

IN THE SUPREME COURT OF THE STATE OF NEVADA


ARON M. SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47302

FILED

OCT 17 2006

ORDER OF AFFIRMANCE

JANEITE M. BLOOM
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

This is an 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; Brent T. Adams, Judge.

Appellant Aron M. Smith was originally convicted, pursuant to a guilty plea, of one count of attempted robbery. The district court sentenced Smith to a prison term of 36 to 120 months, suspended the sentence and placed Smith on probation for a period not to exceed 3 years. Shortly after being placed on probation, Smith tested positive for drug use and his probation was revoked. Smith did not appeal from the order revoking probation.

Smith filed a timely proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel and counsel filed a supplement. The State filed a motion to dismiss the petition, Smith filed an opposition, and the district court granted the motion.

In the petition and supplement, Smith argued that counsel was ineffective at the probation revocation hearing. This court has recognized that an ineffective assistance of counsel claim will lie only

where the defendant has a constitutional or statutory right to the appointment of counsel.¹ In the context of probation revocation proceedings, counsel is constitutionally required if the probationer requests counsel and makes a colorable claim that (1) he did not commit the alleged violations; or (2) that there are justifying or mitigating circumstances which make revocation inappropriate and these circumstances are difficult or complex to present.²

In this case, Smith concedes that he violated one of the terms of his probation, but argues that he was entitled to counsel because there were substantial reasons which justified or mitigated the violation. Specifically, Smith argues that he had begun regular meetings with his probation officer, he was employed full time, he was subjected to a drug test immediately after his very first meeting with his probation officer, he was stressed because he was living with his parents and his grandfather had recently passed away. Smith further argues that family members and the woman who conducted the substance abuse evaluation should have been called to testify in his favor. Even assuming that these are justifying or mitigating circumstances which made revocation inappropriate, none of them are difficult or complex to present. Accordingly, we conclude that Smith was not constitutionally entitled to counsel, and the district court correctly dismissed the petition as to these claims.

¹McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996).

²Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973); Fairchild v. Warden, 89 Nev. 524, 516 P.2d 106 (1973) (adopting the approach set forth in Gagnon v. Scarpelli).

Smith also claimed in his petition that the district court abused its discretion by revoking his probation. This claim could have been raised in an appeal from the order revoking probation and was therefore waived.³ We therefore conclude that the district court did not err by dismissing the petition as to this claim.

Having considered appellant's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

cc: Hon. Brent T. Adams, District Judge
Eric W. Lerude
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

³See NRS 34.810; Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).