

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALLEN HALLING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48715

FILED

MAY 11 2007

JUVENILE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus. Third Judicial District Court, Churchill County; Robert E. Estes, Judge.

On February 8, 2005, in district court case number CR-30773, appellant Allen Halling was convicted, pursuant to a guilty plea, of one count each of grand larceny of personal goods in excess of \$250.00 and level-two trafficking in a controlled substance. The district court sentenced Halling to serve a prison term of 12 to 48 months for the grand larceny count and a consecutive prison term of 12 to 60 months for the trafficking count. Also, on February 8, 2005, in district court case number CR-30799, Halling was convicted, pursuant to a guilty plea, of one count of grand larceny of personal goods in excess of \$250.00. The district court sentenced Halling to serve a prison term of 12 to 48 months to run consecutively to the sentence imposed in district court case number CR-30773. Halling did not file direct appeals from the judgments of conviction.

On November 21, 2005, Halling filed a post-conviction petition for a writ of habeas corpus challenging his convictions in district court case numbers CR-30773 and CR-30799. The district court appointed counsel to represent Halling. The State filed an opposition to the petition.

Without conducting an evidentiary hearing, the district court denied the petition. Halling filed this timely appeal.

Halling contends that the district court erred by rejecting his claims of ineffective assistance of counsel. Halling contends that defense counsel was ineffective by failing to object at sentencing when the prosecutor breached the plea agreement. In a related argument, Halling contends that defense counsel was ineffective for failing to advise Halling to file a direct appeal challenging the breach of the plea agreement. We conclude that the district court erred by rejecting Halling's claims of ineffective assistance of counsel without conducting an evidentiary hearing.¹

The district court found that Halling's claims of ineffective assistance of counsel involving a breach of the plea agreement were belied by the record. Specifically, the district court found that the prosecutor did not breach the plea agreement "but rather supported the recommendation of the Division of Parole and Probation (Division) which recommended the sentences for CR-30773 be served concurrently." The district court's findings are not supported by the record.² In the presentence report prepared in case number CR-30773, the Division recommended that the sentences imposed for the two counts run consecutively to each other. And at sentencing the prosecutor argued that all counts and all cases should run consecutively stating: "We disagree with the recommendation [of the Division] in one sense. Some of the sentences are recommended to be concurrent. We think the Defendant needs to have sentences that follow

¹See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

²Cf. Riley v. State, 110 Nev. 638, 878 P.2d 272 (1994).

each other consecutive." Later, the prosecutor again stated, "we are asking that everything run consecutive."

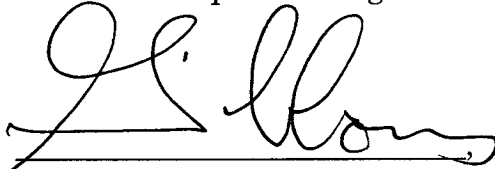
In its appellate brief, the State acknowledges that the district court order contains "factual errors." Nonetheless, the State argues that defense counsel was not deficient at sentencing for failing to object because the prosecutor did not breach the plea agreement. Specifically, the State argues that the prosecutor acted properly in concurring with the Division's recommendation in case number CR-30773. Halling, however, disputes the State's interpretation of the plea bargain, asserting that the prosecutor expressly agreed to recommend that the two counts in case number CR-30773 run concurrently.

The record in this case is insufficient to determine the terms of the plea bargain. Notably, the terms of the negotiations were not included in the written plea agreement. In describing the terms of the negotiations at the plea canvass, the prosecutor stated: with respect to CR-30773, "the State has agreed that they will concur or they will recommend concurrent time on these two Counts"; with respect to docket number CR-30799, the State is "free to argue whether or not that case will run consecutive or concurrent to the other case." (Emphasis added.) There was no further discussion at the plea canvass clarifying what recommendation the prosecutor agreed to concur with. And, as previously discussed, the parties dispute the terms of the plea bargain.


Accordingly, we conclude that the district court erred in rejecting Halling's claims of ineffective assistance of counsel without conducting an evidentiary hearing. After an evidentiary hearing, the district court should make factual findings on the terms of the plea

agreement and determine whether the prosecutor fulfilled the terms and spirit of the bargain.³ We note that, if the prosecutor breached the plea agreement, defense counsel's failure to object and failure to advise Halling to raise the issue in a direct appeal was deficient performance under the standard set forth in Strickland v. Washington.⁴ Further, Halling would have been prejudiced by the deficiency under the Strickland standard given that a breach of the plea bargain is a reversible error.⁵ Accordingly, we

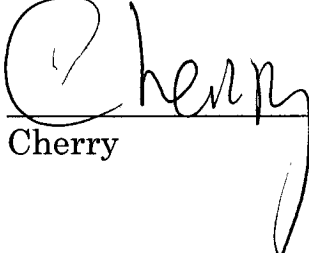
ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.



Gibbons J.



Douglas J.



Cherry J.

³See Van Buskirk v. State, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986).

⁴See Strickland v. Washington, 466 U.S. 668 (1984); see also Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999).

⁵See Sullivan v. State, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999); see also Echeverria v. State, 119 Nev. 41, 44, 62 P.3d 743, 745 (2003) (recognizing that the State's breach of a plea agreement is not subject to harmless-error analysis).

cc: Hon. Robert E. Estes, District Judge
Martin G. Crowley
Attorney General Catherine Cortez Masto/Carson City
Churchill County District Attorney
Churchill County Clerk