

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN J. NELSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44986

FILED

SEP 14 2005

ORDER OF REVERSAL AND REMAND

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

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

On June 23, 2004, the district court convicted Nelson, pursuant to a guilty plea, of possession or sale of documents or personal identifying information to establish false identity (category C felony). The district court sentenced Nelson to serve a term of 12 to 48 months in the Nevada State Prison. Nelson did not file a direct appeal.

On July 13, 2004, Nelson filed a motion to modify his sentence in the district court. The district court granted the motion and modified Nelson's sentence to a term of 12 to 36 months in the Nevada State Prison.¹

¹The district court entered an amended judgment of conviction on October 7, 2004.

On September 8, 2004, Nelson 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 Nelson or to conduct an evidentiary hearing. On March 15, 2005, the district court denied appellant's petition. This appeal followed.

In his petition, Nelson contended, among other things, that his trial counsel was ineffective for misadvising him concerning the elements necessary to support a conviction of a category C felony pursuant to NRS 205.465. Specifically, Nelson claimed that he only admitted to possessing identification for the purpose of establishing a false identity, which is a category E felony. Nelson further argued that on this basis his guilty plea was unknowingly entered.

Our preliminary review of the record on appeal indicated that Nelson's claim, that his trial counsel did not properly advise him concerning the elements necessary to support a category C felony, was not belied by the record, and may, if true, entitle him to relief. We concluded that under these circumstances, the district court may have erred by denying Nelson's petition without first conducting an evidentiary hearing.²

On June 9, 2005, we ordered the State to show cause why this appeal should not be remanded to the district court for an evidentiary

²See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984) (a petitioner is entitled to an evidentiary hearing if he raises a claim that, if true, would entitle him to relief).

hearing. The State filed a timely response in which the State argued that an evidentiary hearing was not warranted because: (1) the guilty plea agreement, which appellant acknowledged having signed, read, and understood, provided that appellant was pleading guilty to a category C felony; (2) at the plea canvass, appellant's trial counsel advised the court that appellant would be pleading guilty to a category C felony; (3) at sentencing the court adjudged appellant guilty of "possession or sale of a document or personal identifying information to establish false status or identity, a felony;" (4) in an affidavit filed after appellant filed his petition, appellant's trial counsel stated that counsel had advised appellant of the charges contained in the criminal complaint as well as the factual allegations supporting the charges; and (5) defendant admitted that he entered a bank with the false identification with the intent to open a bank account, which is one of the offenses enumerated in NRS 205.465(2) and makes appellant's crime a category C felony.

The record does not belie Nelson's claim that his counsel did not advise him of the elements necessary to support a category C felony. Possession of identification for the purpose of establishing a false identity is generally a category E felony, but can be elevated to a category C felony under certain limited circumstances.³ The State did not allege in its charging document, and Nelson did not admit during the plea canvass, that he sold or transferred the personal identifying information, or that he

³See NRS 205.465(2), (3).


possessed the identifying information to commit one of the enumerated crimes set forth in the statute. Although the presentence investigation report indicates that Nelson admitted to the department of parole and probation that he entered a bank with the false identification with the intent to open a bank account, Nelson did not make these admissions under oath before the district court judge, and therefore the statement could not be considered as part of Nelson's guilty plea. Additionally, as the State noted, at sentencing, the court adjudged appellant guilty of "possession or sale of a document or personal identifying information to establish false status or identity, a felony." The court did not specifically identify whether Nelson was guilty of a category C felony or a category E felony. Finally, to the extent that the district court relied on counsel's affidavit when denying Nelson's petition, such reliance was improper because an affidavit may not be used to resolve a factual dispute in lieu of an evidentiary hearing.⁴ Thus, we conclude that the district court erred in failing to hold an evidentiary hearing on this issue.

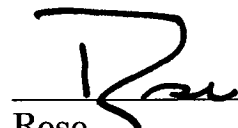
Having reviewed the record on appeal, and for the reasons set forth above, we conclude that briefing and oral argument are unwarranted.⁵ Accordingly, we

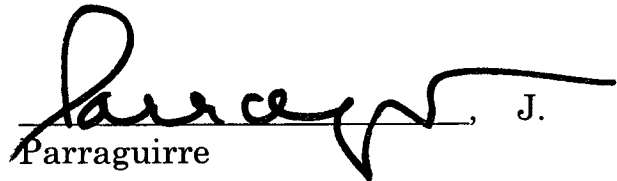
⁴See Mann v. State, 118 Nev. 351, 355, 46 P.3d 1228, 1231 (2002) ("Only after the district court decides to conduct an evidentiary hearing do the statutes allow for expansion of the record").

⁵See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for an evidentiary hearing to determine whether Nelson's trial counsel properly advised him of the elements necessary to support a category C felony.⁶


_____, J.
Douglas


_____, J.
Rose


_____, J.
Parraguirre

cc: Hon. Stewart L. Bell, District Judge
Kevin J. Nelson
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁶We have considered all proper person documents filed or received in this matter. We conclude that Nelson is only entitled to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.