

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS KIRK SUDBERRY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50957

FILED

MAR 04 2009
TRACIA 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 dismissing appellant Dennis Kirk Sudberry's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

On August 17, 2006, the district court convicted Sudberry, pursuant to a jury verdict, of aggravated stalking and use or possession of explosives during the commission of the crime of aggravated stalking. The district court sentenced Sudberry to serve consecutive prison terms of 40 to 180 months and 26 to 120 months. No direct appeal was taken.

On November 2, 2006, Sudberry filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Sudberry, and counsel filed a supplemental petition. The State moved to dismiss the petition. The district court declined to conduct an evidentiary hearing and dismissed Sudberry's petition. This appeal followed.

On appeal, Sudberry contends that the district court erred in dismissing his claim that he was denied his right to appeal. He argues that the district court erred in failing to consider a letter that he sent to the district court after the verdict, but prior to sentencing, as a notice of appeal. He further argues, for the first time on appeal, that the district court failed to inform him, a defendant who pleaded not guilty and represented himself at trial, of his right to an appeal after passing sentence. See NRS 177.075(2).

Sudberry submitted a letter to the district court after the jury's verdict, but prior to the entry of the judgment of conviction. In the letter, titled "Defendants [sic] Statement," Sudberry stated "I will appeal these verdicts to the appellet [sic] courts and win." In the remainder of the document, Sudberry asserted that he was innocent, the district court erred in convicting him without the assistance of counsel, and that the district court should impose probation. Although the district court issued a notice stating that it received the document but did not consider it, the judge initialed the notice. Therefore, it appears that the judge may have considered the letter. In dismissing Sudberry's petition, the district court stated that the letter did not resemble a notice of appeal and found that, although the letter briefly mentioned Sudberry's intent to appeal, the letter was a plea for leniency at sentencing.

NRS 177.075(2) provides:

When a court imposes sentence upon a defendant who has not pleaded guilty or guilty but mentally ill and who is without counsel, the court shall advise the defendant of his right to appeal, and if

he so requests, the clerk shall prepare and file forthwith a notice of appeal on his behalf.

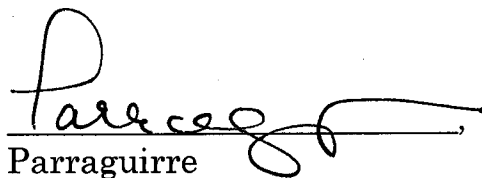
The sentencing transcript demonstrates that Sudberry was not advised of his right to appeal at the sentencing hearing. Based on Sudberry's letter, it appears that, had the district court advised Sudberry of his right to appeal, he would have timely requested an appeal, at which point, the district court clerk should have prepared and filed a notice of appeal. We conclude that the district court clerk's failure to prepare and file a notice of appeal denied Sudberry of his right to a direct appeal. Therefore, we conclude that the district court erred by dismissing Sudberry's appeal deprivation claim.

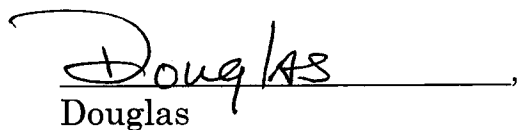
Because Sudberry demonstrated that he was deprived of his right to a direct appeal, Sudberry established good cause and actual prejudice that would have permitted him to raise direct appeal claims in his petition. See NRS 34.810(1)(b)(2) (providing that claims that could have been raised on direct appeal shall be dismissed, unless the court finds cause for the failure to present the grounds and actual prejudice to the petitioner). Therefore, we conclude that the district court erred by dismissing Sudberry's remaining claims on the basis that they should have been raised on direct appeal.

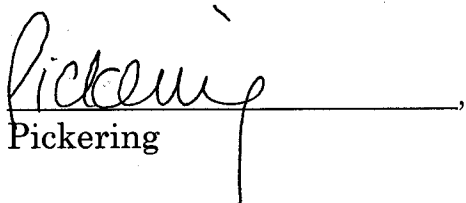
Accordingly, we reverse the dismissal of Sudberry's petition, and we remand this appeal for the appointment of counsel to assist Sudberry in the filing of a post-conviction petition raising all direct appeal issues pursuant to the remedy set forth in Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

Having concluded that the district court erred by dismissing Sudberry's petition, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.¹

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Hon. Steven P. Elliott, District Judge
Karla K. Butko
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

¹In light of this order, we decline to address Sudberry's remaining claims of error on appeal.