

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS STONE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55617

FILED

SEP 29 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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.¹ Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

In his petition filed on September 1, 2009, appellant claimed that his counsel was ineffective for failing to file an appeal after sentencing. Appellant asserted that counsel should have known he wanted to appeal as counsel had filed a notice of appeal from the denial of a presentence motion to withdraw a guilty plea, which was dismissed by this court prior to the sentencing hearing because there is no independent appeal from the denial of a presentence motion to withdraw a guilty plea. Stone v. State, Docket No. 52305 (Order Dismissing Appeal, October 15, 2008). Appellant asserted that counsel should have filed a notice of appeal after the sentencing hearing because counsel should have known appellant

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

still wanted to appeal the adverse decision on his presentence motion to withdraw a guilty plea.

Based upon our review of the record on appeal, we cannot affirm the district court's denial of appellant's appeal deprivation claim. First, contrary to the district court's findings, counsel's obligation to file a notice of appeal in this case did not depend upon a written contract to do the same or payment for an appeal. This court has held that if a defendant expresses a desire to appeal, counsel is obligated to file a notice of appeal on the defendant's behalf. See 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); see also Roe v. Flores-Ortega, 528 U.S. 470, 477, 480 (2000). This duty does not depend upon a contract or payment, and in fact, pursuant to NRAP 3C(b)(2), trial counsel is to arrange their calendars and adjust their contracts for compensation to accommodate the additional duties imposed by the fast track rules.² Although trial counsel testified at one point in the hearing that he felt appellant had closure and did not wish to appeal, trial counsel also testified that he did not discuss an appeal with appellant after the dismissal of the first appeal.³ Further,

²Trial counsel, for purposes of the fast track rules, "means the attorney who represented the defendant . . . in district court in the underlying proceedings that are the subject of the appeal." NRAP 3C(b)(1). In this case, Mr. Thomas Stafford represented appellant during the litigation of a presentence motion to withdraw the guilty plea and at the sentencing hearing, placing the obligation of the appeal regarding these, if desired by appellant, on Mr. Stafford.

³Trial counsel's testimony also contained confusing statements that he had never indicated he would appeal after appellant entered his plea,
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trial counsel filed a request for transcripts on January 13, 2009, indicating the transcripts were necessary to determine whether appellate issues were present—a motion singularly unnecessary if trial counsel believed appellant did not want to appeal.⁴ At the evidentiary hearing, no explanation was provided for the request or its peculiar timing. Moreover, contrary to arguments and statements at the evidentiary hearing, when trial counsel fails to file an appeal despite having a duty to do so, the petitioner is not required to demonstrate prejudice—prejudice is presumed. Hathaway, 119 Nev. at 250, 71 P.3d at 507. In light of trial counsel’s often confusing testimony and the misunderstanding regarding trial counsel’s duty to file an appeal if a defendant expresses a desire to do so, this court cannot say substantial evidence supports the district court’s finding that trial counsel believed appellant did not want to file an appeal. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Therefore, we reverse the decision of the district court denying the appeal deprivation claim. We remand this matter to the district court with instructions for the district court to apply the remedy set forth in NRAP 4(c) by entering a written order: (1) containing specific findings of fact and conclusions of law that the Nevada Supreme Court determined


... continued


but Mr. Stafford did not represent appellant at the time he entered his plea.


⁴We further note that an appeal filed at this point would have been untimely as the judgment of conviction was entered on October 29, 2008. NRAP 4(b).

that appellant established a valid appeal-deprivation claim and is entitled to a direct appeal with the assistance of retained or appointed counsel; (2) directing the appointment of appellate counsel, if appellant is indigent; and (3) directing the district court clerk to prepare and file a notice of appeal from the judgment of conviction on appellant's behalf within 5 days from the date of the district court's order. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.⁵

 _____, J.

Cherry
 _____, J.

Saitta
 _____, J.
Gibbons

cc: Hon. Valorie Vega, District Judge
Thomas Stone
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁵We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein.