

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIE HARTWELL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

WILLIE LAMAR HARTWELL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 45344

**FILED**

SEP 20 2005

No. 45687  
JANEITE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

These are proper person appeals from orders of the district court denying appellant's petitions for writs of habeas corpus. We elect to consolidate these appeals for disposition.<sup>1</sup> Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.

On March 17, 2004, the district court convicted appellant, pursuant to a guilty plea, of two counts of burglary while in possession of a firearm, one count of conspiracy to commit robbery, and two counts of robbery with the use of a deadly weapon in district court case number C181309. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve five concurrent terms of ten to twenty-five years in the Nevada State Prison. No direct appeal was taken.

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<sup>1</sup>See NRAP 3(b).

On March 17, 2004, the district court also convicted appellant, pursuant to a guilty plea, of one count of burglary while in possession of a firearm and one count of robbery with the use of a deadly weapon in district court case number C183357. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve two concurrent terms of ten to twenty-five years in the Nevada State Prison. The district court imposed this sentence to run consecutively to the sentence imposed in district court case number C181309. No direct appeal was taken.

On February 15, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court designating both district court cases. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On May 20, 2005, the district court entered written orders denying appellant's petition in both cases. This appeal followed.

In his petition, appellant claimed, among other things, that his trial counsel was ineffective for failing to file a direct appeal. Appellant claimed that shortly after sentencing he inquired about and expressed a desire to appeal to his counsel and that his counsel told him that he would be limited to filing a post-conviction petition or a motion for reconsideration of sentence.

This court has held that "[t]rial counsel is ineffective if he or she fails to file a direct appeal after a defendant has requested or

expressed a desire for a direct appeal; counsel's performance is deficient and prejudiced is presumed under these facts."<sup>2</sup> A petitioner must prove the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.<sup>3</sup>

Our review of the records on appeal revealed that the district court may have erroneously denied appellant's petition without holding an evidentiary hearing. Appellant is entitled to an evidentiary hearing if he raised claims that if true would entitle him to relief, and if his claims are not belied by the record.<sup>4</sup> Here, it appeared that appellant's claim that his counsel did not file a direct appeal after appellant conveyed an interest in a direct appeal is not belied by the records and may entitle him to an evidentiary hearing.

On July 15, 2005, this court directed the State to show cause why this matter should not be remanded to the district court for an evidentiary hearing.<sup>5</sup> On August 16, 2005, the State filed a response and indicated that the State did not oppose an order of remand for an

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<sup>2</sup>Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003).

<sup>3</sup>Means v. State, 120 Nev. \_\_\_, 103 P.3d 25, 33 (2004).

<sup>4</sup>Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

<sup>5</sup>The order to show cause was filed only in Docket No. 45344 because the notice of appeal that was later docketed in Docket No. 45687 was inadvertently not sent at the same time as the notice of appeal in Docket No. 45344. However, because both appeals involve one petition filed in two district court cases and because the issues are identical for each case, it is unnecessary to issue an order to show cause in Docket No. 45687.

evidentiary hearing on the issue of whether appellant's trial counsel was ineffective for failing to file a direct appeal. Accordingly, we reverse the district court's order denying appellant's petition filed in both district court cases, and we remand this matter to the district court for an evidentiary hearing on whether appellant's trial counsel was ineffective for failing to file a direct appeal on appellant's behalf.<sup>6</sup> If it is determined that appellant has been deprived of his right to a direct appeal without his consent, appellant shall be appointed counsel and provided with an opportunity to file a petition for a writ of habeas corpus in each case raising any issues appropriate for direct appeal.<sup>7</sup>

Having reviewed the records on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in these matters.<sup>8</sup> Accordingly, we

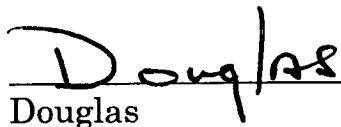
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<sup>6</sup>In his petition, appellant also claimed that he had improperly stipulated to habitual criminal status and that various constitutional rights were violated because the information was defective, he was not properly informed that the State was seeking habitual criminal adjudication and the district court did not exercise its jurisdiction to adjudicate appellant a habitual criminal. Because these are direct appeal claims and in light of our decisions in these appeals, we decline to consider these claims at this time. If the district court determines that trial counsel was not ineffective for failing to file a direct appeal, the district court shall resolve all of the claims raised in appellant's petition in a final, written order denying the petition. Appellant may then appeal to this court from the final, written order of the district court.

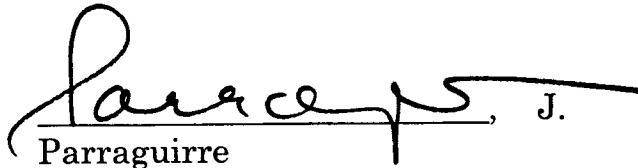
<sup>7</sup>See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

<sup>8</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

ORDER the judgments of the district court REVERSED AND REMAND these matters to the district court for proceedings consistent with this order.<sup>9</sup>

 J.  
Douglas

 J.  
Rose

 J.  
Parraguirre

cc: Hon. Nancy M. Saitta, District Judge  
Willie Hartwell  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>9</sup>This order constitutes our final disposition of these appeals. Any subsequent appeals shall be docketed as new matters.