

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUAN JACOBO GARCIA A/K/A
JACOBO JUAN GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44006

FILED

FEB 11 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

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

On December 30, 2003, the district court convicted Garcia, pursuant to a jury verdict, of two counts of conspiracy to commit burglary (gross misdemeanor), two counts of conspiracy to commit robbery, two counts of burglary while in possession of a deadly weapon, three counts of robbery with the use of a deadly weapon, and four counts of first-degree kidnapping with the use of a deadly weapon. The district court sentenced Garcia to multiple terms totaling four consecutive terms of life in the Nevada State Prison with the possibility of parole after five years, plus four consecutive terms of 35 to 150 months. No direct appeal was taken.

On June 21, 2004, Garcia filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Garcia or to conduct an evidentiary hearing. On August 31, 2004, the district court denied Garcia's petition. This appeal followed.

In his petition, Garcia contended that his trial counsel was ineffective for failing to respond to his numerous phone calls and letters. Additionally, Garcia asserted that a direct appeal from his judgment of conviction was currently pending in this court, although no such appeal was ever filed. We therefore elect to construe Garcia's ineffective assistance of counsel claim as a claim that his counsel was ineffective for failing to communicate with him and file a direct appeal, despite Garcia's dissatisfaction with the results of his trial. We note that during Garcia's sentencing hearing, he proclaimed his innocence and stated his intention to file an appeal.

Our preliminary review of this appeal revealed that the district court may have erroneously denied Garcia's petition without first conducting an evidentiary hearing. This court has held that "an attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction."¹ Prejudice is presumed under these facts.² If Garcia is able to demonstrate that his trial counsel ignored his request for an appeal, he has established ineffective assistance of trial counsel.³

On December 14, 2004, we ordered the State to show cause why this appeal should not be remanded to the district court for an evidentiary hearing to determine whether Garcia is entitled to relief on his appeal deprivation claim. The State responded to our order on January

¹Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994).

²See Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003).

³See Mann v. State, 118 Nev. 351, 353-54, 46 P.3d 1228, 1229-30 (2002).

18, 2005. The State argues that because Garcia did not explicitly raise an appeal deprivation claim in his petition, this court should overlook the fact that Garcia, the State, and the district court were all under the misapprehension that a direct appeal had been filed on Garcia's behalf.⁴

We are not persuaded by the State's position. Although the State is correct in their assertion that Garcia did not specifically raise an appeal deprivation claim in his petition, such a claim is implicit in Garcia's contention that his counsel was ineffective for failing to communicate with him, coupled with his mistaken belief that a direct appeal had been filed on his behalf. Consequently, we remand this case to the district court to conduct an evidentiary hearing to determine whether Garcia's counsel failed to file a direct appeal after he expressed a desire for a direct appeal.⁵ If the district court determines that Garcia was denied the right to a direct appeal, the district court shall appoint counsel to


⁴We note that in its order, the district court incorrectly stated that Garcia "appealed the judgment of conviction to the Nevada Supreme Court. The Nevada Supreme Court's records reflect that the appeal has been closed."

⁵In his petition, Garcia additionally raised the following claims: (1) his convictions for both burglary and robbery were impermissible because they were based on the same incident; (2) his kidnapping conviction was incidental to the robbery; and (3) his identification was never confirmed. In light of our disposition relating to the appeal deprivation claim, we decline to reach the merits of these claims. If the district court determines that the appeal deprivation claim lacks merit, the district court shall resolve these claims in the final order denying Garcia's petition. If the district court determines that Garcia was deprived of a direct appeal without his consent, the claims Garcia raised in the instant petition may be raised by appointed counsel in the petition filed pursuant to Lozada, 110 Nev. at 359, 871 P.2d at 950.


represent Garcia and shall permit Garcia to file a petition for a writ of habeas corpus raising issues appropriate for direct appeal.⁶

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that briefing and oral argument are unwarranted in this matter.⁷ Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.⁸


_____, C.J.
Becker


_____, J.
Maupin


_____, J.
Parraguirre

⁶See id.

⁷See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁸This order constitutes our final disposition of this appeal. Any subsequent appeal from an order of the district court denying Garcia's appeal deprivation claim and the claims not reached in this order shall be docketed as a new matter. We have considered all proper person documents filed or received in this matter. We conclude that Garcia is entitled only to the relief described herein.

cc: Hon. Michelle Leavitt, District Judge
Juan Jacobo Garcia
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk