

IN THE SUPREME COURT OF THE STATE OF NEVADA

GILBERT DEMETRIUS AGUILAR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50723

DAYOMASHELL DAVID AGUILAR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50736

FILED

SEP 05 2008

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

ORDER OF REVERSAL AND REMAND

These are proper person appeals from orders of the district court denying appellants' post-conviction petitions for writs of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. We elect to consolidate these appeals for disposition.¹

On January 9, 1998, the district court convicted appellant Gilbert Aguilar, pursuant to a jury verdict, of conspiracy to commit murder, murder with the use of a deadly weapon, possession of a firearm by an ex-felon, discharging a firearm at or into a vehicle, and two counts of discharging a firearm at or into a structure. The district court sentenced Gilbert Aguilar as a habitual criminal to serve two consecutive terms of

¹See NRAP 3(b).

life in the Nevada State Prison without the possibility of parole for the murder count. The district court also sentenced appellant to terms totaling 40 to 100 years for the remaining counts.

On that same date, the district court convicted appellant Dayomashell Aguilar, pursuant to a jury verdict, of conspiracy to commit murder, murder with the use of a deadly weapon, discharging a firearm at or into a vehicle, and two counts of discharging a firearm at or into a structure. The district court sentenced Dayomashell Aguilar to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole after 20 years for the murder with a deadly weapon conviction. The district court also sentenced appellant to terms totaling 11 to 28 years for the remaining counts.

This court dismissed both appellants' appeals from their judgments of conviction.² The remittitur issued on January 18, 2000.

On September 8, 2000, appellants each filed proper person post-conviction petitions for writs of habeas corpus in the district court. The State opposed the petitions. On December 6, 2000, Judge Donald Mosley took the petitions off calendar. On January 26, 2007, appellant Gilbert Aguilar filed a proper person petition for a writ of mandamus with this court in which he challenged the district court's decision to take his post-conviction petition for a writ of habeas corpus off calendar. On April 16, 2007, this court granted the petition and directed the district court to

²Aguilar v. State, Docket Nos. 31595 and 31811 (Order Dismissing Appeals, December 20, 1999).

place both appellants' petitions back on calendar.³ On September 7, 2007, Gilbert Aguilar filed a motion for the appointment of post-conviction counsel and accompanying affidavit of indigency. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellants. On February 8, 2008, the district court denied appellants' petitions after conducting an evidentiary hearing. This appeal followed.

Our review of the record on appeal reveals that the district court abused its discretion in denying appellants' petitions without appointing counsel. NRS 34.750 provides for the discretionary appointment of post-conviction counsel and sets forth the following factors which the court may consider in making its determination to appoint counsel: the petitioner's indigency, the severity of the consequences to the petitioner, the difficulty of those 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.

In their petitions, appellants raised numerous claims of ineffective assistance of counsel. These claims included claims that counsel failed to investigate numerous State witnesses, interview numerous alibi witnesses, permitted the introduction of unreliable scientific and demonstrative evidence, failed to obtain physical evidence,


³Aguilar v. District Court, Docket No. 48815 (Order Granting Petition, April 16, 2007).

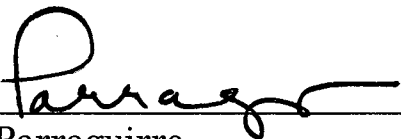
and failed to litigate competency.⁴ These claims arose out of a nine-day trial that occurred roughly ten years before the district court conducted the evidentiary hearing in the instant case. Further, the evidentiary hearing that was held did not fully address appellants' claims despite the fact that it purported to do so. Moreover, the structure of the hearing appeared to improperly restrict the appellants' examination of witnesses. In particular, the district court arbitrarily limited the duration of each examination and inappropriately guided the examination of each witness. In addition, Gilbert Aguilar moved for the appointment of counsel and claimed that he was indigent. Dayomashell Aguilar requested counsel at the evidentiary hearing. Both appellants had been granted permission to proceed in forma pauperis. The district court's failure to appoint post-conviction counsel deprived appellants of a meaningful opportunity to litigate their claims at the evidentiary hearing. As appellants are serving significant sentences, are indigent, have raised numerous claims that required the investigation of facts outside the record, and faced a significant impediment to litigating those claims with the district court's delay in resolving the petitions, we reverse the district court's denial of appellants' petitions and remand these matters for the appointment of counsel to assist appellants in the post-conviction proceedings.

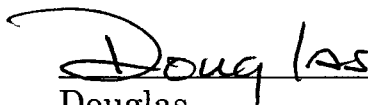
⁴We further note that appellants' petitions and accompanying memoranda totaled roughly 140 pages each. Further, each appellant relied on over 130 pages of exhibits each for their respective petitions.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that briefing and oral argument are unwarranted.⁵ Accordingly, we

ORDER the judgments of the district court REVERSED AND REMAND these matters to the district court for proceedings consistent with this order.⁶


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Donald M. Mosley, District Judge
Gilbert Demetrius Aguilar
Dayomashell David Aguilar
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

⁵See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁶We have considered all proper person documents filed or received in these matters. We conclude that appellants are only entitled to the relief described herein.