

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL THOMAS HARVEY,
Appellant,
vs.
WARDEN, WARM SPRINGS
CORRECTIONAL CENTER,
STEPHANIE HUMPHREY AND
DIRECTOR, NEVADA DEPARTMENT
OF CORRECTIONS, GLEN WHORTON,
Respondents.

No. 47404

FILED

FEB 28 2007

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

ORDER OF REMAND

This is a proper person appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus. Ninth Judicial District Court, Douglas County; David R. Gamble, Judge.

On July 28, 2004, the district court convicted appellant, pursuant to a jury verdict, of one count each of assault with the use of a deadly weapon and battery with the use of a deadly weapon. The district court sentenced appellant to serve a term of twelve to thirty months in the Nevada State Prison for assault and a consecutive term of twenty-four to sixty months for battery. The sentence for battery was suspended with appellant to be placed on formal probation for a period not to exceed five years. Appellant did not file a direct appeal.

On July 27, 2005, appellant, with the assistance of counsel, filed a post-conviction petition for a writ of habeas corpus in the district court. On November 1, 2005, appellant filed a supplemental petition. The State moved to dismiss the petition and appellant filed an opposition to the motion to dismiss. The district court denied the State's motion to dismiss, directed the State to file an answer to the petition and supplemental petition, and ordered an evidentiary hearing.¹ Prior to the evidentiary hearing, the district court granted appellant's counsel's motion to withdraw. On May 3, 2006, the district court dismissed appellant's petition. This appeal followed.

In his petition, appellant raised several direct appeal claims. Appellant argued that he was unable to raise the claims in a prior proceeding because he represented himself at trial and sentencing and he was never informed by the district court of his right to appeal or of the time period for perfecting an appeal. The record reveals that the district court did not inform appellant of his right to appeal.

NRS 177.075(2) requires the district court, at sentencing, to inform a defendant who did not plead guilty and who is without counsel of his right to appeal. Because the record reveals that the district court did

¹See NRS 34.770.

not inform appellant of his right to appeal, appellant's appeal notification claim had merit.

The record on appeal indicates that at the evidentiary hearing the district court discussed the issue of whether the appeal notification claim was raised as cause for failing to file a direct appeal and raising the instant claims in his petition² or as a ground for relief within the petition. We note, however, that the district court never made a conclusive determination of whether the claim was raised as a ground for relief. If the appeal notification claim was raised as a ground for relief, appellant demonstrated a valid appeal deprivation claim.

The remedy for an appeal deprivation claim is to permit the defendant, with the assistance of counsel, to file a petition pursuant to Lozada v. State in which the defendant has the right to raise all issues he could have raised on direct appeal.³ Because appellant was not given the opportunity to file a petition raising all issues he could have raised on direct appeal, the petition filed below cannot be construed as the equivalent of a Lozada petition. Further, because the assistance of counsel is essential to remedy the loss of the right to an appeal,⁴ allowing

²See NRS 34.810(1)(b).

³110 Nev. 349, 359, 871 P.2d 944, 950 (1994).

⁴See id.

appellant to proceed in proper person at the evidentiary hearing would have been improper.

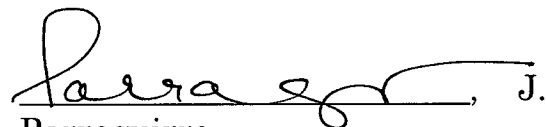
Because the district court did not conclusively determine whether appellant raised his appeal notification claim as a ground for relief, we remand this appeal for an evidentiary hearing to decide this issue. If appellant raised the appeal notification claim as a ground for relief, the district court shall provide appellant an opportunity to file a Lozada petition in which appellant may raise all issues he could have raised on direct appeal.⁵ Because the Lozada remedy is a direct appeal remedy, if appellant chooses to pursue relief by filing a Lozada petition, appellant must be represented by counsel.⁶

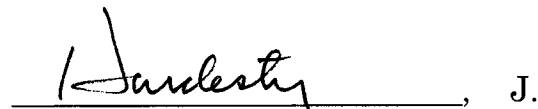
⁵In light of this order, we decline to consider the issues raised in appellant's petition. If appellant raised his appeal notification claim as a ground for relief, he may raise the issues raised in the instant petition in his Lozada petition. In the event appellant files a Lozada petition and that petition is denied, appellant may appeal the denial of that petition. See NRS 177.015.


⁶Appellant has no constitutional right to proceed on direct appeal without counsel, and this court does not permit an appellant to proceed in proper person on direct appeal from his judgment of conviction. See Blandino v. State, 112 Nev. 352, 914 P.2d 624 (1996); see also Martinez v. Court of Appeal of California, 528 U.S. 152 (2000). If necessary, the district court shall conduct a hearing to determine whether appellant is indigent and entitled to the appointment of counsel. See NRS 171.188; NRS 34.750.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is entitled only to relief granted, and that briefing and oral argument are unwarranted.⁷ Accordingly, we

ORDER this matter REMANDED to the district court for proceedings consistent with this order.⁸

 J.
Parraguirre

 J.
Hardesty

 J.
Saitta

⁷See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁸This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter. We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein.

cc: Hon. David R. Gamble, District Judge
Daniel Thomas Harvey
Attorney General Catherine Cortez Masto/Carson City
Douglas County District Attorney/Minden
Douglas County Clerk