

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID PAUL LEWIS A/K/A DONALD  
HAMMERS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 42966

FILED

NOV 04 2004

ORDER OF REVERSAL AND REMAND

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Bloom*  
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

On April 27, 2001, the district court convicted appellant, pursuant to a plea of nolo contendere, of one count each of second-degree murder, attempted murder and possession of a firearm by an ex-felon. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after ten years for second degree murder and a consecutive twenty-four to two hundred forty months for attempted murder. Appellant was also sentenced to serve a term of twelve to seventy-two months in the Nevada State Prison for possession of a firearm by an ex-felon, to be served concurrently with the sentence for

attempted murder. This court dismissed appellant's untimely appeal from his judgment of conviction and sentence for lack of jurisdiction.<sup>1</sup>

On November 7, 2003, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State moved to dismiss the petition. Appellant opposed the motion to dismiss. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. After conducting a hearing, the district court denied appellant's petition holding that the petition was untimely and appellant failed to demonstrate good cause for the delay and prejudice. This appeal followed.

Appellant filed his petition more than two years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.<sup>2</sup> Appellant's petition was procedurally barred absent a demonstration of good cause for the delay and prejudice.<sup>3</sup>

In an attempt to demonstrate good cause for the delay, appellant argued that he was denied his right to a direct appeal. Appellant asserted that his counsel failed to advise him of his right to appeal and failed to secure his consent not to file an appeal. Additionally, appellant asserted that his counsel said she would file some papers on his

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<sup>1</sup>Lewis v. State, Docket No. 41161 (Order Dismissing Appeal, April 28, 2003).

<sup>2</sup>See NRS 34.726(1).

<sup>3</sup>See id.

behalf, which he "assumed was his 'Appeal,' challenging his judgment of conviction and sentence."<sup>4</sup> He claimed that he learned in March 2003 that no appeal had been taken.

On January 12, 2004, the district court conducted a hearing at which it heard testimony from appellant's former counsel regarding the issue of good cause. Appellant was not present or represented by counsel at this hearing. Because it appeared that the ex parte hearing may have violated this court's holding in Gebers v. State,<sup>5</sup> this court directed the State to show cause why this appeal should not be remanded to the district court for an evidentiary hearing, with appellant present, for the purpose of determining whether appellant demonstrated good cause for the delay in filing his petition. The State responded and indicated that it did not oppose an order of remand.

Accordingly, we reverse the order of the district court and remand this case to the district court to conduct an evidentiary hearing, with appellant present, for the purpose of determining whether appellant demonstrated good cause for the delay in filing his petition.


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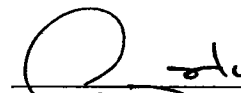
<sup>4</sup>Appellant claimed that he later learned that these papers were to seek commutation of his sentence due to a medical condition.


<sup>5</sup>118 Nev. 500, 50 P.3d 1092 (2002) (holding that a petitioner's statutory rights are violated when a district court conducts an evidentiary hearing when the petitioner is not present at the hearing nor represented by post-conviction counsel).

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.<sup>6</sup> Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.<sup>7</sup>

 \_\_\_\_\_, J.  
Becker

 \_\_\_\_\_, J.  
Agosti

 \_\_\_\_\_, J.  
Gibbons

cc: Hon. Sally L. Loehrer, District Judge  
David Paul Lewis  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>6</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>7</sup>This constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.