by reinstating Stewart's right to appeal when that right was clearly not violated. This Court should reverse.

A. Reinstating the Period to Appeal Is Not Available to a Defendant Who Filed a Timely *Pro Se* Appeal

Rule 4(f) codifies the reinstatement remedy this Court first established in *Manning v. State*, 2005 UT 61, 122 P.3d 628. *See* Utah R. App. P. 4(f) & adv.

comm. note. The Court in *Manning* supplanted the so-called *Johnson* remedy, which had been created to restore the right to appeal in "situations in which a defendant was *prevented from bringing* a timely appeal through no fault of his own." *Manning*, 2005 UT 61, ¶12 (emphasis added); *see State v. Johnson*, 635 P.2d 36, 38 (Utah 1981). Because "the evolution of statutory law and procedural rules" made the *Johnson* remedy "no longer feasible," the *Manning* Court created a new "readily accessible and procedurally simple method" to restore a denied right to appeal. *Manning*, 2005 UT 61, ¶¶14, 25–26; *see id.* ¶¶15–25 (describing evolution of the law and procedures). But the purpose remained the same. *Id.* ¶26. Thus, for almost forty years, there has been but one objective to the reinstatement remedy—to provide "relief for defendants who have *not filed a direct appeal* because their right to appeal has been unconstitutionally denied." *Id.* ¶24 (emphasis added).

The *Manning* Court made clear that reinstatement is only available to defendants who did not file a timely notice of appeal. *See id.* ¶¶12, 24. "[C]riminal defendants who *fail to file* a notice of appeal within the required time period are presumed to have knowingly and voluntarily waived" the right to appeal and have exhausted their appellate remedies. *Id.* ¶¶1, 24 (emphasis added). But the new reinstatement procedure gives a defendant the opportunity to prove that his failure to file an appeal was not a waiver,

but "that he ha[d] been unconstitutionally deprived, through no fault of his own, of his right to appeal." *Id.* ¶31; *see id.* ¶¶1, 32; *see also State v. Kabor*, 2013 UT App 12, ¶14, 295 P.3d 193 ("the reinstatement inquiry focuses…on whether the defendant's failure to file an appeal was a voluntary and knowing choice").

Thus, to be eligible for the reinstatement remedy, a defendant must have "failed to appeal within the required thirty-day time period." *Manning*, 2005 UT 61, ¶32. Only then can a defendant invoke rule 4(f) and attempt to prove that something beyond his control prevented him from timely appealing. *Id.* ¶¶31–32.[2]

Since *Manning*, this Court has reemphasized that a defendant who files a timely notice of appeal has not been denied the right to appeal, making rule 4(f) inapplicable. In *State v. Rees*, 2005 UT 69, ¶¶17–19, 125 P.3d 874, decided only two months after *Manning*, the Court held that the reinstatement remedy

[2] The prerequisite of a defendant failing to appeal before reinstatement even becomes an option was central to the *Manning* decision. The Court referred to Manning's or a hypothetical defendant's failure to appeal at least fourteen times throughout the opinion. *See Manning*, 2005 UT 61, ¶¶1, 7, 8, 24, 31, 32, 33, 38, 42. But it never even suggested that a defendant who did appeal could seek reinstatement. Indeed, such a suggestion would have contradicted the central framework of requiring a defendant to prove that his failure to appeal was not a knowing and voluntary waiver of the right to appeal.

is not available to a defendant who filed a timely notice of appeal. The Court explained that a denial of the right to appeal discussed in *Manning* occurs when a defendant was "'prevented'" from "'proceeding'" with an appeal. *Id.* ¶17 (quoting *Manning*, 2005 UT 69, ¶24). It then explained what "proceeding" with an appeal means: "the act of 'proceeding' with an appeal…encompass[es] filing a notice of appeal, not more." *Id.* ¶18. Therefore, a defendant is only denied his right to appeal when he is "prevented" from filing a timely notice of appeal.

More recently, this Court reaffirmed that a defendant who appealed was not deprived of the right to appeal. First, the Court held that claims for reinstatement are subject to harmless error review to "ensure[] that reinstatement relief is given only to those defendants who *fail to appeal* through no fault of their own." *Collins*, 2014 UT 61, ¶40 (cleaned up) (emphasis added). Thus, rule 4(f) requires a defendant to prove that "something outside of his control cause[d] the *failure to appeal*" and that but for that interference, he would have appealed. *Id.* ¶¶31–33, 43 (emphasis added). Finally, the Court continued by stating plainly that "[a] defendant who actually files an appeal…has not been prevented from proceeding with an appeal and suffers no harm." *Id.* ¶42.

In sum, throughout its history, this Court has consistently limited the remedy of restarting the time to file a direct appeal to defendants who were prevented from filing a notice of appeal within the original thirty-day period. Nothing more. It is not intended to allow a defendant who timely appealed to have a second direct appeal after the first one was unsuccessful.

Under this clear and unbroken precedent, Stewart, who filed a timely notice of appeal, was not denied his right to appeal and has no claim under rule 4(f). The court of appeals erred when it held otherwise. That decision is fundamentally at odds with the purpose of rule 4(f) and this Court's precedent. It should be reversed.

B. The Court of Appeals' Concern With the Alleged Denial of Stewart's Right to Counsel on Appeal Does Not Fall Within the Ambit of Rule 4(f)

The court of appeals dismissed this Court's precedent in a footnote. *Stewart*, 2018 UT App 151, ¶10 n.1. The court essentially ignored *Collins*, with its definitive statement that "[a] defendant who actually files an appeal…has not been prevented from proceeding with an appeal and suffers no harm," *Collins*, 2014 UT 61, ¶42, relegating the entire case to a single citation without explanation. And it claimed that *Rees* was "inapplicable" because it "did not contemplate a situation in which a defendant was denied the right to appeal by being denied the right to counsel." *Stewart*, 2018 UT App 151, ¶10 n.1.

The court of appeals' focus on Stewart's right to counsel misses the point. Because Stewart filed a timely notice of appeal, he was not denied his right to appeal. Whether that timely appeal unfolded in a way that conflicted with Stewart's constitutional rights is a matter for post-conviction review; it does not merit a second direct appeal.

1. Reinstating the period to file a second direct appeal is not the proper remedy for a defendant who already filed a direct appeal *pro se*, even if he was not told he could have had counsel on his first appeal

As explained, the purpose of the reinstatement remedy is to give someone the opportunity to appeal who lost it through no fault of his own. It is not to give a second appeal to someone who exercised the right to appeal merely because the first would have been more meaningful with counsel.

Rees made this clear when it held that the right to appeal is not denied even if the appeal itself is not meaningful. After Rees' appellate counsel failed to prepare an adequate record, resulting in the affirmance of his conviction on that basis, Rees sought to reinstate his appeal, claiming that he was denied his right to appeal because his counsel was ineffective. *Rees*, 2005 UT 69, ¶¶2–5. The court of appeals held that the trial court should have reinstated the time to appeal because Rees' right to a "meaningful appeal" was denied. *Id.* ¶¶5–6, 19.

This Court reversed, holding that Rees was not deprived of his right to appeal because he appealed. *Id.* ¶20. Relying on *Manning*, this Court determined that ineffective assistance of counsel on appeal "does not" "constitute a denial of the right to appeal." *Id.* ¶15. So long as a defendant "gain[s] entry to appellate courts," by "filing of a notice of appeal, not more," the right to appeal has been preserved, even if the appeal is concluded "by a ruling on the merits or involuntary dismissal." *Id.* ¶18. Once that appeal is over, a defendant must pursue post-conviction relief. *Id.* ¶¶18, 20.

The *Rees* Court rejected the court of appeals' characterization that reinstatement was appropriate when a defendant was denied "a *meaningful appeal*." *Id.* ¶19. Although the *Manning* Court used the term meaningful, it was used to describe "the type of conduct or circumstance that deprived a defendant of access to the appellate process," not the appeal itself. *Id.* The court of appeals' use incorrectly suggested that reinstatement relief was "available to provide an additional direct appeal to a defendant whose appeal has resulted in an unfavorable outcome." *Id.* But a defendant is not entitled to a second appeal by claiming his first one was not "meaningful." *Id.* Rather, as explained, he must show that he was wholly prevented from filing an appeal. *Id.* ¶¶17–18.

The court of appeals has repeated the error it made in *Rees*—it incorrectly focused on whether Stewart's appeal was meaningful because he did not have counsel to prepare a brief, *Stewart*, 2018 UT App 151, ¶¶11–14, 18, rather than on the real issue rule 4(f) is designed to address—whether Stewart was "prevented" from filing an appeal in the first place, *Rees*, 2005 UT 69, ¶¶17–19.

The court of appeals held that "[i]f an indigent defendant is not made aware of the right to counsel, he 'has been prevented in some meaningful way from proceeding with a first appeal of right.'" *Stewart*, 2018 UT App 151, ¶13 (quoting *Manning*, 2005 UT 61, ¶26). But as explained, a defendant is only "prevented from proceeding with an appeal" if he is prevented from filing a timely notice of appeal. *Rees*, 2005 UT 69, ¶¶17–18. And even if Stewart was not made aware of his right to counsel, that did not prevent him from "proceeding with an appeal"—he filed one. R689–90.

The court of appeals, nevertheless, believed that Stewart was denied his right to appeal because he lacked counsel to help him file a brief. *See Stewart*, 2018 UT App 151, ¶18. But whether a defendant files an appellate brief, with or without counsel, is irrelevant to the only material question under rule 4(f)—whether his right to appeal was wholly denied. The *Rees* Court did not say that the act of "proceeding with an appeal" encompasses

filing a notice of appeal, filing a brief, obtaining a decision on the merits, and doing all of it with the assistance of counsel. It said, "the act of 'proceeding' with an appeal…encompass[es] filing a notice of appeal, *not more*." *Rees*, 2005 UT 69, ¶18 (emphasis added). And that once a defendant files a notice of appeal and "gain[s] entry to appellate courts," as Stewart did here, he has exhausted his right to appeal, even if the appeal is dismissed involuntarily, as Stewart's was. *Id.*

Certainly, an appeal litigated with the assistance of counsel to prepare a brief would have been better. But rule 4(f) is not intended to assure a better appeal. It is designed only to remedy the complete denial of an appeal. Because Stewart filed a timely notice of appeal, it is inconsequential for purposes of reinstatement that his appeal would have been more meaningful had he been aided by counsel. Rule 4(f), therefore, is not applicable in Stewart's situation. Such defendants have "exhausted their remedy of direct appeal" and may not seek "an additional direct appeal," as Stewart has done, and which the court of appeals has erroneously granted. *Id.* ¶¶18–19.

Defendants in Stewart's position, however, are not left without a remedy. Those defendants who exhausted their right to appeal but whose appeals were defaulted in a way that violated a constitutional may seek appropriate relief through the Post-Conviction Remedies Act. *See id.* ¶18; *see*

also Utah Code Ann. § 78B-9-102(1)(a) (West Supp. 2017) (PCRA "establishes the sole remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies, including a direct appeal"). But a defendant may not circumvent the exclusive remedy and one-year statute of limitations of the PCRA by disguising his claim as one of a denial of the right to appeal. *See* Utah Code Ann. § 78B-9-102(1)9a) & 107; Utah R. Civ. P. 65C(a).

The court of appeals' decision attempts an expansive redefinition of what constitutes an "appeal" in a way that allows for multiple direct appeals until a defendant gets one that is "meaningful." This Court rejected that expansion once and should reject it again.

2. Failing to inform a defendant of the right to counsel on appeal cannot without more deprive a defendant of the right to appeal

The court of appeals held that Stewart was denied his right to appeal because it believed that Stewart was not "properly advise[d]" of the right to appeal when he was not informed of the right to counsel on appeal. *Stewart*, 2018 UT App 151, ¶¶14, 18, 24. Even if the court had been correct that properly advising a defendant of his right to appeal requires telling him that he may have counsel on appeal, the error was harmless because Stewart appealed. But the court of appeals was not correct.

This Court has made clear that the failure to "properly advise" a defendant of the right to appeal is harmless and cannot be a denial of the right to appeal if the defendant appeals despite the court's failure. *Collins*, 2014 UT 61, ¶42. Thus, if failing to advise a defendant of the right to counsel warrants any consideration at all within the context of rule 4(f), it is only to determine whether that failure prevented a defendant from filing an appeal. *See id.*; *Manning*, 2005 UT 61, ¶26. And when it does not, it is of no consequence for purposes of rule 4(f).

In any event, not advising a defendant of his right to counsel on appeal is not a failure to "properly" advise him of his right to appeal. In *Manning*, this Court established three ways that a defendant could be denied the right to appeal, one of which was if "the court or the defendant's attorney failed to properly advise defendant of the right to appeal." *Manning*, 2005 UT 61, ¶31. The Court in *Collins* assumed that being "properly" advised of the right to appeal means only that the defendant was informed that (1) he has a right to appeal, and (2) that he must do so within thirty-days of sentencing, as required by rule 22(c)(1) of the Utah Rules of Criminal Procedure. *Id.* ¶26; *see* Utah R. Crim. P. 22(c)(1) (2017) ("Following imposition of sentence, the court shall advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed.").

Likewise, at the time of Stewart's sentencing, rule 22(c) required a court to provide defendants with only the same two pieces of information. Utah R. Crim. P. 22(c) (2003). The State is unaware of any other law, rule, case, or procedure that existed at the time of Stewart's sentencing that required a trial court to tell a defendant that he could have counsel on appeal, let alone that stated that failing to do so constituted a denial of the right to appeal and therefore warranted reinstatement of the time to appeal. Particularly here, where Stewart had previously waived his right to counsel and elected to proceed *pro se* at trial and at sentencing, and then continued *pro se* on his appeal. *See* R210–12. A court need not continually readvise a defendant of his right to counsel once that right has been waived. *See State v. Tharp*, 395 N.W.2d 762, 764 (Neb. 1986) ("once a defendant has been informed of his right to counsel, there is no requirement that the same information be conveyed to a defendant on each subsequent court appearance").

It was not until May 1, 2018—almost fifteen years after Stewart's sentencing—that rule 22(c)(1) was amended to require a court to inform defendants at sentencing of "the right to retain counsel or have counsel appointed by the court if indigent." Utah R. Crim. P. 22(c)(1) (2018); *see Stewart*, 2018 UT App 151, ¶14 n.4.

Accordingly, the failure to advise a defendant at sentencing of the right to counsel on appeal, at least prior to May 1, 2018, does not mean that the defendant was not "properly advised" of his right to appeal for purposes of rule 4(f).[3]

And as explained, the concern addressed by rule 4(f) is the failure to timely file a notice of appeal. Whether a court advises a defendant that he has a right to counsel to prosecute a timely filed appeal does not inform whether he was prevented from timely filing the appeal in the first place.

The court of appeals' holding to the contrary is significantly problematic. Up until a few months ago, nothing expressly required a trial court to advise a defendant of his right to counsel on appeal. In addition, rule 4(f) has no time limit. As a result, under the court of appeals' decision, any defendant, at any time, and whether he appealed already or not, can have the time to appeal reinstated by showing that the trial court did not tell him something that no law required a court to say. Rule 4(f) was not intended to provide such a wide-reaching, and practically unlimited reinstatement of the period to appeal, especially for defendant's who already exercised their right to appeal, as Stewart did here. Rather, the rule was created to narrowly and

[3] Whether the May 2018 amendment changes the analysis should not be decided here because it was not in effect at Stewart's sentencing.

specifically remedy the complete denial of the right to appeal when something beyond a defendant's control prevented him from appealing. This Court should reaffirm that principle and reverse the court of appeals' decision.

* * * *

Stewart was not denied his right to appeal because he filed a timely notice of appeal. Whether Stewart was informed of his right to counsel on appeal is irrelevant to the reinstatement inquiry because the trial court was not required to inform him again of his right to appeal after he waived it, and because it did not affect the timely filing of Stewart's appeal. The court of appeals' decision should be reversed.

II.

THE COURT OF APPEALS ERRONEOUSLY REVERSED BASED ON ITS OWN IMPROPER FACTUAL FINDING THAT STEWART'S TESTIMONY WAS CREDIBLE, WHEN ITS CHOICES WERE LIMITED TO AFFIRMING OR REMANDING FOR ADDITIONAL FINDINGS

The court of appeals also erroneously held that Stewart had proved that he had not been advised of his right to counsel on appeal, improperly substituting its weighing of the evidence for the trial court's.

The trial court concluded that Stewart did not prove by a preponderance of the evidence that he was not told of his right to counsel on appeal. This was so, it reasoned, because Stewart had provided no evidence

to corroborate his "mere claim…11 years after sentencing, that he [was] quite sure" that he was not told of his right to counsel on appeal. R1156.

The court of appeals reversed. In essence, it held that the trial court had to (1) find that Stewart's testimony was credible because it was uncontradicted, and (2) conclude that Stewart's testimony alone met his burden of proof. *Stewart*, 2018 UT App 151, ¶22.

But that holding contradicts binding precedent that precludes appellate courts from making factual findings. Where factual findings are not expressly made or are otherwise insufficient, appellate courts are limited to: (1) assuming that any omitted findings would have been consistent with the trial court's ruling if the record could support the assumption and affirm; or (2) remanding for more detailed findings. The court of appeals did neither, choosing instead to essentially make its own findings on appeal. This was error.

For over 65 years this Court has held that where "there are no findings of fact" appellate courts are to "assume that the trier of the facts found them in accord with its decision," and "affirm the decision if from the evidence it would be reasonable to find facts to support it." *Mower v. McCarthy*, 245 P.2d 224, 226 (Utah 1952); *accord State v. Ramirez*, 817 P.2d 774, 788, n.6 (Utah 1991) (citing cases). If an "ambiguity of the facts makes this assumption

unreasonable" the appropriate remedy is a remand for further findings. *Ramirez*, 817 P.2d at 788; *accord State v. Ruiz*, 2012 UT 29, ¶24, 282 P.3d 998 ("failure to state the grounds for a decision may only justify *remand* to the trial court") (quotation simplified). But an appellate court may not make its own findings of fact to fill in the gap. "[I]t is not the function of an appellate court to make findings of fact because it does not have the advantage of seeing and hearing witnesses testify." *Rucker v. Dalton*, 598 P.2d 1336, 1338 (Utah 1979).

Both this Court and the court of appeals have followed these two options in recent rule 4(f) cases. In *Collins*, 2014 UT 61, ¶56, Collins testified at a rule 4(f) hearing that he was not told of the thirty-day deadline to file an appeal, and that if he had been, he would have made sure his attorney filed one. The record, however, was "unclear" whether the trial court believed his testimony. *Id.* ¶57. While the court did make some credibility findings with respect to Collins' testimony, it "did not make a specific credibility finding with respect to Mr. Collins's testimony concerning the thirty-day deadline." *Id.* "Because of this ambiguity," the Court remanded to the trial court for the requisite factual finding. *Id.*

Conversely, in *State v. Robles-Vasquez*, 2015 UT App 108, ¶7, 349 P.3d 769, the defendant testified at his rule 4(f) hearing that he had asked his counsel to file an appeal, but his counsel failed to so do. The trial court stated

that the defendant's testimony "seem[ed] disingenuous" because it took him three years to claim a denial of the right to appeal. *Id.* The court of appeals held that the trial court's ruling, although lacking an explicit finding of credibility, "implicitly found that [Robles-Vasquez] did not ask his counsel to file an appeal within the permitted time," and affirmed. *Id.* ¶13.[4]

The court of appeals here stated that "the [trial] court did not make findings" about Stewart's credibility. *Stewart*, 2018 UT App 151, ¶22. It therefore had two options: affirm or remand for findings.

The court of appeals, however, erroneously reversed. While admitting that Stewart's testimony was "self-serving and not detailed," the court determined that because "the State offered no evidence to the contrary and because the court did not find that the evidence presented was incredible or unreliable," the trial court "clearly erred" in denying the motion. *Stewart*, 2018 UT App 151, ¶22. This is wrong for two reasons.

First, the court of appeals' analysis creates an intolerable paradigm—testimony that is not directly contradicted is credible as a matter of law. A

[4] *See also Ruiz*, 2012 UT 29, ¶¶25–27 (in a non-rule 4(f) case, this Court held that the court of appeals erred in deciding that the trial court's "failure to articulate the basis for [its] decision warranted reversal" because the reason for the decision was "apparent on the record," but even if it were not apparent, the court of appeals erred "in reversing [the] ruling instead of remanding").

trial fact-finder—court or jury—sees and hears the witnesses testify. Even if uncontradicted, the fact-finder may reject the testimony for several reasons, including the witness's demeanor; the witness's motive to lie; factors that may have deteriorated the witness's memory, such as the passage of time; and the lack of corroboration. Thus, the trial court was under no obligation to accept Stewart's "self-serving and not detailed" account of what was or was not said at a hearing twelve years earlier, even if uncontroverted by the evidence from the State. *See Farrell v. Turner*, 482 P.2d 117, 120 (Utah 1971) ("The trial court did not have to believe [the defendant's] self-serving statement").

Second, the court of appeals' conclusion that Stewart's testimony was "uncontroverted" ignores the frailties of Stewart's testimony. While the State did not present its own witnesses—likely because it could not find anyone who could remember the dialogue at Stewart's sentencing hearing so many years earlier—Stewart's testimony was far from certain.

Stewart candidly admitted that he did not have a "full memory" of everything he was told. R1123. He could not "remember a whole lot" of what was said about his right to counsel when he waived it. R1119. And he could only remember "certain things" from his sentencing hearing because he wrote them in a notebook. R1123. But he claimed that the trial court did not

tell him of his right to counsel on appeal, since he purportedly did not make a note of that fact in his notebook. R1125. But Stewart did not claim that his notebook says he was not told about his right to counsel.

Stewart's testimony really boils down to this: his admittedly limited notes said nothing about the right to counsel, so it must not have been addressed. Thus, the only thing Stewart had to support his claim was the absence of documentation along with an admission that his documentation was incomplete.

The trial court, having witnessed Stewart testify, and being in the best position to assess Stewart's demeanor and credibility, determined that this "mere claim" failed to meet the preponderance of the evidence standard. R1156–57. And the foundation for the "mere claim"—Stewart's incomplete memory and documentation—was not so incontrovertible that the court of appeals could properly override the trial court's assessment of its insufficiency to meet Stewart's burden of proof. The court of appeals should have affirmed because it is apparent in the record that the trial court did not find Stewart's self-serving testimony, with admitted memory deficiencies, credible or persuasive enough to meet his burden of proof and that finding was reasonable.

Instead, the court of appeals erroneously made its own credibility determination. That is not the court of appeals' prerogative. The only options the court of appeals had were to affirm based on the trial court's implicit finding consistent with its ruling, or to remand for more explicit findings. It had no authority to reverse based on the absence of findings or based on its own credibility determination. The court of appeals' failure to adhere to this Court's clear precedent warrants reversal.

CONCLUSION

The court of appeals' decision should be reversed for two reasons. First, Stewart was not denied his right to appeal because he filed a timely notice of appeal and because any failure to inform Stewart of the right to counsel on appeal did not constitute a failure to properly advise him of his right to appeal. Second, even if the failure to inform Stewart of the right to counsel on appeal could warrant reinstatement, the court of appeals erroneously disregarded the trial court's conclusion that Stewart did not prove he was not so informed. The State asks this Court to reverse the court of appeals' decision.

Respectfully submitted on January 28, 2019.

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Utah Attorney General

/s/ Jeffrey D. Mann
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Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 7,395 words, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

☑ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

☐ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

/s/ Jeffrey D. Mann
JEFFREY D. MANN
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on January 28, 2019, the Brief of Petitioner was served upon respondent's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

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I further certify that an electronic copy of the brief in searchable portable document format (pdf):

☑ was filed with the Court and served on respondent by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

☐ was filed with the Court on a CD or by email and served on respondent.

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/s/ Melanie Kendrick

Addenda

Addendum A

2018 UT App 151

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,
v.
CALVIN PAUL STEWART,
Appellant.

Opinion
No. 20160611-CA
Filed August 16, 2018

Fourth District Court, Provo Department
The Honorable Lynn W. Davis
No. 011403597

Douglas J. Thompson, Margaret P. Lindsay, and
Leah Jordana Aston, Attorneys for Appellant

Sean D. Reyes and Jeffrey D. Mann, Attorneys
for Appellee

JUDGE KATE A. TOOMEY authored this Opinion, in which
JUDGES JILL M. POHLMAN and RYAN M. HARRIS concurred.

TOOMEY, Judge:

¶1 Calvin Paul Stewart was convicted in 2003 of seventeen second and third degree felonies. Twelve years later, he filed a motion to reinstate the period for filing a direct appeal, which the court denied. He appeals the denial of that motion, arguing that a criminal defendant's right to appeal requires that the defendant be informed of the right to counsel on appeal. We agree and therefore reverse.

BACKGROUND

¶2 In 2001, the State charged Stewart with multiple securities violations, including securities fraud and the sale of unregistered securities. He was initially represented by private counsel, but counsel later withdrew because Stewart could not afford to pay him. The court appointed Stewart a public defender, but ultimately Stewart decided to represent himself at trial. Stewart was convicted and sentenced to prison on seventeen counts, with each sentence to run consecutively.

¶3 With the help of a non-attorney friend, Stewart filed a notice of appeal and a docketing statement, and this court set a briefing schedule. Stewart expected his friend to help file a brief, but the friend declined to do so when Stewart could not pay him. Stewart failed to file a brief by the deadline, and this court dismissed his appeal.

¶4 Over the next decade, Stewart filed various motions for relief, including a motion to appoint counsel, a motion to correct his sentence, and a motion for relief from what he characterized as a void judgment. The district court denied each of these motions. On one occasion, he appealed one of these rulings, and this court affirmed the district court's decision. *See State v. Stewart*, 2010 UT App 367U (per curiam).

¶5 In 2015, Stewart filed a pro se "Motion to Reinstate Period for Filing Direct Appeal" under rule 4(f) of the Utah Rules of Appellate Procedure, which is the motion at issue in this appeal. Stewart also filed a related motion to appoint counsel. The court appointed a public defender to represent Stewart and, after counsel filed an amended motion to reinstate Stewart's direct appeal, the court held an evidentiary hearing in early 2016.

¶6 At the hearing, Stewart testified that when the court released the appointed public defender as his 2003 trial was

approaching, the judge informed him that he would have to find new counsel by a specific date or proceed without representation. Stewart understood this to mean that if he chose not to have appointed counsel at trial, he could not have appointed counsel on appeal. Stewart testified that the court did not inform him of the right to counsel on appeal during his trial or at his sentencing hearing, and that had he known, he would have requested counsel to assist with his appeal.

¶7 Stewart's counsel argued that Stewart was deprived of his right to appeal under rule 4 of the Utah Rules of Appellate Procedure. Counsel argued that even though Stewart filed a notice of appeal, he was never informed of his constitutional right to counsel on appeal, and without the help of counsel, he was unable to file a brief to perfect his appeal. Counsel argued that, because Stewart did not know and was not informed he was entitled to appellate counsel, the time period for Stewart to file an appeal should be reinstated.

¶8 The district court denied Stewart's motion for three reasons. First, Stewart's "requests to represent himself in his 2003 jury trial and sentencing" and "his choice to proceed in his appeal pro se" constituted a "constructive waiver of his right to an attorney on appeal." Second, Stewart's motion failed on the merits because his own failure to respond to the briefing deadline caused his appeal to be dismissed. Third, Stewart's "mere claim" that he was not informed of his right to counsel did not meet the threshold burden of proof in showing he had been deprived of the right to appeal. Stewart appeals.

ISSUE AND STANDARD OF REVIEW

¶9 Stewart contends the district court erred by denying his motion to reinstate the time to file a direct appeal. We review the court's legal conclusion that Stewart was not deprived of his

right to appeal for correctness and its underlying factual findings for clear error. *State v. Kabor*, 2013 UT App 12, ¶ 8, 295 P.3d 193.

ANALYSIS

I. Stewart Was Deprived of the Meaningful Right to Appeal.

¶10 Stewart's only contention on appeal is that the district court erred in failing to reinstate the time to file his direct appeal under rule 4(f) of the Utah Rules of Appellate Procedure. Stewart argues that, under the Utah and United States constitutions, a criminal defendant must be informed both that he has a right to appeal his conviction and that he has the right to counsel on appeal. He argues that, because he was not advised of his right to counsel on appeal, he was effectively deprived of his right to appeal.[1]

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1. The State argues that Stewart was not deprived of his right to appeal, because he filed a notice of appeal. The State cites *State v. Rees*, 2005 UT 69, 125 P.3d 874, which states that "the act of 'proceeding' with an appeal encompass[es] filing a notice of appeal, not more." *Id.* ¶ 18; *see also Manning v. State*, 2005 UT 61, ¶ 31, 122 P.3d 628 (outlining some of the circumstances in which a defendant can prove "that he has been unconstitutionally deprived, through no fault of his own, of [the] right to appeal"). Because Stewart filed a notice of appeal, the State argues he was therefore not "prevented in some meaningful way from proceeding" with his appeal. *See Rees*, 2005 UT 69, ¶ 17 (quotation simplified); *accord State v. Collins*, 2014 UT 61, ¶ 42, 342 P.3d 789. But *Rees* is inapplicable here because *Rees* did not contemplate a situation in which a defendant was denied the right to appeal by being denied the right to counsel. Indeed, in

(continued...)

A. A Defendant's Right to Appeal Includes Being Informed of the Right to Counsel on Appeal.

¶11 The Utah Constitution guarantees the right to appeal in all criminal prosecutions. Utah Const. art. I, § 12. "This shows that the drafters of our constitution considered the right of appeal essential to a fair criminal proceeding. Rights guaranteed by our state constitution are to be carefully protected by the courts. We will not permit them to be lightly forfeited." *State v. Tuttle*, 713 P.2d 703, 704 (Utah 1985). To protect this right, rule 4(f) allows a court to reinstate the thirty-day period for filing a direct appeal for a defendant who "was deprived of the right to appeal." Utah R. App. P. 4(f). *Manning v. State*, 2005 UT 61, 122 P.3d 628, which led to the promulgation of rule 4(f),[2] explains that a defendant has been denied the right to appeal when he "has been prevented in some meaningful way from proceeding with a first appeal of right." *Id.* ¶ 26 (quotation simplified); *see id.* ¶ 24 (explaining that when a defendant is "unconstitutionally denied his [or her] right to appeal" there must be a "means of regaining that right"). *Manning* outlines several possible circumstances that would demonstrate that a defendant "ha[d] been unconstitutionally deprived, through no fault of his own, of [the] right to appeal," including, among

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Rees, the defendant was represented by counsel, but alleged that his counsel was ineffective. *See* 2005 UT 69, ¶ 9. The court in *Rees* did not address whether the right to appeal includes the right to be represented by counsel, or specifically whether a defendant must be informed of the right to counsel on appeal.

2. The Advisory Committee Note to rule 4 of the Utah Rules of Appellate Procedure explains that "[p]aragraph (f) was adopted to implement the holding and procedure outlined in *Manning v. State*, 2005 UT 61, 122 P.3d 628."

others, situations in which "the court or the defendant's attorney failed to properly advise defendant of the right to appeal." *Id.* ¶ 31.

¶12 The Utah Constitution also requires that an accused "be provided with the assistance of counsel at every important stage of the proceedings against him." *Ford v. State*, 2008 UT 66, ¶ 16, 199 P.3d 892 (quotation simplified). And our supreme court has recognized that the assistance of counsel is crucial to an appeal. *See Manning*, 2005 UT 61, ¶ 16 ("[T]he right to representation is an integral part of the right to appeal . . . ."). As the Supreme Court of the United States has stated,

> The assistance of appellate counsel in preparing and submitting a brief to the appellate court which defines the legal principles upon which the claims of error are based and which designates and interprets the relevant portions of the trial transcript may well be of substantial benefit to the defendant. This advantage may not be denied to a criminal defendant, solely because of his indigency, on the only appeal which the State affords him as a matter of right.

Swenson v. Bosler, 386 U.S. 258, 259 (1967) (per curiam); *see also Douglas v. California*, 372 U.S. 353, 356–58 (1963) (holding that the right to the assistance of counsel guaranteed by the Sixth Amendment extends through appeal).

¶13 A defendant must be aware of this right in order to exercise it. At the trial level, a defendant may only "knowingly and voluntarily" waive the right to counsel. *See State v. Graham*, 2012 UT App 332, ¶ 19, 291 P.3d 243 ("Because a defendant's choice of self-representation often results in detrimental consequences to the defendant, a trial court must be vigilant to assure that the choice is freely and expressly made with eyes

open." (quotation simplified)). Though a defendant may be informed of his right to counsel at the trial level, we cannot assume that he is aware that he is also entitled to the assistance of counsel on appeal unless he has been informed. If an indigent defendant is not made aware of the right to counsel, he "has been prevented in some meaningful way from proceeding with a first appeal of right." *See Manning*, 2005 UT 61, ¶ 26 (quotation simplified). As other courts have recognized, "[t]he right to appeal at the expense of the state is mere illusion if the convicted indigent defendant does not know such right exists." *United States ex rel. Smith v. McMann*, 417 F.2d 648, 654 (2d Cir. 1969); *see id.* ("We think the only practical, logical and fair interpretation to be given to *Douglas v. California*[, 372 U.S. 353 (1963),] is that it imposes upon the state a duty to warn every person convicted of [a] crime of his right to appeal and his right to prosecute his appeal without expense to him by counsel appointed by the state."); *see also United States v. Aloi*, 9 F.3d 438, 444 (6th Cir. 1993) (reiterating the constitutional requirement to be advised of appellate rights, including the right to counsel on appeal).[3]

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3. *See also United States ex rel. Singleton v. Woods*, 440 F.2d 835, 836 (7th Cir. 1971) (determining that the failure to advise an indigent defendant of his right to court-appointed counsel on appeal violated the Equal Protection Clause of the Fourteenth Amendment and the Sixth Amendment right to counsel); *Nichols v. Wainwright*, 243 So. 2d 430, 431 (Fla. Dist. Ct. App. 1971) (requiring that an indigent defendant, who has indicated the desire to appeal, be informed of the right to counsel on appeal); *Cochran v. State*, 315 S.E.2d 653, 654 (Ga. 1984) (requiring a defendant to be "made aware of his right to counsel on appeal and the dangers of proceeding without counsel"); *State v. Allen*, 239 A.2d 675, 677 (N.J. Super. Ct. Law Div. 1968) (concluding that "both the Fourteenth and Sixth Amendments require one to be advised of his state-created right of appeal in addition to the

(continued...)

¶14 We therefore conclude that a defendant is entitled to be informed of his right to counsel on appeal, and this right is inherent in a defendant's right to an appeal.[4]

B. The District Court Erred By Denying Stewart's Motion to Reinstate the Time for Direct Appeal.

¶15 The district court gave three reasons for denying Stewart's motion to reinstate the time period to file a direct appeal. First, it determined it need not reach the issue of whether the right to appeal requires a defendant to be notified of the right to counsel on appeal, because Stewart knowingly or constructively waived his right to counsel on appeal by repeatedly requesting to represent himself at trial and sentencing and then proceeding pro se in his appeal.

¶16 A defendant does not constructively waive the right to an attorney on appeal by opting to represent himself at the trial level, and the State does not cite any controlling authority to the contrary. Moreover, Stewart's "choice" to proceed pro se on

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(...continued)
right to counsel on an appeal"); *cf. Sibley v. State*, 775 So. 2d 235, 241–43 (Ala. Crim. App. 1996) (requiring waiver of the constitutional right to counsel on appeal to be knowing and intelligent); *Casner v. State*, 155 P.3d 1202, 1206–07 (Kan. Ct. App. 2007) (determining the defendant was not fully informed of his rights on appeal when he was told he could appeal but was not informed he had the right to an attorney on appeal).

4. Rule 22(c)(1) of the Utah Rules of Criminal Procedure was amended effective May 1, 2018, to require the sentencing court to "advise the defendant of defendant's right to appeal . . . and the right to retain counsel or have counsel appointed by the court if indigent."

appeal did not constitute a waiver of his right to counsel on appeal. We agree with Stewart that to effectively "choose" to represent himself instead of requesting counsel requires knowledge that he is entitled to have counsel appointed. Though the court stated that Stewart "repeatedly was notified of his right to counsel," those notifications occurred at the trial level, with respect to the trial, and there is no evidence the court informed him he was entitled to the assistance of counsel on appeal. *See infra* ¶ 22. We therefore conclude the court erred in determining that Stewart constructively waived this right on appeal.

¶17 Second, the court stated that Stewart's motion failed under *Manning*. *Manning* allows a court to "reinstate the time frame for filing a direct appeal where the defendant can prove . . . that he has been unconstitutionally deprived, *through no fault of his own*, of [the] right to appeal." *Manning v. State*, 2005 UT 61, ¶ 31, 122 P.3d 628 (emphasis added). In this case, the district court determined that "due to a clear pattern of conduct in this case, Stewart [had] created, in his own actions, his own fault in failing to meet the briefing deadline set forth by the Court of Appeal[s]," and so Stewart's appeal "was ultimately dismissed . . . due to Stewart's own failure to respond."

¶18 But we have determined that failure to inform a defendant of the right to counsel on appeal does not "properly advise" the defendant, and thereby unconstitutionally deprives the defendant, of the right to appeal. *See id.*; *see also supra* ¶ 14. Through no fault of his own, Stewart was not informed of the right to counsel and was, in that respect, effectively deprived of the right to appeal. Although Stewart filed a pro se notice of appeal and docketing statement, he cannot be faulted for not perfecting his appeal by filing a timely brief where he was unaware of his right to be assisted by counsel on appeal. *See Swenson v. Bosler*, 386 U.S. 258, 259 (1967) ("The assistance of appellate counsel in preparing and submitting a brief to the appellate court . . . may well be of substantial benefit to the

defendant. This advantage may not be denied to a criminal defendant, solely because of his indigency . . . ."). Stewart testified that he would have requested counsel if he had been properly informed, and the State noted counsel would have been appointed had he requested it. Stewart thus missed the deadline for filing his appellate brief because he was not assigned appellate counsel who would have helped him navigate the procedural requirements of an appeal and who would have prepared and submitted a brief on his behalf. We therefore disagree with the district court that Stewart created "his own fault" by missing the briefing deadline set by this court.

¶19 Third, the district court stated there was insufficient evidence that Stewart had not been deprived of the right to appeal. Specifically, the court ruled that a "mere claim by Mr. Stewart, 11 years after sentencing, that he is quite sure the sentencing judge did not inform [him] of his right to the appointment of appellate counsel is simply insufficient" to meet the preponderance-of-the-evidence standard required by rule 4(f) of the Utah Rules of Appellate Procedure.

¶20 We give deference to the court's factual findings and will "not overturn them unless they are clearly erroneous." *State v. Kabor*, 2013 UT App 12, ¶ 8, 295 P.3d 193. Rule 4(f) of the Utah Rules of Appellate Procedure requires a district court to "enter an order reinstating the time for appeal" if it "finds by a preponderance of the evidence that the defendant has demonstrated that the defendant was deprived of the right to appeal." Under this standard, "the court needs only to balance the evidence, using discretion to weigh its importance and credibility, and decide whether the [defendant] has more likely than not" been deprived of the right to appeal. *See State v. Archuleta*, 812 P.2d 80, 82–83 (Utah Ct. App. 1991) (outlining the preponderance-of-the-evidence standard of proof in the context of a probation violation).

¶21 Here, Stewart testified the district court did not "inform [him] about [his] right to a have an attorney represent [him] on appeal," and that he would have asked for one to be appointed had he been informed of that right. Admittedly, his testimony was self-serving and not detailed. Stewart stated he could not "remember a whole lot of exactly what [the trial judge] asked [him]," and he did not have a "full memory of everything" that was said to him from the bench. He testified that he wrote down "certain things [he] wanted to remember" in a notebook and that whether the court informed him of his right to an attorney on appeal was "a fact that [he would] remember": the court did not. There are no transcripts from the sentencing hearing,[5] and the State offered no evidence suggesting Stewart was informed of his right to appellate counsel.

¶22 Although the district court has discretion to weigh the importance and the credibility of the evidence, it characterized Stewart's testimony as a "mere claim" and stated the "lack of evidence" did not meet the preponderance standard of proof. We disagree. Stewart's uncontroverted testimony was evidence that he was not informed of his right to appellate counsel. Stewart bore the burden of proof and offered his testimony as evidence. No other evidence was offered, either by Stewart or by the State, and the court did not make findings that Stewart's testimony was incredible or unreliable.[6] This means that the only

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5. Though Stewart filed a pro se motion requesting "the entire transcript of all recorded hearings," only the transcripts from the two-day jury trial were provided, and the recording of the sentencing hearing is no longer available.

6. The court stated that "[a] mere claim by Mr. Stewart, 11 years after sentencing, that he is quite sure the sentencing judge did not inform [him] of his right to the appointment of appellate counsel is simply insufficient" to meet the preponderance-of-the-

(continued...)

evidence presented tended to prove that Stewart was not informed of the right to counsel on appeal, thus making it "more likely than not" that Stewart was not so informed. Because the State offered no evidence to the contrary and because the court did not find that the evidence presented was incredible or unreliable, the court clearly erred in determining Stewart did not demonstrate by a preponderance of the evidence that he was not informed of the right to counsel on appeal.

¶23 Because the three reasons for the court's determining that Stewart was not deprived of his right to appeal are flawed, we conclude it erred in making this determination. Thus, we reverse its decision.

CONCLUSION

¶24 We conclude that a defendant is unconstitutionally deprived of his right to appeal if he is not informed that he has the right to the assistance of counsel on appeal. We also conclude Stewart did not constructively waive his right to counsel on appeal, did not create his own fault by missing the briefing deadline, and provided sufficient evidence to meet the preponderance standard under rule 4(f) of the Utah Rules of Appellate Procedure. We therefore reverse the district court's decision and remand for the court to reinstate the period for Stewart to file a direct appeal.

(...continued)
evidence standard, and that this "lack of evidence" was critical and dispositive. The court's statement suggests Stewart needed to provide more evidence to meet the preponderance standard, not that the court found Stewart's testimony to be incredible or unreliable.

CERTIFICATE OF MAILING

I hereby certify that on the 16th day of August, 2018, a true and correct copy of the attached OPINION was sent by standard or electronic mail to be delivered to:

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Judicial Secretary

TRIAL COURT: FOURTH DISTRICT, PROVO DEPT, 011403597
APPEALS CASE NO.: 20160611-CA

Addendum B

Utah R. App. P. 4.

(a) Appeal from final judgment and order. In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) Time for appeal extended by certain motions.

(1) If a party timely files in the trial court any of the following motions, the time for all parties to appeal from the judgment runs from the entry of the order disposing of the motion:

(A) a motion for judgment under Rule 50(b) of the Utah Rules of Civil Procedure;

(B) a motion to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted, under Rule 52(b) of the Utah Rules of Civil Procedure;

(C) a motion to alter or amend the judgment under Rule 59 of the Utah Rules of Civil Procedure;

(D) a motion for a new trial under Rule 59 of the Utah Rules of Civil Procedure; or

(E) a motion for a new trial under Rule 24 of the Utah Rules of Criminal Procedure.

(2) A notice of appeal filed after announcement or entry of judgment, but before entry of an order disposing of any motion listed in Rule 4(b), shall be treated as filed after entry of the order and on the day thereof, except that such a notice of appeal is effective to appeal only from the underlying judgment. To appeal from a final order disposing of any motion listed in Rule 4(b), a party must file a notice of appeal or an amended notice of appeal within the prescribed time measured from the entry of the order.

(c) Filing prior to entry of judgment or order. A notice of appeal filed after the announcement of a decision, judgment, or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(d) Additional or cross-appeal. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the

first notice of appeal is docketed, or within the time otherwise prescribed by paragraphs (a) and (b) of this rule, whichever period last expires.

(e) Extension of time to appeal. The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraphs (a) and (b) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(f) Motion to reinstate period for filing a direct appeal in criminal cases. Upon a showing that a criminal defendant was deprived of the right to appeal, the trial court shall reinstate the thirty-day period for filing a direct appeal. A defendant seeking such reinstatement shall file a written motion in the sentencing court and serve the prosecuting entity. If the defendant is not represented and is indigent, the court shall appoint counsel. The prosecutor shall have 30 days after service of the motion to file a written response. If the prosecutor opposes the motion, the trial court shall set a hearing at which the parties may present evidence. If the trial court finds by a preponderance of the evidence that the defendant has demonstrated that he was deprived of his right to appeal, it shall enter an order reinstating the time for appeal. The defendant's notice of appeal must be filed with the clerk of the trial court within 30 days after the date of entry of the order.

Addendum C

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. **CALVIN PAUL STEWART,** Defendant.	**RULING AND ORDER ON DEFENDANT'S MOTION TO REINSTATE PERIOD FOR FILING DIRECT APPEAL** CASE NO: 011403597 JUDGE: LYNN W. DAVIS

Defendant Calvin Paul Stewart's ("Stewart") Motion to Reinstate Period for Filing Direct Appeal was heard before the Court on June 29, 2016. Doug Thompson represented Stewart who was not present. Kelsey Young, Deputy Utah County Attorney, represented the State of Utah ("the State"). The Court took the matter under advisement. Having considered arguments presented by both parties and having reviewed submitted memoranda, the Court hereby rules as follows.

I. Procedural Posture

On April 15, 2015, Stewart, without counsel, filed a "Motion to Reinstate Period for Filing Direct Appeal Pursuant to Rule 4(f) Utah Rules of Appellate Procedure." On April 29, 2015, the State filed a "Memorandum in Opposition to [Stewart]'s Motion to Reinstate Period for Filing Direct Appeal Pursuant to Utah Rule of Appellate Procedure 4(F)." On May, 11, 2015 Stewart, again without counsel, filed a "Verified Reply to Memorandum in Opposition to Motion to Reinstate Period for Filing Direct Appeal."

On August 12, 2015, the court held a review hearing. The Court appointed the Utah County Public Defender's Office to represent Stewart. On October 7, 2015, Stewart, by way of appointed counsel, asked for leave to amend his motion. The Court granted Stewart's request.

On November 24, 2015, Stewart filed his "Amended Motion to Reinstate Direct Appeal Pursuant to Rule 4(f) and Memorandum in Support." On January 19, 2016, the State filed "State's Opposition to [Stewart]'s Amended Motion to Reinstate Direct Appeal." On January 22, 2016 Stewart filed "[Stewart]'s Reply to State's Opposition to the Amended Motion to Reinstate Direct Appeal Pursuant to Rule 4(f)." On February 10, 2016, the Court heard oral argument on whether the court had jurisdiction to hear Stewart's motion. On April 15, 2016 this Court found that it had jurisdiction to hear the motion.

After resolving the jurisdictional question, oral argument on the Motion to Reinstate was scheduled for June 7, 2016. At the time of the hearing, Stewart was incarcerated in the State Prison in Gunnison. A Transport Order was issued to transport Stewart to the hearing in Provo. However, prior to the hearing, Stewart made a verbal waiver to his attorney, Mr. Thompson, to waive his right to appear in person at the hearing. Based on that verbal waiver, Stewart was not transported from the prison and did not appear at that hearing. At the hearing and on the record, the Court expressed concern that Stewart again be given every opportunity to appear in person at the hearing, especially given the nature of the claims by Stewart that he had been denied rights due to representational and procedural issues. The Court set a new date for the hearing, and the Court instructed Mr. Thompson that if Stewart still desired to waive his right to appear, the Court required that Stewart do so expressly, in writing. On June 20, 2016, Stewart filed a written, notarized Waiver of Appearance. Oral argument was then heard.

II. Parties' Arguments

A. *Defendant's Argument*

1. There is no time bar on Stewart's motion under Rule 4(f).

Rule 4 of the Utah Rules of Appellate Procedure describes how and when a direct appeal from a criminal conviction can be taken. Generally, notice of appeal must be filed "within 30 days after the date of the entry of the judgment". UTAH. R. APP. PRO. 4(a). A defendant who wants to request reinstatement of the period for filing a direct appeal can file a motion under Subsection (f), which provides:

> Upon a showing that a criminal defendant was deprived of the right to appeal, the trial court shall reinstate the thirty-day period for filing a direct appeal. A defendant seeking such reinstatement shall file a written motion in the sentencing court and serve the prosecuting entity. If the defendant is not represented and is indigent, the court shall appoint counsel. The prosecutor shall have 30 days after service of the motion to file a written response. If the prosecutor opposes the motion, the trial court shall set a hearing at which the parties may present evidence. If the trial court finds by a preponderance of the evidence that the defendant has demonstrated that the defendant was deprived of the right to appeal, it shall enter an order reinstating the time for appeal. The defendant's notice of appeal must be filed with the clerk of the trial court within 30 days after the date of entry of the order.

UTAH R. APP. PRO. 4(f).

The language of the rule makes no mention of a timeframe in which the sentencing court has jurisdiction to entertain a motion to reinstate. Nor does it mention that the district court ever loses jurisdiction. While Stewart agrees that not all defendants in all situations are indefinitely entitled to relief under Rule 4(f), he argues that the district courts have jurisdiction to consider such motions indefinitely. The open ended time frame is unlikely to be abused since the Rule is only available for the limited issue of whether a defendant was denied the right to appeal.

Stewart suggests that the ongoing jurisdiction in Rule 4(f) is very similar to the ongoing jurisdiction created by Rule 22(e) of the Utah Rules of Criminal Procedure (a "court may correct

an illegal sentence, or a sentence imposed in an illegal manner, at any time.") UTAH R. CRIM. PRO. 22(e). Because an extended length of time does not transform an illegal sentence into a legal sentence, the same should be true of Rule 4(f). If a defendant is denied his constitutional right to appeal through no fault of his own, the passage of time cannot solve that problem, and the district court's ability to consider whether such a right was denied should not be extinguished simply because of the passage of time. Putting an arbitrary time limitation on the district court's authority to consider a motion to reinstate the thirty-day period for filing a direct appeal seems unnecessary and unfair.

Because there is nothing in the Rule 4(f) to suggest that there is a time bar on Stewart's motion to reinstate, any assertion that there is a time bar is not supported by the plain language of the rule.

2. Stewart was effectively denied his right to appeal.

While Stewart was aware of his right to appeal (as evidenced by his timely notice of appeal), he was not aware of his right to have counsel appointed to assist him and that without the benefit of counsel he was unable to perfect his appeal. Stewart asserts that courts should undertake a process of informing a defendant of his right to retain counsel or have counsel appointed for appeal just like the process at an initial appearance. *See* UTAH R. CRIM. PRO. Rule 7(e). Stewart asserts that the same duty and obligation should apply to courts with regard to an appeal after a person is sentenced.

Relative to the trial, Rule 22(c)(1) of the Rules of Criminal Procedure applies: "[f]ollowing imposition of sentence, the court shall advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed." UTAH R. CRIM. PRO. Rule 22(c)(1). Stewart asserts that being informed of the "right to appeal" includes being informed that the right

includes the right to have the assistance of counsel on appeal and the right for indigent defendants to be appointed counsel. In fact, knowing about the right to the assistance of counsel is a crucial part of knowing that an appeal can be filed. Without that knowledge, and because of the very technical requirements of an appeal, the average person would not likely be able to take even the first step at pursuing an appeal, let alone be able to file a brief that complies with the court rules. That much is evidenced by the procedural facts in this case. Because he did not have the benefit of counsel, Stewart was unable to file any claims challenging his convictions.

Additionally, the State fails in its analysis of *Manning v. State*, 2005 UT 61, 122 P.3d 628. The State asserts that the "three circumstances" (State's Opp'n at 3) in *Manning* are the *only* way for a defendant to be entitled to reinstate his appeal. Stewart asserts that neither *Manning* nor Rule 4(f), which was adopted to implement the holding and procedure outlined in *Manning*, would limit reinstatement to only those circumstances. UTAH R. APP. PRO. Rule 4, Advisory Committee Note. Instead, reinstatement under Rule 4(f) is open to anyone who can demonstrate they have been deprived of their right to appeal, not just those whose right was deprived in the circumstances exampled in *Manning*. The Utah Supreme Court created a "readily accessible and procedurally simple method by which persons improperly denied their right to appeal can promptly exercise this right." *Manning*, 2005 UT 61, ¶25-26. This mechanism is especially important in Utah because our constitution mandates providing an appeal in all criminal cases. *Id.* at ¶26. The Court held that "upon a defendant's motion, the trial or sentencing court may reinstate the time frame for filing a direct appeal where the defendant can prove, based on facts in the record or determined through additional evidentiary hearings, that he has been unconstitutionally deprived, through no fault of his own, of his right to appeal." *Id.*, at ¶31.

Stewart agrees with the State that no case can be cited from Utah to show that a defendant is entitled to reinstate an appeal where the defendant's deprivation came in the form of the sentencing court's failure to inform the defendant of his right to counsel on appeal or failure to provide an opportunity to have counsel appointed. However, Stewart believes that this proposition is self-evident. In Kansas, an exception to the general appellate jurisdiction rule "has been recognized only in those cases where a defendant either was not informed of his or her rights to appeal or was not furnished an attorney to exercise those rights or was furnished an attorney for that purpose who failed to perfect and complete an appeal." *State v. Ortiz*, 640 P.2d 1255, 1258. Also in *Casner v. State*, 155 P.3d 1202, 1207 (Kan. App. 2007) the court recognized that while the sentencing court did advise him of his right to appeal, the court did not discuss the right to counsel on appeal, and concluded that the defendant "was not informed of his right to appeal." *Id.*

In this case, Stewart asserts that he was never informed of his rights regarding a direct appeal. He asserts that the district court did not inform him that he was entitled to an appeal, that he had the right to have counsel represent him on appeal, or that if he could not afford to hire counsel he could ask to have counsel appointed to represent him on appeal. Stewart claims that the district court did not inquire into whether Stewart intended to request the assistance of appointed counsel on appeal. Stewart wanted to appeal his convictions, as evidenced by the filing of the notice of appeal. Stewart also wanted, and needed, the help of an attorney on appeal, as evidenced by his request at the prison for the assistance of the contract attorneys.

According to Rule 4(f), because the State has opposed Stewart's motion, Stewart argues that this Court "shall set a hearing at which the parties may present evidence." UTAH. R. APP. PRO. Rule 4. At that hearing, Stewart expects to testify consistently with the proffered facts at which

point the State could present counter-evidence or merely argue that these circumstances do not amount to a deprivation of the right to appeal. If Stewart could show by a preponderance of the evidence that he was deprived of his right to appeal based on the fact that he did not have counsel to aid in that process, Stewart expects that this Court would find in his favor.

B. *Plaintiff's Argument*

The State agrees that under UTAH R. OF APP. P. 4(f), in order for the Defendant to be successful on his motion to reinstate his appeal, he must demonstrate, by a preponderance of the evidence, that he was unconstitutionally deprived, through no fault of his own, his right of appeal. *Manning v. State*, 2005 UT 61, ¶ 31. However, the State argues that in *Manning*, the Utah Supreme Court sets out *only* three circumstances in which a defendant can show that he was deprived of his right to appeal, none of which apply to Stewart. Those three circumstances are as follows.

First, a defendant asked his attorney to file an appeal but the attorney failed to do so. This circumstance does not apply to Stewart because he was not represented at the time of his appeal, and Stewart's timely appeal was filed in 2003.

Second, either the court or the defendant's attorney failed to properly advise the defendant of his right to appeal. Again, this situation does not apply to Stewart. He must have been aware of his right to appeal because he filed a timely appeal.

Third, a defendant diligently, but futilely, attempted to appeal within the statutory time frame and there was no fault on the defendant's part. This is the situation that Stewart is applying in this case. Stewart is asking the Court to reinstate his time to appeal because he was not represented at the time of his statutory right to an appeal. Stewart is asking the court to interpret

his lack of a representing attorney as a deprivation of his right to an appeal, and he asks the court to draw this conclusion and make this finding without any supporting case law.

The appllate record in this case shows a clear pattern of fault on Stewart's part. First, at his own request, over the objection of his own attorney, he asked the trial court to allow him to represent himself at jury trial. The Court eventually granted Stewart's request to proceed *pro se*. Second, after Stewart was convicted of all of the charges against him, he also proceeded to be sentenced representing himself. At that point Stewart, once again *pro se*, filed a timely Notice of Appeal.

While it is correct that a defendant has the right to an attorney during the appeal process, *Evitts v. Lucey*, 469 U.S. 387 (U.S. 1985), this right can be waived. It is the State's position that Stewart waived his right to an attorney, based on Stewart's previous requests to represent himself at his 2003 jury trial and at the sentencing and his decision to proceed in his appeal *pro se*. This is also supported by Stewart's timely filing of his first Notice of Appeal in 2003.

Stewart was also at fault when he failed to meet the briefing deadline set by the Court of Appeals. His failure to respond resulted in the dismissal of his appeal in 2004.

III. Legal Analysis

While there are no time limitations or situational limitations barring Stewart's Rule 4(f) motion, Stewart has failed to show that he was, through no fault of his own, unconstitutionally deprived of his right to appeal.

A. *No Time Limitation*

There is no time bar on a motion under Rule 4(f). The language of the rule makes no mention of a timeframe in which the sentencing court has jurisdiction to entertain a motion to

reinstate a motion to appeal. In *Manning*, the Utah Supreme Court has created a "readily accessible and procedurally simple method by which persons improperly denied their right to appeal can promptly exercise this right." *Manning*, 2005 UT 61, ¶25-26. The Court held that "upon a defendant's motion, the trial or sentencing court may reinstate the time frame for filing a direct appeal where the defendant can prove, based on facts in the record or determined through additional evidentiary hearings, that he has been unconstitutionally deprived, through no fault of his own, of his right to appeal." *Id.* at ¶31. The plain language of the rule is simple: a motion may be made at any time "[u]pon a showing that a criminal defendant was deprived of the right to appeal . . . ." UTAH R. APP. PRO. 4(f). There is no time restriction limiting when a Rule 4(f) motion may be made.

B. *No Limiting Circumstances*

Manning does not specify three, and only three, situations in which a petitioner may file Rule 4(f) motion to re-instate the opportunity to file an appeal. In *Manning*, the Utah Supreme Court simply gives three examples of circumstances under which a defendant may have been deprived of his right to appeal. The Court reasons that any such circumstances "would include" the three examples it provides, but it does not state that those are the only three situations that trigger a valid Rule 4(f) motion. *Manning v. State*, 2005 UT 61, ¶ 31. A defendant is not limited to only those three situations. Reinstatement under Rule 4(f) is open to anyone who can demonstrate they have been deprived of their right to appeal, not just those who fall under the three circumstances exampled in *Manning*.[1]

[1] Rule 4(f) was adopted in response to *Manning* to implement not only the holding but the overall procedure as outlined in *Manning* and is thus broader than *Manning*. UTAH R. APP. PROC. Rule 4(f) Advisory Committee Note.

C. *Right to Counsel During the Appeal*

A defendant's right to appeal is not substantively denied when a defendant is not instructed that he has the right to counsel during the appeal. Stewart does cite case law in Kansas that seems to support the assertion that the lack of instruction to a defendant about his right to counsel in an appeal substantially strips that defendant of his full right to appeal. *State v. Ortiz*, 640 P.2d 1255, 1258 (Kan. 1982). However, subsequent cases have narrowed *Ortiz* to only "truly exceptional circumstances, when . . . late direct appeal [is permitted]. We place conscious emphasis on 'exceptional.'" *State v. Patton*, 195 P.3d 753, 765 (Kan. 2008). "The general rule remains that timely filing of a notice of appeal is indispensable and jurisdictional." *Id.* Stewart also cites another Kansas case. *Casner v. State*, 155 P.3d 1202, 1207 (Kan. App. 2007) (while the sentencing court did advise him of his right to appeal, the court did not discuss the right to counsel on appeal and thus the defendant was not informed of his right to appeal). Here, Stewart provided no record to show that he was not informed of his right to counsel for an appeal.

While Kansas' right to appeal does seem to include the notification requirement of the right to counsel during the appeal, no case law can be cited to support that proposition here in Utah. However, the Court need not reach that question in this case. There are sufficient facts here, as enumerated below, to show that Stewart knowingly waived such a right, if such a right does exist in Utah.

IV. Ruling

Stewart's right to appeal was not denied him for several reasons. First, Stewart's previous requests to represent himself in his 2003 jury trial and sentencing along with his choice to proceed in his appeal *pro se*, was a constructive waiver of his right to an attorney for the appeal.

This is demonstrated by his timely filing, *pro se*, of his first Notice of Appeal in 2003. He repeatedly was notified of his right to counsel, and he repeatedly declined to be represented by counsel. Any claimed lack of awareness about the appeals process and the right to appeal or the right to counsel during appeal was due to his own election. There was no instructive or procedural fault in either the district court or the Court of Appeals.

Second, while Stewart has validly filed this motion to reinstate, the motion simply fails on the merits. Stewart validly filed the motion consistent with *Manning* and Rule 4(f), because the circumstances in this case do not preclude such a filing. However, due to a clear pattern of conduct in this case, Stewart has created, in his own actions, his own fault in failing to meet the briefing deadline set forth by the Court of Appeal. After his earlier *pro se* filings and his ongoing desire to proceed *pro se*, his appeal was ultimately dismissed in 2004 due to Stewart's own failure to respond.

Finally, while there is no time bar on a motion under Rule 4(f), significant delays certainly can result in a failure to meet the threshold burden of proof. The Court carefully notes the timeline in this case. This started as a 2001 case, and the jury trial was conducted in 2003, approximately 12 years before the Stewart filed his current Motion. The assigned trial judge retired over eight years ago. At sentencing, Stewart was convicted on 23 counts, including the following charges:

a. SIX counts of SECURITIES FRAUD, a 2nd degree felony;
b. FIVE counts of SALE OF UNREGISTERED SECURITY, a 3rd degree felony;
c. FIVE counts of UNREGISTERED SECURITIES AGENT, a 3rd degree felony;
d. ONE count of PATTERN OF UNLAWFUL ACTIVITY, a 2nd degree felony.

Stewart elected to represent himself during sentencing, conducted on August 14, 2003, and there is no evidence that he requested the appointment of counsel. Stewart was sentenced to prison for an indeterminate period of not less than 10 years, each term to serve consecutively, and was ordered to pay $2,857,600.00 plus interest in restitution to the Victims Fund. Although Stewart was acting *pro se*, he filed a timely Notice of Appeal on September 12, 2003. The Utah Court of Appeals denied the appeal on August 9, 2004 for procedural reasons. Now, many years later, Stewart files his Motion to Reinstate.

This Court honors and respect the guarantees of the Sixth Amendment and that is precisely why this Court found that jurisdiction did lie with this Court and rejected the State of Utah's Motion to Dismiss based on the claim of lack of jurisdiction. But, it does not follow that a Motion to Reinstate will be automatically granted if jurisdiction is found. Under the clear reasoning of *Manning* and Rule 4(f), this Court may reinstate the time frame for filing a direct appeal if Stewart has proven, based on facts in the record or by a determination made in additional evidentiary hearings, that he has been unconstitutionally deprived, through no fault of his own, of his right to appeal. That issue is the clear focus of this Court.

Stewart has not supplied a transcript nor a copy of a transcript of his sentencing hearing. A mere claim by Mr. Stewart, 11 years after sentencing, that he is quite sure the sentencing judge did not inform of his right to the appointment of appellate counsel is simply insufficient. The lack of evidence is critical in the estimation of this Court and is dispositive. This Court needs "facts in the record or determined through additional evidentiary hearings, that he has been unconstitutionally deprived, through no fault of his own, of his right to appeal." *Manning*, 2005 UT 61, ¶ 31. A "preponderance of the evidence" standard cannot simply be ignored nor glossed over by this Court. UTAH. R. APP. PRO. 4(f).

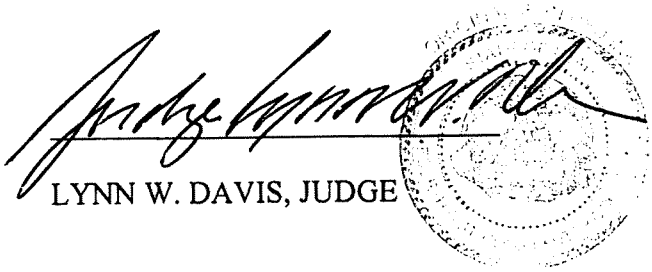
In addition, Stewart's own choices regarding self-representation (*pro se*), his lengthy delay in making a motion to reinstate the time for direct appeal, and his other dilatory acts all go to the finding of this Court that Stewart was not unconstitutionally deprived of his right to appeal.

V. Order

Stewart has clearly failed to establish, by a preponderance of the evidence, that he has been deprived, through no fault of his own, of his right to appeal. Accordingly, Stewart's Amended Motion to Reinstate Period For Filing Direct Appeal is hereby DENIED.

Dated this 18th day of July, 2016

BY THE COURT:



LYNN W. DAVIS, JUDGE

Addendum D

FOURTH DISTRICT COURT, PROVO

UTAH COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 011403597
Plaintiff,	:	
v	:	
CALVIN PAUL STEWART,	:	
Defendant.	:	With Keyword Index

ORAL ARGUMENT FEBRUARY 10, 2016

BEFORE

THE HONORABLE LYNN W. DAVIS

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 E. Ellen Way
Sandy, Utah 84092
801-523-1186

APPEARANCES

For the Plaintiff: KELSY B. YOUNG
Utah County Attorney

For the Respondent: DOUGLAS J. THOMPSON
Attorney at Law

* * *

INDEX

PROVO, UTAH; FEBRUARY 10, 2016

JUDGE LYNN W. DAVIS

(Transcriber's note: Identification of speakers may not be accurate with the audio recordings.)

PROCEEDINGS

THE COURT: Next case?

MR. THOMPSON: Yes, Judge. Number 90 is Calvin Paul Stewart.

THE COURT: And he is present. Doug Thompson here in his behalf.

MR. THOMPSON: Does that sound okay?

DEFENDANT STEWART: Yes.

MR. THOMPSON: Thank you, Judge and we'll just make another record today, Mr. Stewart's been given the aide of a hearing device. He's reported to me that that's helping.

We are here again. Last time we were here the State had just, just recently, the night before the hearing had filed its opposition to our amended motion to reinstate. The Court continued the hearing and I filed my reply to their opposition a few days later. So I believe we're here on two questions, maybe just one question. The first is whether or not the Court has jurisdiction to entertain this motion and the second is if that jurisdiction exists, whether or not Mr. Stewart should be, his time to file an appeal should be reinstated.

Has the Court had an opportunity to review all the filings?

THE COURT: I know what the arguments are, yeah, clearly.

MR. THOMPSON: Okay. So I'm not exactly sure what the Court is anticipating, additional oral argument or if you want to take the testimony today. I'm open to either of those options.

THE COURT: However you wish to proceed as it relates to it. Of course, the State's position is that this Court lacks jurisdiction and may even therefore object to the taking of testimony. Whose going to be - whose here for the state of Utah today?

MS. YOUNG: Kelsy Young, Your Honor. That is our position just in a nutshell. I don't think he's asking to reinstate his appeal, I think he's asking for the appeal to essentially be reconsidered since there was an appeal. So our position is essentially that.

MR. THOMPSON: So I guess as a beginning matter, is the Court prepared to rule on the question of jurisdiction today?

THE COURT: Well, let's make a record as it relates to that and anything further that you wish to state, that's the State's position as it relates to the fact the Court lacks jurisdiction in connection with this on a motion or quasi

motion to reconsider his appeal and the State can be heard and then you can respond.

MR. THOMPSON: Okay.

THE COURT: I mean, we've addressed it before but there's been some additional briefing involved here and the State may be heard.

MS. YOUNG: And I really don't have much to add beyond what was in my original opposition and what I just stated to the Court today about - I understand that Rule 4 doesn't necessarily, isn't barred by a time constraint and that isn't exactly what I'm arguing here. I'm arguing that the appeal process, it occurred. He's asking for it to be reinstated but for really only on fault of his own and I think that he's had his appeal process and so rather than asking that he be reinstated, he's asking it be reconsidered and that's why I'm saying at this point this Court has lost jurisdiction, it had already gone up and been heard.

THE COURT: It's a 2001 case.

MS. YOUNG: Correct.

MR. THOMPSON: I think I understand the State's position, Judge, and I want to make sure that I preserve my arguments to make them distinct. One of the things the State has said is that they're objecting to the Court's jurisdiction because they believe an appeal has already occurred and they think that, they're asserting that Rule 4 wouldn't apply in

any case where an appeal has been heard. I don't - I disagree with that position but I think I can make a record with respect to it anyway.

Mr. Stewart didn't have an appeal. He filed notice of appeal. This is made clear in our amended motion -

THE COURT: Sure.

MR. THOMPSON: - he filed a notice of appeal and he filed a docketing statement but an appeal was not perfected, no brief was ever filed, neither the Court of Appeals and the Supreme Court considered the merits of any of his claims. His appeal was dismissed procedurally because a brief wasn't filed. So I disagree with the State's assertion that he has had an appeal. There were other documents also filed by Mr. Stewart in the past 12 or 13 years, other types of petitions and they're all outlined in my amended motion as well. None of those constitute a direct appeal from his conviction either. So from his position he has not appealed and that's the response to the State's argument.

From a legal prospective I think even if he had appealed that wouldn't divest this Court from the jurisdiction it has to consider the motion. Now, if he had appealed and he had not - and the appeal had gone through, I think that would be good grounds for this Court to deny the motion.

THE COURT: Sure, it would be barred.

MR. THOMPSON: I think the Court would say you have,

to Mr. Stewart, you have not been denied, and you in turn would deny the motion but I don't think it would divest you from jurisdiction to rule on it and that jurisdiction arises directly from Rule 4 itself and I can't make it any plainer than the rule. It says that the Court has jurisdiction, continuing jurisdiction, even when it doesn't have jurisdiction over other matters, it has continuing jurisdiction to consider these motions. So I feel very confident this Court can rule on the motion on the merits and I think most of the State's arguments point to the merits of the case rather than the jurisdiction. And so as a preliminary matter I think the Court absolutely has jurisdiction to consider the merits of this claim and decide whether or not Mr. Stewart has, in fact, been denied his appeal through no fault of his own.

MS. YOUNG: If I could just add one thing to that - and I understand Mr. Thompson's position - however, I disagree that the merits weren't necessarily heard in this case. I understand that a brief wasn't filed; however, when he first sent his appeal to the Court of appeals, they looked at the merits essentially and said there is nothing here. Then the State jumped in and said, Well, we think there actually might be a valid claim here. The State responded to that and then the Court of Appeals set a briefing schedule and then at that point, yes, the defendant did not file any response and so it

was dismissed at that point. I think that's an indication that they did look at the merits.

And then additionally, he filed a writ to the Utah Supreme Court again where they looked at some of the merits, essentially sent him a letter, you know, addressed to a pro se defendant explaining some of his options. They talked about the PCRA. They talk about that they've read the merits and they don't see anything there. And even though that was outside of their time frame, I also think it was addressed at that juncture as well. So that's my, again, my position and to why this has already been heard.

THE COURT: Okay.

MR. THOMPSON: I think there's one point to be added to that. I actually think that's a good point to be raised with the Court that when he filed his docketing statement in the direct appeal from this case his docketing statement contained allegations that, that he intended to raise on appeal. As someone who does appellate practice, I understand that process. The docketing statements don't necessarily bind an appellant to the arguments that are made. The Court generally just wants some idea of what could be raised there. When he filed his docketing statement the State, excuse me the Court did respond with that a sua sponte motion to dismiss saying that he hadn't raised in the docketing statement anything that they could consider.

The State, the Attorney General's Office responded to that motion from the Court and said we think that that's wrong, we think there may be something to consider and based on the State's motion, the Court of Appeals withdrew its motion. So his case was not being dismissed on the merits when it was dismissed. It was being dismissed for failing to file a brief. A briefing schedule was put forward, it was not dismissed because they found his docketing statement entirely lacking.

THE COURT: Okay. Well, I think it's a very, very interesting posture as it relates to this and, of course, it's a 2001 case and because he's going to appeal whatever this Court does, my ruling has got to be in writing so I'll take it under advisement and will rule and hopefully within a period of 30 to 45 days.

MR. THOMPSON: Can I have a clarification, Judge?

THE COURT: Yeah.

MR. THOMPSON: Today we've just talked about the jurisdictional question.

THE COURT: I know.

MR. THOMPSON: If the Court is inclined to deny for lack of jurisdiction, I still feel and I sort of made this argument last time, I still feel obligated to put a proffer on the record of what would be made if we had been allowed to argue the merits of the motion.

THE COURT: Sure.

MR. THOMPSON: In my reply to the state's objection, ummm, I invited the Court to do one of two things, either have the hearing or simply accept -

THE COURT: Or in the alternative you could proffer as it relates what you anticipate in connection with the hearing.

MR. THOMPSON: And I actually put a proffer in the amended motion to begin with.

THE COURT: I see that and that's part of the record but I don't know whether you wanted to enhance it on the record today together with your client or not.

MR. THOMPSON: My preference would be to do that, to take testimony, rather than rely upon those -

THE COURT: Then without ruling you can proceed -

MR. THOMPSON: - paragraphs.

THE COURT: - as it relates to the testimony you take.

MR. THOMPSON: Thank you, Judge.

THE COURT: But that's certainly not barring the Court as it relates to the ultimate determination in the case.

MR. THOMPSON: I understand that. This is a proffer and if the Court rules that there's no jurisdiction, then it will remain a proffer.

THE COURT: Okay.

MR. ?: I'm sorry to interrupt, before we embark on that can we take a couple of matters that are summary.

THE COURT: Sure.

MR. THOMPSON: I don't have any objection, Judge.

THE COURT: Okay, very well. Let's do that.

(Other cases handled)

THE COURT: Then let's go back to the Calvin Paul Stewart matter.

MR. THOMPSON: Okay, Judge. Just a practical consideration, how would you like him to testify?

THE COURT: Well, have him seated as close as he can to the witness stand and pull the microphone back up so that we can make a record. Anthony can do that.

You may proceed.

MR. THOMPSON: Thank you, Your Honor.

Sir, can you put your name on the records?

MR. STEWART: My name is Calvin Paul Stewart.

THE COURT: Let's have him sworn.

MR. THOMPSON: Excuse me, Judge.

CLERK: Please raise your right hand.

MR. STEWART: I can't.

THE COURT: To the extent you're able.

CALVIN PAUL STEWART

having been first duly sworn, testified upon his oath as follows:

DIRECT EXAMINAITON

By MR. THOMPSON:

Q Okay, Mr. Stewart, maybe one more time for the record.

A Calvin Paul Stewart.

Q Okay. Mr. Stewart, where do you currently reside?

A I'm an inmate at the Gunnison Facility, Central Utah Correction Facility in Gunnison, Utah.

Q How long have you been an inmate with the Utah Department of Corrections?

A About 12 ½ years.

Q And what was the conviction or the case that put you into that custody status?

A Security fraud or several securities violations.

Q Okay. That case, those security fraud cases from here in Utah County, did you have a trial on that case?

A I did.

Q And who was the judge that presided over that trial?

A Schofield.

Q Judge Schofield? Okay. Were you represented by an attorney at that trial?

A I was not.

Q You were not. Did you proceed pro se?

A I did.

Q At any time prior to your trial were you represented

by an attorney?

A I was.

Q Can you explain that just for a little bit?

A I hired an attorney. I was put into three different courts and no longer could afford him and so he withdrew.

Q So you had an attorney on multiple cases at some point and he withdrew?

A Yes.

Q Because you couldn't pay him?

A Yeah, because I couldn't pay.

Q Okay, thank you. Did you have any other attorneys than that, the attorney that you hired?

A Then I was appointed a public defender.

Q What happened to that?

A Well, I had several conversations with him and he told me he did not understand securities, they were too complex, that I needed to plea bargain and he didn't have the time to work on my case.

THE COURT: Who was that?

THE WITNESS: I'd have to look at the record. I can't remember his name.

Q (BY MR. THOMPSON) Without going into more of the details about why you had a disagreement with him, the question, my real question is directed at he didn't stay your attorney?

A No, he did not stay my attorney.

Q And what was that process? Did you tell the judge something?

A I put in a notice of appearance and I was not - I can't remember the judge's name, it was not Schofield and my attorney was there. He had filed a notice of withdrawal and the judge at that time said that I could not represent myself and I needed an appointment and so he appointed me a counsel with the public defenders. I'm trying to think of the name of the -

Q Sure. I guess what I'm saying is when you went to trial, you said you went to trial without an attorney, you went pro se.

A That's right.

Q So, at some point you no longer had the public defender?

A Pardon?

Q At some point you no longer had the public defender?

A I had a public defender for a while and then I put in notice of appearance. That went before Judge Schofield. The public defender opposed being a co-counselor or anything and then he basically let the co-counsel or my counselor withdraw -

Q At that time -

A - at that time.

Q - when you had this motion to appear for yourself, to represent yourself -

A Yeah.

Q - did the judge talk to you about representing yourself?

A He asked me some questions I think. The thing that he did not address that I think he should have addressed was the fact that I had problems hearing.

Q Okay. We can talk about that a little bit later but as far as did he talk to you about what your responsibilities would be by representing yourself?

A To be straightforward, honest, I really can't remember a whole lot of exactly what he asked me.

Q Okay.

A I -

Q Do you recall whether or not the judge, when you began to represent yourself, did he inform you about your right to have an attorney represent you on appeal?

A He did not.

Q So you went forward to trial and you lost?

A Yes.

Q And you were set for sentencing.

A I was.

Q And you were sentenced to the prison?

A I was.

Q At your sentencing did Judge Schofield inform you of your right to appeal?

A No, he did not.

Q Did he inform you of your right to have an attorney appointed to represent you on appeal?

A He did not do that either.

Q Did you know that you had the right to an attorney on appeal?

A I did not know that but I did have a friend - well, I (inaudible).

Q That's okay.

A I did have a friend that said he'd help me with the appeal.

Q Okay, that friend, was he an attorney?

A He was not.

Q If the judge at your sentencing hearing had told you that you had the right to an attorney on appeal, would you have asked for one?

A I would have. I knew I was way in over my head.

Q The record shows that you filed a notice of appeal.

A I did.

Q Did you write that document?

A It was given to me by my friend.

Q Your friend? What's your friend's name?

A Garrett Timmerman.

Q Okay, so he filed the notice of appeal for you?

A He gave it to me, I signed it and I believe I sent it.

Q Okay. And then the record also shows that you filed a docketing statement, do you know anything about that document?

A All I know about the docketing statement is Garrett was the one that drew it up. I did not know the grounds that was done. I was at my other trial, it was brought in during a break, put under my hand and I signed it. I did not even have a chance to read it.

Q Okay. After you were at the prison did you communicate with any attorneys?

A I asked for the contract attorney. I asked him, I sent him a letter asking for help on my appeal and he wrote back saying that they did not do appeals.

Q Okay. When Mr. Timmerman, when you were communicating with Mr. Timmerman, were you expecting him to write your appeal?

A I was hoping he would, yes, I did expect that.

Q And did he communicate with you about what the appeal was going to be?

A No, he did not.

Q When was the last time you talked to him?

A The last time I talked to him I was in prison. I

called him on the phone. He asked me what grounds I wanted, I told him that the main thing I wanted was the thing on the hearing, my hearing problem. Other than that I told him, I don't really know enough about it to make any decisions. He asked me for some money. I told him I didn't have it. That was it.

Q Now, after that time your appeal was dismissed and you filed some more petitions and motions, some with the Supreme Court, some with the district court.

A Yes.

Q Have you had any attorney's help on any of those?

A No, I kept requesting attorneys and it was kept being denied. I requested an attorney every time and I was denied every time.

MR. THOMPSON: That's all the questions I have, Judge.

THE COURT: Anything from the state of Utah?

MS. YOUNG: Thank you.

CROSS EXAMINATION

BY MS. YOUNG:

Q Can you hear me okay?

A I can, yes.

Q All right. So how long ago was your conviction?

A Pardon? I have a harder time understanding you - I have a hard time with women.

Q That's all right. So how long ago was your conviction?

A 2003.

Q And today your candid, you said you don't remember a lot of what the judge said; is that correct?

A There's some things I remember, some things I don't, yes.

Q But you don't have a full memory of that?

A I'll tell you what I did. When I got out there was certain things I wanted to remember, I wrote them down in a notebook when I got back in prison so that I could remember them.

Q But from your memory today you don't have a full memory of everything that was said to you from the bench?

A No, I don't, just mainly have that which was written down -

Q Okay.

A - because I know that was said. The other is if it's shaky I won't accept it.

Q Yeah, you know, you don't remember your first attorney's name, correct, that's one thing?

A My first attorney?

Q Well, no, your public defender attorney's name?

A Oh, it was Means, Means. I think maybe it was Thomas Means. It takes me a while to remember things.

Q Okay, it's coming back. Okay. But you weren't pleased with his work; is that correct?

A Pardon?

Q You weren't satisfied with his work?

A I was not, no.

Q And you understood that that attorney was an appointed attorney?

A I do.

Q Okay. And you said that you were familiar with requesting attorney's, correct? You had done that before, you requested attorneys?

A Yeah, I guess. When my attorney withdrew, right then the judge asked me if I wanted an attorney and I told him no and he said that he was going to go ahead an appoint one anyway.

Q Okay. So you knew that that was a possibility that you could get an attorney from the State if you couldn't afford one?

A Yes. But also, the judge said that if I didn't have an attorney by, I believe it was May - and you'll find this, it's actually written in the docket that if I didn't have an attorney by then I could not have an attorney and so I assumed that included forever.

Q Okay, but you eventually went with a public defender until you chose not to be represented by the public defender

in your trial?

A Yes, because he said he couldn't win.

MS. YOUNG: Okay. That's all the question I have. Thank you.

THE COURT: Anything further, counsel?

MR. THOMPSON: Yes, Judge, just a couple of followup questions.

REDIRECT EXAMINATION

BY MR. THOMPSON:

Q Mr. Stewart, the State asked you some questions about gaps in your memory, about that sentencing date.

A Yeah.

Q I'm just going to ask you one more time, do you remember whether or not the judge informed you about your right to have an attorney appointed for your appeal?

A He did not that I wrote down in my notebook.

Q So that's a fact that you do remember?

A That is a fact.

Q Okay. And this, this last little comment that you made about the judge informing you that if you didn't have an attorney on your case by May, that you wouldn't be able to have an attorney after that?

A He did that.

Q He said that to you before or after Mr. Means had stopped representing you?

A After.

Q I see. So after the public defender had been taken off of your case, the judge told you if you don't have an attorney soon, you won't have one at all?

A That's right.

Q And your understanding of that was forever?

A That was my understanding.

MR. THOMPSON: That's all my questions, Judge.

THE COURT: Very well, thank you very much.

MS. YOUNG: Nothing further.

MR. THOMPSON: So I guess it's just up to the Court and we'll await a ruling.

THE COURT: Well, do this, submit a proposed order for me to sign within 30 days. I'll review that and we'll go from there.

MR. THOMPSON: Thank you, Judge.

THE COURT: Thirty days and then I will carefully review that and see how consistent the proposed orders are with the briefing involved and that's what we'll do.

MR. THOMPSON: Very good. Thank you, Judge.

THE COURT: Thank you.

Thank you, Mr. Stewart. Are you able to hear me clearly?

DEFENDANT STEWART: I am today.

THE COURT: Okay.

DEFENDANT STEWART: It's just the women are hard for me to hear because my hearing is in the upper ranges mostly, but, like I say, if I didn't hear I ask.

THE COURT: Very well. Thank you, sir.

DEFENDANT STEWART: Your welcome.

(Whereupon the hearing was concluded)

(Transcript completed on May 24, 2016)