

IN THE SUPREME COURT OF THE STATE OF NEVADA

MILO WILLIAM HICKS, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56486

FILED

APR 06 2011

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; Elissa F. Cadish, Judge.

Appellant filed a post-conviction petition for a writ of habeas corpus on September 22, 2008, alleging that he was deprived of a direct appeal from his November 8, 2007 conviction. The district court granted relief and allowed appellant to file a petition pursuant to Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994), which it later denied on the merits. On appeal, this court affirmed the order of the district court. Hicks v. State, Docket No. 54904 (Order of Affirmance, July 15, 2010). The remittitur issued on August 10, 2010.

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).

On April 6, 2010, appellant filed a post-conviction petition for a writ of habeas corpus alleging that counsel for his Lozada petition was ineffective. The district court concluded that the April 6, 2010, petition was untimely and successive because it was filed more than one year after the judgment of conviction was filed and appellant had already filed a post-conviction petition for a writ of habeas corpus. See NRS 34.726(1); NRS 34.810(2).


Because the Lozada petition was the remedy for the deprivation of a direct appeal, Gerbers v. State, 118 Nev. 500, 505, 50 P.3d 1092, 1095 (2002), the one-year period to timely file a post-conviction petition for a writ of habeas corpus must begin on the date of the issuance of the remittitur from the denial of appellant's Lozada appeal. Cf. Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004); Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998). The instant petition was filed less than one year after the issuance of the remittitur from the denial of the appeal for appellant's Lozada petition on August 10, 2010. As the instant petition was filed less than one year after the issuance of the remittitur from his Lozada appeal, the district court erred in concluding the petition was untimely.

In addition, as Lozada counsel had been appointed to assist appellant in raising direct appeal claims, appellant's claims of ineffective assistance of Lozada counsel should have been addressed as a claim of ineffective assistance of appellate counsel. See Gerbers, 118 Nev. at 505, 50 P.3d at 1095. Appellant could not have raised claims of ineffective assistance of his Lozada counsel in a previous petition, Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003), and his claims of ineffective


assistance of counsel have not yet been addressed on the merits. Therefore, the district court erred in concluding that the petition was successive. NRS 34.810(2).

Because the district court erred in denying the petition as procedurally barred, we reverse the order of the district court and remand for the district court to consider appellant's claims of ineffective assistance of counsel on the merits.² Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.³


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Pickering

²We also note that the district court should consider the appointment of post-conviction counsel. See NRS 34.750.

³This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter. 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. Elissa F. Cadish, District Judge
Milo William Hicks, Jr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk