

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

No.2019-KP-00296

VS.

DEREK FABACHER

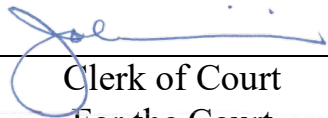
IN RE: State of Louisiana - Applicant Plaintiff; Applying For Writ Of Certiorari,
Parish of Jefferson, 24th Judicial District Court Number(s) 14-0385, Court of
Appeal, Fifth Circuit, Number(s) 18-KH-703;

September 23, 2020

Writ application granted with order.

JLW
JDH
SJC
JTG
WJC
JHB

Supreme Court of Louisiana
September 23, 2020



Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

No. 19-KP-0296

STATE OF LOUISIANA

v.

DEREK FABACHER

**ON SUPERVISORY WRITS TO THE TWENTY-FOURTH
JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON**

PER CURIAM:

Writ granted in part. Defendant pleaded guilty, waived his right to appeal, and was informed of the time in which to apply for post-conviction relief. Defendant then timely applied for post-conviction relief, alleging he received ineffective assistance of counsel. The district court found the application for post-conviction relief to be premature because defendant did not first seek an out-of-time appeal pursuant to *State v. Counterman*, 475 So.2d 336 (La. 1985). The district court erred.

Code of Criminal Procedure art. 924.1 provides, “An application for post conviction relief shall not be entertained if the petitioner may appeal the conviction and sentence which he seeks to challenge, or if an appeal is pending.” It should not, however, be construed as requiring that a defendant pursue an appeal he has waived, forfeited, or does not want before he applies for post-conviction relief. In addition, this court in *State v. Counterman*, 475 So.2d 336, 339 (La. 1985), concluded that “the appropriate procedural vehicle for a defendant to seek the exercise of his right to appeal, after the delay provided in Article 914 has expired, is an application for post conviction relief pursuant to Articles 924–930.7.” This court further noted:

When the defendant has an appeal pending *or may still appeal*, the court cannot entertain an application for post conviction relief. La.C.Cr.P. Art. 924.1. However, when the time for appealing has elapsed without the filing of an appeal, defendant *may seek reinstatement of his right to appeal* by application for post conviction relief in the trial court.

Counterman, 475 So.2d at 339 n.4 (emphasis added). Thus, *State v. Counterman* provides a mechanism by which a defendant *may* seek reinstatement of his right to appeal after he has lost it. It does not *require* that a defendant seek reinstatement of his right to appeal before he can present a claim of ineffective assistance of counsel by timely filed application for post-conviction relief. Notably, claims of ineffective assistance of counsel are normally relegated to collateral review. *See State v. Burkhalter*, 428 So.2d 449, 456 (La. 1983). Accordingly, the matter is remanded to the district court, which is ordered to consider the application for post-conviction relief in accordance with procedures provided in La.C.Cr.P. arts. 927 et seq. The application is otherwise denied.