

IN THE SUPREME COURT OF THE STATE OF NEVADA

DESMOND FLEMING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45253

FILED

DEC 09 2005

ORDER OF REVERSAL AND REMAND

JANE E M BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
DEPUTY CLERK

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

On October 24, 2003, the district court convicted appellant Desmond Fleming, pursuant to an Alford¹ plea, of first degree murder and perjury. The district court sentenced Fleming to serve a term of life in the Nevada State Prison with the possibility of parole after twenty years for the murder count, and a concurrent term of nineteen to forty-eight months for the perjury count. Fleming did not file a direct appeal.

Fleming filed proper person post-conviction petitions for writs of habeas corpus in the district court on March 5, 2004; March 8, 2004; June 18, 2004; July 6, 2004; and September 17, 2004. Although the district court minutes reflect that that the district court orally denied these petitions, no written orders to that effect were ever entered.

On October 1, 2004, Fleming 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

¹North Carolina v. Alford, 400 U.S. 25 (1970).

district court declined to appoint counsel to represent Fleming or to conduct an evidentiary hearing. On April 20, 2005, the district court denied Fleming's petition. This appeal followed.

The district court's written order denying Fleming's petition of October 1, 2004, does not contain "specific findings of fact and conclusions of law supporting the decision of the district court."² More specifically, the district court's written order of April 20, 2005, contains no findings or conclusions respecting whether the district court found that the petition filed on October 1, 2004, was successive, or a supplement to the first petition, or to any of the prior petitions. Furthermore, because the district court entered no written orders denying any of the prior petitions, this court is unable to discern the procedural posture of this appeal.

With respect to Fleming's prior petitions, the minutes of the district court indicate that the district court orally denied Fleming's first two petitions, those filed on March 5, and March 8, 2004, on the grounds that those petitions were "fugitive documents." The district court apparently reasoned that Fleming was represented by counsel and was therefore not authorized to proceed in proper person.

The records before this court indicate, however, that in March 2004, the same attorney who represented Fleming in the proceedings leading to his conviction was listed in the district court's records as Fleming's post-conviction counsel of record. NRS 34.370(3) provides that a post-conviction petition for a writ of habeas corpus shall be filed "as a new action separate and distinct from any original proceeding in which a conviction has been had." Because a post-conviction habeas petition commences a "new action," which is "separate and distinct" from the

²NRS 34.830; NRAP 4(2).

proceedings resulting in the conviction, Fleming's former counsel was not and should not have been automatically designated as his counsel of record in the post-conviction habeas proceedings.

Additionally, because post-conviction habeas petitions commonly challenge the effective assistance provided by counsel who represented a defendant in the proceedings leading to a conviction, it is not appropriate to designate counsel, who is the subject of a petitioner's post-conviction claims of ineffective assistance, as counsel of record in the post-conviction habeas proceedings. Therefore, it appears that, in its oral decision denying Fleming's two petitions filed in March 2004, the district court erroneously reasoned that the petitions were "fugitive documents."³

In summary, it appears from the record before us that none of the claims presented in Fleming's various petitions have ever been adequately reviewed and resolved by the district court. Further, the district court's written order of April 20, 2005, is inadequate because it does not contain specific findings of fact and conclusions of law.

Therefore, we reverse the district court's order of April 20, 2005, and we remand this matter to the district court for the proper resolution of all of Fleming's proper person petitions for writs of habeas corpus.⁴ On remand, the district court shall review all of the claims alleged in Fleming's petitions and shall enter a written order or orders containing specific findings of fact and conclusions of law supporting the decision of the district court with respect to each of Fleming's petitions.

³Of course, because no written orders were ever entered denying those petitions, the district court is free to reconsider its oral decision.

⁴The district court may exercise its discretion to appoint new counsel, pursuant to NRS 34.750, to assist appellant and to conduct any evidentiary proceedings deemed necessary.

Accordingly, we

ORDER the judgment of the district court REVERSED, AND WE REMAND this matter to the district court for further proceedings consistent with this order.⁵

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

cc: Honorable Jackie Glass, District Judge
Desmond Fleming
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁵This order constitutes our final disposition of this appeal. Any subsequent appeal from an order or orders of the district court denying Fleming's petitions shall be docketed as a new matter. We have considered all proper person documents filed or received in this matter, and conclude that Fleming is entitled only to the relief described herein.