

IN THE SUPREME COURT OF THE STATE OF NEVADA

GEORGE WILLIAM GIBBS, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51790

FILED

DEC 11 2008

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's "motion for order, writ of mandamus or leave to file petitioner's 'motion to vacate out, or in the alternative, to reconsider request for additional findings of fact and conclusions of law.'" Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

On May 30, 2002, the district court convicted appellant, pursuant to a jury verdict, of one count of manufacturing or compounding a controlled substance, one count of conspiracy to manufacture or compound a controlled substance, one count of trafficking in a controlled substance, four counts of using a minor to produce pornography, eleven counts of lewdness with a child under fourteen years of age, three counts of possession of visual presentation depicting the sexual conduct of a person under sixteen years of age, and nine counts of sexual assault on a minor under fourteen years of age. The district court sentenced Gibbs to various concurrent and consecutive terms of imprisonment amounting to

life imprisonment with the possibility of parole. This court affirmed the judgment of conviction.¹ The remittitur issued on July 1, 2003.

On June 17, 2005, Gibbs filed a motion for leave to file “Petitioner’s First Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction).” The State opposed the motion. On July 18, 2005, the district court denied Gibbs’s motion after finding that a proper person post-conviction petition for a writ of habeas corpus apparently prepared in May 2004 was never filed in the district court and that there was no good cause for the late filing of the petition as it was appellant’s responsibility to ensure that the petition was filed. On appeal, this court vacated the district court’s order and remanded for further proceedings.²

Upon remand, Jose Pallares Esq. entered an appearance as appellant’s post-conviction counsel of record. Mr. Pallares filed several supplements to the petition. On August 14, 2007, the district court orally denied the petition. Mr. Pallares filed a notice of appeal on August 23, 2007. The district court memorialized its decision in writing and entered an order on October 17, 2007, and the clerk of the district court served

¹Gibbs v. State, Docket No. 39643 (Order of Affirmance, June 3, 2003).

²Gibbs v. State, Docket No. 45893 (Order Vacating Judgment and Remanding, November 13, 2006).

notice of entry of that order on October 18, 2007. On November 20, 2007, appellant filed a proper person notice of appeal from the written decision.

Appellant submitted a proper person notice to discharge his attorney of record, which was subsequently filed on November 19, 2007. Appellant also submitted a “motion to vacate out, or in the alternative, to reconsider request for additional findings of fact and conclusions of law.” However, the clerk of the district court refused to file this document as appellant was represented by counsel when he submitted the latter motion. According to appellant, the clerk of the district court stamped the motion received and forwarded the motion to Mr. Pallares, appellant’s counsel of record. Mr. Pallares filed a motion to withdraw as counsel of record on December 12, 2007. Appellant then filed a motion for the appointment of appellate counsel or to allow appellant to proceed in forma pauperis. On December 27, 2007, the district court orally granted Mr. Pallares’ motion to withdraw as counsel of record, denied appellant’s request for the appointment of appellate counsel, and granted appellant’s request to proceed in forma pauperis. A written order memorializing the latter two decisions was entered on January 15, 2008.

On April 11, 2008, appellant filed a “motion for order, writ of mandamus or leave to file petitioner’s ‘motion to vacate out, or in the alternative, to reconsider request for additional findings of fact and conclusions of law.’” On April 30, 2008, the district court summarily denied the motion. This appeal followed.

In his motion, appellant claimed that the clerk of the district court failed in a duty to file his “motion to vacate out, or in the alternative,

to reconsider request for additional findings of fact and conclusions of law,” which was submitted for filing on or around November 20, 2007. Appellant sought an order directing the clerk of the district court to file his motion.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station or to control an arbitrary or capricious exercise of discretion.³ We have consistently held that the district court clerk has a ministerial duty to accept and file documents presented for filing if those documents are in proper form.⁴ This court has further recognized that the clerk of the district court has a duty to maintain accurate files.⁵

³NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

⁴See, e.g., Sullivan v. District Court, 111 Nev. 1367, 904 P.2d 1039 (1995) (holding that the district court had a duty to file an application to proceed in forma pauperis and “receive” a civil complaint); Bowman v. District Court, 102 Nev. 474, 728 P.2d 433 (1986) (holding that the clerk has a ministerial duty to accept and file documents unless given specific directions from the district court to the contrary).

⁵See Whitman v. Whitman, 108 Nev. 949, 840 P.2d 1232 (1992) (holding that clerk has no authority to return documents submitted for filing; instead, clerk must stamp documents that cannot be immediately filed “received,” and must maintain such documents in the record of the case); Donoho v. District Court, 108 Nev. 1027, 842 P.2d 731 (1992) (holding that the clerk of the district court has a duty to file documents and to keep an accurate record of the proceedings before the court).

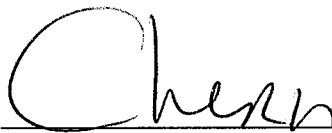
Based upon our review of the record on appeal, we conclude that the district court did not abuse its discretion in denying appellant's motion. Eighth Judicial District Court Rule 3.70 specifically provides:


Except as may be required by the provisions of NRS 34.730 to 34.830, inclusive, all motions, petitions, pleadings or other papers delivered to the clerk of the court by a defendant who has counsel of record will not be filed but must be marked with the date received and a copy forwarded to that attorney for such consideration as counsel deems appropriate. This rule does not apply to applications made pursuant to Rule 7.40(b)(2)(ii) [pertaining to substitution, withdrawal or change of attorney].

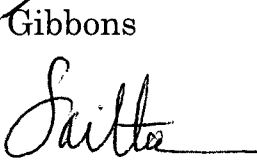
Appellant was represented by counsel of record when he submitted his "motion to vacate out, or in the alternative, to reconsider request for additional findings of fact and conclusions of law," and thus, the district court clerk could properly refuse to file the document. The record on appeal indicates that the clerk of the district court marked the motion "received" and forwarded the motion to counsel of record as required by the district court rules and this court's case law. Nothing in NRS chapter 34 requires appellant to file a "motion to vacate out, or in the alternative, to reconsider request for additional findings of fact and conclusions of law" in his habeas corpus proceedings. Notably, appellant has an appeal pending in this court from the denial of his post-conviction petition for a writ of habeas corpus in Docket No. 50083.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁷

 _____, J.

Cherry
 _____, J.

Gibbons
 _____, J.
Saitta

cc: Hon. Jackie Glass, District Judge
George William Gibbs Jr.

⁶See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁷We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.