

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID BRUFFETT,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 46452

**FILED**

JUL 25 2006

ORDER OF REVERSAL AND REMAND

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

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

On January 29, 2004, the district court convicted appellant, pursuant to a jury verdict, of robbery with the use of a firearm and conspiracy to commit robbery. The district court sentenced appellant to serve two consecutive terms of 26 to 120 months in the Nevada State Prison for robbery with the use of a firearm and a concurrent term of 28 to 72 months for conspiracy. During trial, appellant was represented by Jack Alian. At sentencing, appellant was represented by Jenny Hubach for Jack Alian. No direct appeal was taken.

On January 14, 2005, appellant 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, the district court declined to appoint counsel to represent appellant. An evidentiary hearing was held on September 8, 2005. On November 7, 2005, the district court denied appellant's petition. This appeal followed.

Appellant contended that his trial counsel was ineffective for failing to file a direct appeal. Specifically, appellant contended Ms. Hubach told him at the sentencing hearing that Mr. Alian's office would file a direct appeal of the conviction. However, no direct appeal was filed.

This court's preliminary review of the record on appeal revealed that the district court may have erroneously denied appellant's petition because appellant's contentions were not refuted by the evidence presented at the evidentiary hearing. Appellant testified at the evidentiary hearing that Ms. Hubach told him Mr. Alian's office would file a direct appeal. Mr. Alian testified at the hearing and denied he was told appellant wanted to appeal. Ms. Hubach was not called to testify.

Accordingly, on May 3, 2006, this court ordered the State to show cause why this appeal should not be remanded to the district court for an evidentiary hearing to determine whether or not counsel's performance fell below an objective standard of reasonableness.<sup>1</sup> The State did not oppose the remand of appellant's appeal to the district court for an evidentiary hearing on whether appellant's appeal deprivation claim has merit.

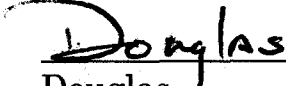
Accordingly, we reverse the decision of the district court denying this claim and remand this matter to the district court to conduct an evidentiary hearing on the issue of whether appellant's counsel failed to file a notice of appeal after Ms. Hubach told appellant an appeal would be filed. If the court determines that counsel failed to file a notice of appeal after appellant expressed a desire to appeal, the district court shall appoint counsel to represent appellant and shall permit appellant to file a

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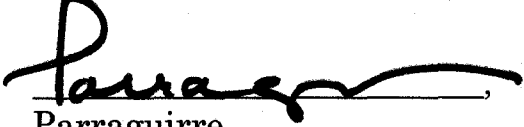
<sup>1</sup>See Strickland v. Washington, 466 U.S. 668 (1984).

petition for a writ of habeas corpus raising any issues appellant could have raised on an appeal.<sup>2</sup> Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.<sup>3</sup>

 \_\_\_\_\_, J.  
Douglas

 \_\_\_\_\_, J.  
Becker

 \_\_\_\_\_, J.  
Parraguirre

cc: Hon. Steven P. Elliott, District Judge  
David Bruffett  
Attorney General George Chanos/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

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<sup>2</sup>See Lozada v. State, 110 Nev. 349, 359, 871 P.2d 944, 950 (1994).

<sup>3</sup>In light of the foregoing, appellant's February 21, 2006 "Motion for Leave to file Motions, Briefs and Papers," "Motion for Appointment of Counsel on Appeal and Order to Produce Documents, Trial Transcripts, and all Tangible Property of Appellant" and April 24, 2006 brief are hereby denied. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.