

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond, on Friday, the 3rd day of December 2004.

Alexander F. Bowman, Appellant,

against Record No. 040213
Circuit Court No. CL03000360

Gerald K. Washington, Warden, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Stafford County.

Upon consideration of the record, the briefs, and the argument of counsel, the Court is of opinion that there is merit in the petitioner's procedural argument.

The petition for a writ of habeas corpus alleged that petitioner was denied the effective assistance of counsel for several reasons, including that his counsel was ineffective for failing to file a timely petition for appeal to the Court of Appeals. The petition also alleged various other errors.

In his "Memorandum in Opposition to Motion to Dismiss" filed in the circuit court, the petitioner asked the circuit court to allow him to file a belated appeal to the Court of Appeals, and to dismiss his remaining claims without prejudice. The warden agreed that the petitioner through no fault of his own was denied his right of appeal to the Court of Appeals, but requested that the petitioner's

remaining claims be dismissed with prejudice. The circuit court entered a final order directing the Commonwealth to request that the Court of Appeals grant petitioner leave to pursue a belated appeal from his criminal conviction in the circuit court. However, the circuit court also dismissed the petitioner's remaining claims with prejudice.

The circuit court's dismissal of these remaining claims with prejudice was an abuse of the court's discretion. Although Code § 8.01-654 bars a petitioner from raising new claims in a subsequent petition for habeas corpus, Dorsey v. Angelone, 261 Va. 601, 604, 544 S.E.2d 350, 352 (2001), the statute does not prevent a petitioner from reasserting claims that have been dismissed without prejudice in a prior proceeding. See Daniels v. Warden, 266 Va. 399, 403, 588 S.E.2d 382, 384 (2003). Had the circuit court granted the petitioner's request to have his remaining claims dismissed without prejudice, he would have been able to pursue and conclude his direct appeal and obtain any appropriate relief before litigating the merits of his collateral action.

Accordingly, the part of the circuit court's order addressing the petitioner's belated appeal to the Court of Appeals is affirmed, and the part of the circuit court's order dismissing the petitioner's remaining claims with prejudice is reversed. The cause is remanded to the circuit court for entry of an order dismissing the petitioner's remaining habeas corpus claims without prejudice.

It is ordered that the Circuit Court of Stafford County allow counsel for the appellant a fee of \$725 for services rendered the appellant on this appeal, in addition to counsel's costs and necessary direct out-of-pocket expenses.

This order shall be certified to the Circuit Court of Stafford County and shall be published in the Virginia Reports.

A Copy,

Teste:

Patricia H. Kreuger, Clerk