

IN THE SUPREME COURT OF THE STATE OF NEVADA

NICHOLAS HASLER A/K/A NICHOLAS
CARSON HASLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48837

FILED

MAR 06 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *S. Young*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from the district court's denial of a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

On September 1, 2004, the district court convicted appellant Nicholas Hasler, pursuant to a guilty plea, of robbery and conspiracy to commit robbery. Hasler was sentenced to a term of 26 to 120 months in prison for robbery and a concurrent term of 36 to 48 months in prison for conspiracy to commit robbery. The district court suspended Hasler's sentence and placed him on probation for an indeterminate period of time not to exceed 36 months. On November 1, 2005, the district court entered a written order revoking Hasler's probation, causing his original sentence to be executed. Hasler did not file a direct appeal.

On October 20, 2006, Hasler filed a post-conviction petition for a writ of habeas corpus in the district court. In his petition, Hasler challenged the revocation of his probation on the grounds that he received ineffective assistance of counsel. The State opposed the petition, arguing

that it was untimely filed because it was filed more than one year after entry of the judgment of conviction pursuant to NRS 34.726(1). On January 4, 2007, the district court dismissed Hasler's petition, concluding that it was untimely filed and that Hasler failed to demonstrate good cause for the delay.¹ This appeal followed.

We conclude that the district court erred in applying the procedural time bar in NRS 34.726(1) to Hasler's petition. Hasler did not challenge the validity of his judgment of conviction and sentence in his petition; rather, he challenged the continued legality of his confinement as a result of alleged errors that occurred during the probation revocation proceedings. NRS 34.726 does not apply to a petition challenging the continued legality of a petitioner's confinement.² Thus, the district court erred in determining that Hasler's petition was untimely filed.

The district court further concluded that Hasler was not entitled to the effective assistance of counsel because no constitutional or statutory right to counsel attaches to a probation revocation proceeding.³ Although a defendant has no absolute right to counsel at a probation

¹See NRS 34.726(1).

²Id. (setting forth a procedural time bar for a "petition that challenges the validity of a judgment or sentence").

³See McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996) (recognizing that a claim of ineffective assistance of counsel will lie only where the defendant has a constitutional or statutory right to the appointment of counsel).

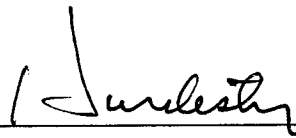
revocation hearing, he may retain counsel or the court may appoint counsel under certain circumstances. In Gagnon v. Scarpelli, the United States Supreme Court determined that the need for counsel for an indigent probationer should be made on a case-by-case basis, and held that an appointment should be made in cases where the probationer makes a colorable claim that probation has not been violated or, even if there was a violation, argues that "there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present."⁴

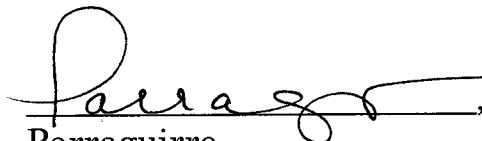
Here, Hasler argued that his counsel was ineffective for failing to file an appeal from the district court's order revoking probation despite Hasler's request that he do so. Hasler contends that counsel should have challenged on appeal several inaccuracies asserted by the Department of Parole and Probation in connection with the revocation of his probation. It is unclear from the submissions before us whether Hasler satisfied the factors set forth in Gagnon and thus was entitled to counsel and, if so, whether his claims of ineffective assistance were meritorious. This circumstance coupled with the district court's erroneous conclusion that Hasler's petition was procedurally barred compels us to remand this

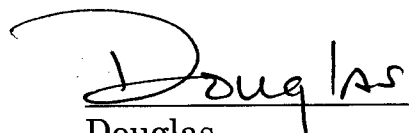
⁴411 U.S. 778, 790 (1973); see Fairchild v. Warden, 89 Nev. 524, 516 P.2d 106 (1973) (adopting the approach set forth in Gagnon).

matter to the district to determine whether Hasler was entitled to counsel under Gagnon and, if so, to consider the merits of his claims. We therefore

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.⁵


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Steven R. Kosach, District Judge
Mary Beth Gardner
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁵This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.