

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEITH G. SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50588

FILED

SEP 03 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

On September 17, 2003, the district court convicted appellant, pursuant to a jury verdict, of first-degree kidnapping and sexual assault. The district court sentenced appellant to serve two consecutive terms of life with the possibility of parole in the Nevada State Prison. This court affirmed appellant's judgment of conviction and sentence on appeal, but remanded the matter to the district court to correct a clerical error.¹ Smith v. State, Docket No. 42069 (Order of Affirmance and Limited

¹Appellant's original judgment of conviction stated that he had been convicted pursuant to a guilty plea when he was actually convicted pursuant to a jury verdict. It is not clear whether an amended judgment of conviction has been filed at this time.

Remand to Correct the Judgment of Conviction, December 21, 2005).
Remittitur issued on January 17, 2006.

On November 29, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. On September 21, 2007, the district court conducted an evidentiary hearing. On October 16, 2007, the district court denied appellant's petition. This appeal followed.²

In his petition, appellant claimed his trial counsel was ineffective in the following ways: 1) failing to present testimony from a nurse that there was no trauma or semen found on the victim; 2) failing to request blood samples of the victim that would show she had been on methamphetamines, 3) not allowing appellant to testify at trial; 4) failing to have an expert in serology and drug samples testify at trial; 5) failing to request an independent review of the audio tapes of his discussions with police; 6) failing to request video surveillance tapes from the Hard Rock Casino; 7) failing to present evidence that the victim had previously been convicted of drug charges and perjury; 8) failing to file appellant's proper person motions; 9) failing to seek production of materials including witnesses prior records, "specific evidence that undermined credibility," and prior inconsistent statements of witnesses pursuant to Brady v.

²Appellant was appointed counsel in the district court on September 26, 2007, five days after the evidentiary hearing.

Maryland, 373 U.S. 83 (1963); and 10) failing to file a motion to set aside the guilty verdict because there was insufficient evidence presented for a conviction. Appellant also claimed that he received ineffective assistance of appellate counsel for failing to include the audio tapes of his interview with detectives on appeal. In addition to ineffective assistance of counsel, appellant claimed that he was subject to double jeopardy because the kidnapping was incidental to the sexual assault. Finally, appellant re-raised each of his claims from his direct appeal.

On appeal, appellant argues, among other things, that the district court abused its discretion by failing to appoint counsel to represent him during the post-conviction proceedings in district court. NRS 34.750 sets forth the following factors which the court may consider in exercising whether to appoint counsel: the petitioner's indigency, the severity of the consequences to the petitioner, the difficulty of the issues presented, whether the petitioner is unable to comprehend the proceedings, and whether counsel is necessary to proceed with discovery. The determination of whether counsel should be appointed is not dependent upon whether a petitioner raises issues in a petition which, if true, would entitle the petitioner to relief.


We cannot affirm the denial of the petition in the instant case at this time. Appellant raised several ineffective assistance of counsel claims, including the failure to investigate, the failure to secure expert witnesses, and failures regarding his right to testify on his behalf at trial which appear to require discovery and investigation outside the record and which are beyond the capability of the average incarcerated person. The

district court granted appellant's request to proceed in forma pauperis but declined to appoint counsel when appellant requested it after the petition was filed and again at the evidentiary hearing. Appellant indicated that he was unfamiliar with the law and procedure involved in litigating his claims. Notably, at the evidentiary hearing, appellant stated that he did not know how to proceed at the hearing, how to ask questions or what questions to ask. At the hearing, appellant appeared confused that he would have to waive his attorney-client privilege and appellant was unable to form specific or focused questions of his former counsel. Appellant's inability to ask specific questions made it difficult to receive clear answers from counsel. Further, appellant's sentence of two consecutive life terms is severe. Finally, appellant was appointed counsel five days after the evidentiary hearing which indicates that the district court determined that counsel was necessary pursuant to NRS 34.750.

The lack of post-conviction counsel at the evidentiary hearing deprived appellant of a meaningful opportunity to litigate his claims and thus, this court cannot conduct a meaningful appellate review at this time. Because appellant is serving two consecutive life sentences, is indigent, and has raised claims that required the investigation of facts outside the record, we reverse the district court's denial of appellant's petition and remand this matter to the district court for further proceedings. On remand, the district court should appoint counsel to assist appellant in the post-conviction proceedings and apply the statutory provisions for supplementing the petition pursuant to NRS 34.750(3).

Accordingly, having reviewed the record on appeal and for the reasons set forth above, we³

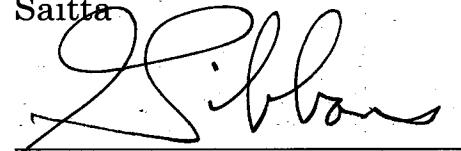
ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

 J.

Cherry

 J.

Saitta

 J.

Gibbons

cc: Eighth Judicial District Court Dept. 7, District Judge
Thomas & Mack Legal Clinic
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

³This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.