

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT BYFORD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47252

FILED

FEB 07 2007

ORDER VACATING AND REMANDING

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 postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Appellant Robert Byford was convicted of first-degree murder and received a sentence of death. This court affirmed Byford's conviction and sentence in 2000.¹ Byford then filed in proper person a timely petition in the district court seeking habeas relief and appointment of counsel. The court appointed counsel, who filed a supplement to the petition. The court eventually denied the petition without conducting an evidentiary hearing.

Byford appealed, and we concluded that the district court had failed to adequately address his claims of ineffective trial and appellate counsel.² We concluded that the district court's order lacked specific

¹Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

²Byford v. State, Docket No. 44215 (Order Affirming in Part, Vacating in Part, and Remanding, November 16, 2005).

findings of fact and conclusions of law to support its decision disposing of these claims on their merits, particularly in the absence of any evidentiary hearing. We reminded the district court that "a postconviction habeas petitioner is entitled to an evidentiary hearing on any claims that if true would warrant relief as long as the claims are supported by specific factual allegations which the record does not belie or repel."³ We therefore vacated the order and remanded, directing the district court "to reconsider these claims and, at a minimum, enter an order that sets forth specific findings of fact and conclusions of law to support its decision disposing of them."⁴

Nevertheless, after our vacatur and remand, the district court took no action. The State, without appearing before the district court to obtain a ruling and without advising Byford or his counsel, submitted to the district court a new proposed order, which the district court signed and filed without bringing the parties before it or notifying Byford. The State and the district court acted improperly, for several reasons.

First, while Eighth District Court Rule 7.21 allows the party "obtaining" an order to submit a proposed order to the district court, the State never obtained an order after our vacatur and remand. Its draft of a new order was therefore unfounded. The district court must make a

³Byford, Docket No. 44215, at 3-4.

⁴Id. at 4.

ruling and state its findings of fact and conclusions of law before the State can draft a proposed order for the district court's review.

Second, Nevada Code of Judicial Conduct 3B(7) requires the district court to "accord every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard." The commentary on this section specifically notes that the district court may request a party to submit proposed findings of facts and conclusions of law, but it must ensure that the "other parties are apprised of the request and are given an opportunity to respond." The district court denied Byford the opportunity to be heard on the State's proposed findings of fact and conclusions of law.

Third, the State argues that Byford never objected to the proposed findings and never sought to have them modified after the order was filed, but there is no requirement that he do so. EDCR 7.21 does not require this and does not relieve the district court of its obligation under NCJC 3B(7) to ensure that the other parties are notified of a proposed order and given the opportunity to comment on it. Nevada Rule of Civil Procedure 52, which the State cites in support of its argument, is inapplicable to a petition for a writ of habeas corpus; the procedure to be followed in such provisions is set forth in NRS chapter 34.⁵ Even if NRCP

⁵See NRS 34.780 (the Nevada Rules of Civil Procedure are applicable to habeas proceedings to the extent they are not inconsistent with NRS 34.360-.830); Mazzan v. Warden, 109 Nev. 1067, 1073, 863 P.2d 1035, 1038 (1993).

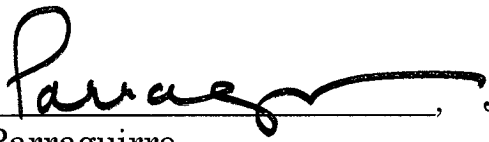
52 did apply here, it provides a right to seek amendment of a district court order; it does not create an obligation to do so.

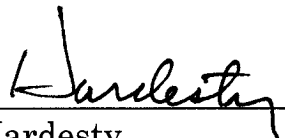
Finally, in resolving Byford's prior appeal from the district court's earlier order denying this habeas petition, this court vacated in part and remanded, specifically directing the district court to "reconsider" Byford's claims of ineffective assistance of counsel. The district court's acceptance of an order drafted unilaterally by the State did not satisfy this direction. Rather--in the event that on remand the district court did not simply evaluate Byford's claims and draft and enter its own order without further argument or evidence--the district court was required at the very least to hold a hearing, with both parties present, at which it stated its new ruling and explained its findings and conclusions, providing guidance for the State to draft a proposed order.


Of course, as we explained before, an evidentiary hearing is required in regard to any claims that are supported by specific factual allegations unrepelled by the record and that would warrant relief if true.⁶ We note that the order drafted by the State, in rejecting claims that Byford's counsel were ineffective, repeatedly asserts that his counsel made strategic choices. In most instances, this is a difficult assessment to make without the benefit of counsel's testimony. Accordingly, we

⁶See Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001).

ORDER the judgment of the district court VACATED AND REMAND this matter to the district court for proceedings consistent with this order.⁷


_____, J.
Parraguirre


_____, J.
Hardesty


_____, J.
Saitta

cc: Hon. Valorie Vega, District Judge
JoNell Thomas
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

⁷During the pendency of this appeal, Byford filed a motion seeking leave to supplementally brief the propriety of the aiding and abetting instructions, based on Mitchell v. State, 122 Nev. ___, 149 P.3d 33 (2006). Mitchell was decided after Byford's opening brief was filed, but Byford raised the issue and cited Mitchell in his reply brief. Due to our vacatur and remand of the order below, we deny this motion as moot. On remand, Byford may supplement his petition with this claim.