

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANNY JOSEPH JARVIS,
Petitioner,

vs.

THE FIFTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF NYE,
AND THE HONORABLE ROBERT W.
LANE, DISTRICT JUDGE,

Respondents,

and

THE STATE OF NEVADA,
Real Party in Interest.

No. 54640

FILED

DEC 03 2009

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

ORDER DENYING PETITION

This is a proper person petition for a writ of mandamus. In reviewing the petition and documents submitted by petitioner, it appeared that petitioner raised a claim that the clerk of the district court had erroneously refused to file a motion to withdraw attorney and a proper person post-conviction petition for a writ of habeas corpus in district court case number CR-5584 because petitioner is represented by attorney Jason Earnest.¹

¹It appeared that petitioner further sought an order directing Mr. Earnest to withdraw from representing petitioner in post-conviction matters in the district court. This court noted that a mandamus petition
continued on next page . . .

In his petition, petitioner asserts that he was originally represented by Mr. Earnest in district court case number CR-5584, but Mr. Earnest was allowed to withdraw due to a conflict of interest and Mr. Carl Joerger was subsequently appointed.² Petitioner asserts that he was sentenced in December 2008, requested that Mr. Joerger file a notice of appeal, but that Mr. Joerger refused and withdrew from representing petitioner. Petitioner filed a proper person notice of appeal from the judgment of conviction, and this court dismissed the untimely appeal for lack of jurisdiction. Jarvis v. State, Docket No. 53383 (Order Dismissing Appeal, May 6, 2009).

Petitioner asserts that Mr. Earnest was appointed to represent petitioner in appellate and post-conviction matters on January 5, 2009. This court dismissed appellant's subsequent appeal from the order appointing counsel because the notice of appeal was late and the order was not substantively appealable. Jarvis v. State, Docket No. 53430

... continued

was not the proper vehicle in which to seek Mr. Earnest's withdrawal as Mr. Earnest's conduct does not fall within the purview of NRS 34.160.

Petitioner has two other district court cases. However, he designated only CR-5584 in this petition. Thus, this matter is confined to district court case number CR-5584.

²The nature of the conflict of interest is not clear from the documents submitted to this court.

(Order Dismissing Appeal, May 12, 2009). Petitioner asserts that he has submitted a proper person post-conviction petition for a writ of habeas corpus and motion to discharge attorney of record, but the clerk of the district court has refused to file these documents because he is represented by Mr. Earnest.

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station or to control an arbitrary or capricious exercise of discretion. NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981). A writ of mandamus will not issue, however, if petitioner has a plain, speedy and adequate remedy in the ordinary course of law. NRS 34.170.

From the documents submitted with the proper person petition, it appeared this petitioner may have raised an issue of arguable merit. This court has 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. *See, e.g., Sullivan v. District Court*, 111 Nev. 1367, 904 P.2d 1039 (1995); Bowman v. District Court, 102 Nev. 474, 728 P.2d 433 (1986); Whitman v. Whitman, 108 Nev. 949, 840 P.2d 1232 (1992) (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) (the clerk of the district court has a duty to file documents and to keep an accurate record of the proceedings before the court). It was unclear from the

documents before this court that the clerk of the district court had filed, received or maintained copies of the proper person documents submitted in CR-5584 as required.

This court directed the real party in interest, on behalf of respondent, to file an answer as to whether the writ should issue. The State argues against issuance of the writ. The State asserts, and provides documentation, that the documents in question, the motion for withdrawal of attorney and the post-conviction petition for a writ of habeas corpus, have been filed in district court case number CR-5584. The State further provides a rather lengthy argument regarding the validity of the guilty plea entered in the three district court cases.

Based upon our review of the documents before this court, we deny the petition for a writ of mandamus. The documents submitted demonstrate that the clerk of the district court has complied with the duty to file documents as the motion for withdrawal of attorney of record and the post-conviction petition for a writ of habeas corpus have been filed in district court case number CR-5584. The validity of the guilty plea is not at issue in this matter, and thus, we decline to consider the State's arguments regarding the validity of the guilty plea.³ We are confident

³We note that the State asserts that appellant filed a proper person notice of appeal from the judgment of conviction in CR-5584 on December 23, 2008. Nothing in the documents submitted by the State supports this assertion. The notice of appeal filed on December 23, 2008, appears to designate only CR-5504 and CR-6005. There is a handwritten case number that appears to be interlineated. The actor who interlineated the

continued on next page . . .

that the district court will resolve all pending matters as expeditiously as the court's calendar permits.

In considering the motion for withdrawal of post-conviction counsel, the district court should consider several things. First, nothing in NRS chapter 34, setting forth the rules governing post-conviction petitions for writs of habeas corpus, requires a petitioner in these circumstances to be represented by appointed counsel. NRS 34.750(1). Additionally, it is questionable whether an attorney may be appointed in post-conviction proceedings who has been appointed to represent a petitioner at any time in the trial and appellate proceedings that would be the subject of the petition or who has withdrawn from representation due to a conflict of interest. Notably, an attorney cannot litigate his own effectiveness in representing a petitioner in prior proceedings.⁴ The order appointing Mr. Earnest indicates that he was appointed for both appellate and post-conviction purposes. However, Mr. Earnest did not file a notice

... continued

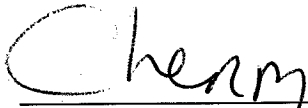
document and the case number are unclear from a casual review of the document. The only notice of appeal from the judgment of conviction filed in CR-5584 and transmitted to this court was filed in the district court on March 4, 2009. As noted earlier, this appeal was dismissed for failure to file a timely notice of appeal. Jarvis v. State, Docket No. 53383 (Order Dismissing Appeal, May 6, 2009).

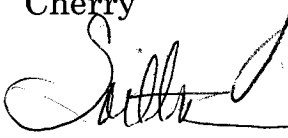
⁴As stated earlier, petitioner asserts and the documents indicate that Mr. Earnest withdrew from representation at the trial level due to a conflict of interest.

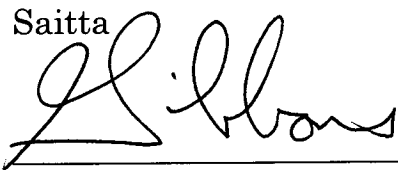
of appeal from the judgment of conviction in CR-5584, which may lead to an appeal deprivation claim raised in CR-5584.⁵ It thus appears from the documents before this court that Mr. Earnest cannot represent petitioner in the post-conviction proceedings in district court case number CR-5584.

Having considered the documents submitted in this matter, we

ORDER the petition DENIED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Robert W. Lane, District Judge
Danny Joseph Jarvis
Attorney General Catherine Cortez Masto/Carson City
Nye County District Attorney/Pahrump
Jason Earnest, Esq.
Nye County Clerk

⁵We express no opinion about the merits of an appeal deprivation claim.