

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARTIN HUBER,
Petitioner,
vs.
CLERK OF THE EIGHTH JUDICIAL
DISTRICT COURT, IN AND FOR
CLARK COUNTY, NEVADA,
Respondent.

No. 47985

FILED

JAN 05 2007

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

ORDER DENYING PETITION IN PART AND
GRANTING PETITION IN PART

This is a proper person petition for a writ of mandamus. Petitioner seeks an order compelling the clerk of the district court to file a notice of appeal that petitioner alleges that he submitted for filing. It appears that petitioner further complained that the clerk of the district court had failed to file a post-sentence motion to withdraw the guilty plea.

Petitioner asserts that a judgment of conviction was entered on December 2, 2005, and that he submitted a notice of appeal for filing on December 21, 2005. Petitioner claims that he learned on July 11, 2006, that the clerk of the district court had not filed his notice of appeal because he was represented by counsel. Petitioner further claims that the notice of appeal was transferred to his trial counsel and that trial counsel failed to file the notice of appeal on his behalf. Petitioner claims that the clerk's actions have deprived him of a direct appeal.

Upon the filing of a notice of appeal in the district court, the clerk of the district court is required to immediately transmit to the clerk

of this court two notice of appeal packets containing, among other things, the notice of appeal.¹ The clerk of the district court is required to transmit the notice of appeal packets despite any perceived deficiencies in the notice of appeal.² Further, this court has consistently held that the district court clerk has a ministerial duty to accept and file documents presented for filing if those documents are in proper form.³ This court has recognized that the clerk of the district court also has a duty to maintain accurate files.⁴

It appeared that petitioner had set forth an issue of arguable merit and that petitioner may have had no adequate legal remedy.⁵ This court determined that a response from the Clark County District Attorney would be of assistance in resolving this matter, and this court directed

¹See NRAP 3(e).

²See NRAP (3)(a)(2).

³See, e.g., Sullivan v. District Court, 111 Nev. 1367, 904 P.2d 1039 (1995) (holding that the district court had a duty to file an application to proceed in forma pauperis and "receive" a civil complaint); Bowman v. District Court, 102 Nev. 474, 728 P.2d 433 (1986) (holding that the clerk has a ministerial duty to accept and file documents unless given specific directions from the district court to the contrary).

⁴See Whitman v. Whitman, 108 Nev. 949, 840 P.2d 1232 (1992) (holding that clerk has no authority to return documents submitted for filing; instead, clerk must stamp documents that cannot be immediately filed "received," and must maintain such documents in the record of the case); Donoho v. District Court, 108 Nev. 1027, 842 P.2d 731 (1992) (holding that the clerk of the district court has a duty to file documents and to keep an accurate record of the proceedings before the court).

⁵See NRS 34.160; NRS 34.170.

that the district attorney address: (1) whether a notice of appeal was submitted by petitioner in proper person for filing; (2) if a notice of appeal was submitted for filing, what day was it received in the district court; (3) if a notice of appeal was submitted for filing, what action was taken upon the notice of appeal by the clerk of the district court; and (4) what authority would permit the clerk of the district court to fail to file a notice of appeal submitted by a criminal defendant even if the notice of appeal was submitted in proper person.

On October 23, 2006, the district attorney's response was filed in this court. The district attorney informed this court that a review of the district court's files did not show any evidence that petitioner attempted to file a notice of appeal in the district court. However, a review of the file indicated that on June 12, 2006, petitioner filed a motion to withdraw his guilty plea in the district court and that this motion was received and forwarded to the Clark County Public Defender's Office as the file before the clerk indicated that he was represented by counsel when he attempted to file his motion. When petitioner inquired on July 4, 2006, why the motion had not been acted upon, the clerk sent a letter to petitioner on July 11, 2006 informing him that the motion was forwarded to his counsel of record. The district attorney informed this court that the Lovelock Correctional Facility stated that records relating to the prison logs were in storage and would not be available until after the date the response was due, and thus, the district attorney was unable to ascertain whether or not the notice of appeal was delivered to prison officials.⁶ Finally, the district

⁶If the case file in the district court did not contain a copy of the notice of appeal, the State was to inform this court of this fact. If the State
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attorney noted that petitioner raised an appeal deprivation claim in a post-conviction petition for a writ of habeas corpus filed in the district court and that there would not be an opposition to an evidentiary hearing on that claim.

Because the district court did not submit copies of any documents in the district court's case file, this court directed the district attorney to submit copies of the June 12, 2006 motion to withdraw a guilty plea, the July 4, 2006 letter from petitioner relating to the motion, and the July 11, 2006 letter from the clerk to petitioner. On November 27, 2006, the district attorney submitted the copies of these documents as requested.

Because this court was unclear why the logs maintained at the prison would be unavailable, this court directed the attorney general, as the representative of the custodian of these records, to obtain and transmit to the clerk of this court copies of the notice of appeal or prison mail logs for the time period of December 21, 2005, through January 2, 2006. Further, the attorney general was to inform this court why those records were unavailable and what steps would be taken to ensure that the timely access to these records was not compromised in the future.

... continued

was unable to determine the day the notice of appeal was received because a copy was not maintained in the case file, the State was to inquire with the Department of Corrections whether there was proof of delivery to a prison official in the notice of appeal or legal mail logs maintained at the prison or correctional facility. The State was to provide this court with copies of any logs supporting the date the notice of appeal was delivered to prison officials.


On December 11, 2006, the attorney general filed a response indicating that petitioner was incarcerated at High Desert State Prison at the time he allegedly mailed his notice of appeal and that he did not use either the notice of appeal or legal mail log maintained by the High Desert State Prison. The attorney general has further informed this court that there was not any problem obtaining copies of the logs, and the attorney general believes that any prior difficulties were due to a miscommunication.

Having reviewed the documents before this court, we conclude that extraordinary relief is not warranted. Petitioner has not demonstrated that he submitted a notice of appeal for filing on December 21, 2005. In fact, petitioner's assertion that the July 11, 2006 letter pertained to his notice of appeal was in fact false as the documents submitted by the district attorney indicated that the July 11, 2006 letter pertained to a motion to withdraw a guilty plea. Therefore, this court denies petitioner's request to compel the district court clerk to file a notice of appeal he alleged that he submitted for filing.

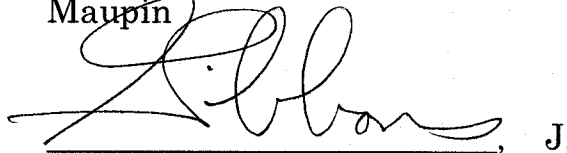
In reviewing the documents before this court, it appears that the clerk of the district court mistakenly declined to file petitioner's post-sentence motion to withdraw a guilty plea. NRS 176.165 permits a defendant to file a post-sentence motion to withdraw the guilty plea. Although it appears that petitioner's trial counsel had not formally withdrawn at the point that he filed his motion, the post-sentence motion was a post-conviction matter independent of the earlier trial proceedings, and thus, petitioner should have been permitted to file the motion in proper person. Therefore, we grant the petition in part and direct the clerk of the district court to cause the post-sentence motion to withdraw

the guilty plea received on June 12, 2006 in the district court to be filed in the district court with a filing date of June 12, 2006. Accordingly, we

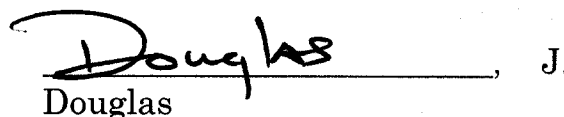
ORDER the petition DENIED in part and GRANTED in part AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the clerk of the district court to file the motion to withdraw a guilty plea received on June 12, 2006 with a filing date of June 12, 2006.⁷

 C.J.

Maupin

 J.

Gibbons

 J.

Douglas

⁷We have considered all proper person documents submitted to this court, and we conclude that petitioner is entitled only to the relief described herein. We note that on December 15, 2006, that petitioner submitted a response in which he now asserts that he mailed the notice of appeal to a friend, who in turn mailed the notice of appeal to the clerk of the district court. We conclude that the affidavit does not alter this court's resolution of this petition.

cc: Hon. Stewart L. Bell, District Judge
Martin Huber
Attorney General Catherine Cortez Masto/Carson City
Attorney General Catherine Cortez Masto/Las Vegas
Clark County District Attorney David J. Roger
Clark County Clerk