


IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHNNY JONES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52443

**FILED**

MAY 27 2009

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a proper person 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; Valerie Adair, Judge.

On November 18, 2005, the district court convicted appellant, pursuant to a jury verdict, of one count of conspiracy to commit robbery, three counts of burglary, and three counts of robbery. The district court sentenced appellant to serve two consecutive terms of 48 to 120 months and a third consecutive sentence of 48 to 180 months in the Nevada State Prison. Appellant's direct appeal was dismissed for lack of jurisdiction because the notice of appeal was untimely filed. Jones v. State, Docket No. 46667 (Order Dismissing Appeal, March 7, 2006).

On January 22, 2007, 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 and NRS 770, the district court declined to appoint counsel to represent appellant or to hold an evidentiary hearing. On April 18, 2007, the district court denied the petition. Appellant appealed. This court affirmed the denial of appellant's ineffective assistance of counsel claims, but reversed the district court's

denial of appellant's claim that his trial counsel was ineffective in failing to file a direct appeal and remanded for an evidentiary hearing. Jones v. State, Docket No. 49525 (Order Affirming in Part, Reversing in Part and Remanding, November 8, 2007).<sup>1</sup>

Upon remand, the district court conducted an evidentiary hearing on the appeal deprivation claim. The district court heard testimony from appellant's trial counsel and appellant. The district court took the matter under advisement, and on November 7, 2008, the district court issued an order denying appellant's claim he was deprived of his right to a direct appeal due to the ineffective assistance of counsel. This appeal followed.

When a conviction is the result of a jury trial, trial counsel has an affirmative duty to inform the defendant of the right to appeal, the procedures for filing an appeal, and the advantages and disadvantages of filing an appeal. Lozada v. State, 110 Nev. 349, 356, 871 P.2d 944, 948 (1994). Moreover, trial counsel "has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction." Id. at 354, 871 P.2d at 947. Prejudice is presumed when counsel's "conduct completely denies a convicted defendant an appeal." Id. at 357, 871 P.2d at 949.

Appellant testified at the evidentiary hearing that he and his attorney talked several different times during trial about an appeal and what issues were appealable. He also testified that several of his family members contacted trial counsel on his behalf to request an appeal.

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<sup>1</sup>This court declined to consider claims more appropriate for a direct appeal.

Appellant's trial counsel testified that he never asked appellant if he wished to appeal and did not inform appellant of the right to appeal.<sup>2</sup> Trial counsel testified that after the district court sentenced appellant, trial counsel left and did not speak with appellant. Apparently, the discussion between the district court and the appellant became very heated and trial counsel determined that nothing "constructive would be handled at that point." Trial counsel testified that he did not have any further contact with appellant or his family after the sentencing. He also testified that he would not have filed an appeal even had appellant requested him to because he believed any possible appealable issues to be frivolous. In fact, he testified that he was not allowed to file an appeal because there were no meritorious issues for an appeal.

The district court found that trial counsel did not ask appellant if he wanted to appeal the conviction nor did he advise appellant of his right to appeal. However, the district court found that appellant was aware of his right to a direct appeal because appellant had initiated conversations with trial counsel regarding his right to appeal. The district court also found that trial counsel did not believe that any meritorious claims existed to raise in an appeal and that trial counsel never represented to appellant that he would file a notice of appeal on his behalf. Therefore, the district court denied appellant's claim that trial counsel was ineffective for failing to file a direct appeal on appellant's behalf.

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<sup>2</sup>However, later in the hearing, trial counsel stated that they did talk about an appeal, but trial counsel told appellant there were no meritorious issues for an appeal.

Having reviewed the documents before this court, we conclude that appellant demonstrated that his trial counsel was ineffective for failing to file a notice of appeal in the instant case. Although the record on appeal indicates that appellant may have been aware generally of the right to appeal, it does not demonstrate that he was informed of the procedures for filing an appeal nor does it appear that he was informed of the advantages and the disadvantages to appealing.

The record on appeal establishes that appellant expressed dissatisfaction with his conviction and indicated, by initiating conversation regarding an appeal, that he wanted to appeal his conviction. In addition, it appears that appellant demonstrated that he was dissatisfied with his sentence because he and the district court engaged in a heated discussion at the sentencing hearing. Trial counsel acknowledged that the discussion was so heated that he did not believe that talking with appellant after the hearing would result in anything constructive. The circumstances in this case indicate that appellant was dissatisfied. In addition, although appellant's trial counsel may have believed that there were not any non-frivolous issues to argue in a direct appeal, appellant's trial counsel had an obligation to file a notice of appeal.<sup>3</sup> Lozada, 110 Nev. at 354, 871 P.2d at 947. See also Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003); Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999). Prejudice is presumed under the facts

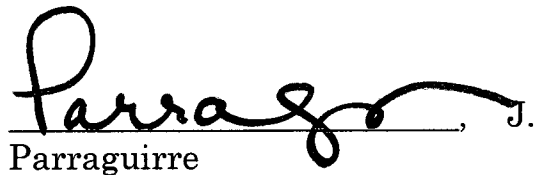
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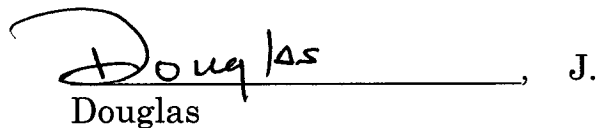
<sup>3</sup>We note that this court has held that there is an exception to counsel's ethical obligation not to raise frivolous issues where counsel must pursue an appeal considered frivolous by counsel. See Ramos v. State, 113 Nev. 1081, 1085, 944 P.2d 856, 858 (1997).

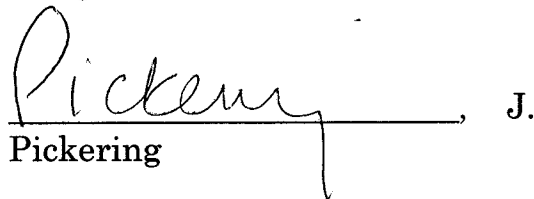
presented in this case. Lozada, 110 Nev. at 354-58, 871 P.2d at 947-49; Hathaway, 119 Nev. at 254, 71 P.3d at 507. Accordingly, we reverse the denial of this claim, and we remand this matter for the appointment of counsel to assist appellant in the filing of a post-conviction petition raising all direct appeal issues pursuant to the remedy set forth in Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.<sup>4</sup>

 J.  
Parraguirre

 J.  
Douglas

 J.  
Pickering

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<sup>4</sup>We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein.

cc: Hon. Valerie Adair, District Judge  
Johnny Lee Jones  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk