

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEPHEN FISHER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45108

FILED

DEC 23 2005

ORDER OF REVERSAL AND REMAND

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

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

On June 17, 2004, appellant Stephen Fisher was convicted, pursuant to a jury verdict, of one count each of robbery and battery causing substantial bodily harm. The district court sentenced Fisher to serve two concurrent prison terms of 24 to 60 months. Fisher filed a direct appeal, but subsequently this court granted Fisher's motion to voluntarily withdraw the appeal.¹

On December 8, 2004, Fisher, with the assistance of counsel, filed a post-conviction petition for a writ of habeas corpus. The State opposed the petition. After hearing argument from counsel, the district court denied the petition.

Fisher contends that the district court erred in denying his petition because his trial counsel was ineffective. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of

¹Fisher v. State, Docket No. 43670 (Order Dismissing Appeal, December 3, 2004).

conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors prejudiced the defense.² To establish prejudice based on the deficient assistance of trial counsel, a defendant must show that but for counsel's mistakes, there is a reasonable probability that the outcome of the trial would have been different.³

Fisher contends that his trial counsel was ineffective by failing to: (1) impeach the victim to show that he committed perjury; and (2) present several witnesses who would have contradicted the victim's account of events and corroborated Fisher's testimony that he did not rob and batter the victim.⁴ We conclude that the district court erred in denying Fisher's claims without conducting an evidentiary hearing.

This court has stated that "[a] petitioner is entitled to a post-conviction evidentiary hearing when he asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief."⁵ Moreover, when "something more than a naked

²See Strickland v. Washington, 466 U.S. 668 (1984).

³Id. at 694.

⁴Fisher also contends that his constitutional due process rights were violated because he was convicted based on perjured testimony. We decline to consider Fisher's contention because he waived his right to raise this issue by failing to pursue it on direct appeal. See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) ("claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings"), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

⁵Mann v. State, 118 Nev. 351, 353, 46 P.3d 1228, 1229 (2002); see also Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

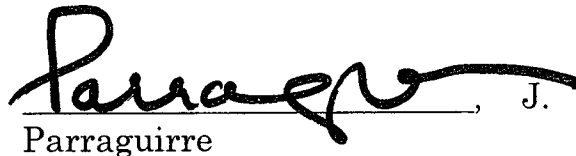
allegation has been asserted, it is error to resolve the apparent factual dispute without granting the accused an evidentiary hearing.”⁶ We conclude that Fisher claims were sufficiently specific and, if true, may entitle him to relief. Therefore, the district court erred in not conducting an evidentiary hearing on his claims.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.

 _____, J.
Douglas

 _____, J.
Rose

 _____, J.
Parraguirre

⁶Vaillancourt v. Warden, 90 Nev. 431, 432, 529 P.2d 204, 205 (1974).

⁷We note that the district court order in this case sets forth the procedural history of the case and the applicable law, but does not include findings of fact. The entry of specific findings of fact greatly assists this court in the resolution of post-conviction appeals and is required by NRS 34.830(1). We are confident that, after conducting an evidentiary hearing in this case, the district court will enter a final written order containing specific findings of fact.

cc: Hon. John S. McGroarty, District Judge
Michael H. Schwarz
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk