

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROGER JENKINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 35173

FILED

JUL 26 2002

ORDER OF REVERSAL AND REMAND

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant Roger Jenkins' post-conviction petition for a writ of habeas corpus.¹

On March 6, 1998, Jenkins was convicted, pursuant to a jury verdict, of one count each of robbery with the use of a deadly weapon (count I) and grand larceny auto (count II). The district court sentenced Jenkins to serve two consecutive prison terms of 26-120 months for count I, and a concurrent prison term of 16-72 months for count II. Jenkins was also ordered to pay restitution in the amount of \$9,596.63, jointly and severally with his codefendant, and he was given credit for 140 days time

¹During all stages of the proceedings below, Jenkins was represented by counsel. Post-conviction counsel withdrew after the denial of Jenkins' petition, however, and the notice of appeal in this case was filed in proper person.

served. This court dismissed Jenkins' untimely direct appeal for lack of jurisdiction.²

On February 23, 1999, Jenkins, with the assistance of counsel, filed a motion for an extension of time within which to file a post-conviction petition for a writ of habeas corpus in the district court. On that same date, the district court granted the motion and permitted Jenkins to file his habeas petition "up to and until April 20, 1999." On April 16, 1999, Jenkins, again with the assistance of counsel, filed his post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Jenkins filed a reply. Pursuant to NRS 34.770, the district court did not conduct an evidentiary hearing. On November 4, 1999, the district court denied Jenkins' petition. This appeal followed.

Our review of the record on appeal revealed that the district court may have erroneously denied Jenkins' petition without conducting an evidentiary hearing. In his petition, Jenkins claimed, among other things, that he told his trial counsel, James L. Buchanan, and later his appellate counsel, Martin Hastings, to file a notice of appeal and that both attorneys failed to do so. Specifically, Jenkins contended that "[i]mmediately upon hearing the jury's decision, [he] instructed trial counsel to file a Notice of Appeal and to appeal the case to the Nevada Supreme Court." Jenkins further claimed that "[s]everal times thereafter,

²Jenkins v. State, Docket No. 32918 (Order Dismissing Appeal, September 10, 1998).

[he] requested trial counsel to file the necessary appeal [but that] trial counsel, for whatever reason, failed to file any such Notice of Appeal.” Jenkins then alleged that “[s]ubsequent to being sentenced, [he] hired the services of [a]ttorney Martin Hastings to effect the appeal,” and that he too failed to file a timely notice of appeal although instructed to do so.³ We concluded that Jenkins’ claim might not be belied by the record and would, if true, entitle him to an evidentiary hearing.⁴ Accordingly, on February 14, 2002, we ordered the State to show cause why we should not remand this matter to the district court for an evidentiary hearing to determine whether or not counsels’ performance fell below an objective standard of reasonableness.⁵

³Hastings did, in fact, file a motion for a new trial in the district court, which was denied. It is not clear from the record, however, whether Jenkins also instructed Hastings to file a notice of appeal from the denial of the new trial motion.

⁴See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (when a post-conviction petition for a writ of habeas corpus raises claims supported by specific factual allegations, which, if true, would entitle the petitioner to relief, the petitioner is entitled to an evidentiary hearing unless the record on appeal belies those claims); Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999) (holding that if a criminal defendant expresses a desire to appeal, counsel is obligated to file a notice of appeal on defendant's behalf); see also Thomas v. State, 115 Nev. 148, 151, 979 P.2d 222, 224 (1999) (holding that where an appellant "expressed a desire to appeal . . . appellant's counsel had a duty . . . to perfect an appeal on appellant's behalf.").

⁵See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

On March 20, 2002, the State responded to our order. In its answer, the State argues that Jenkins' claims that his trial and appellate attorneys failed to file a direct appeal after he asked them to do so is a bare or naked allegation that does not entitle him to an evidentiary hearing.⁶ The State also argues that Jenkins' other claims were previously raised in his initial direct appeal, which this court ultimately dismissed for lack of jurisdiction.

We conclude that the State's arguments are without merit. First, if true, Jenkins' claim that his attorneys failed to file a direct appeal after he requested that they do so entitles him to an evidentiary hearing; Jenkins' claim as written is sufficiently specific regarding his attorneys' allegedly deficient conduct.⁷ Second, assuming Jenkins' claim is true, he is not required to demonstrate prejudice: prejudice is presumed where an appellant instructs counsel to file an appeal and counsel fails to do so.⁸

⁶See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

⁷See Davis, 115 Nev. at 20, 974 P.2d at 660; Thomas, 115 Nev. at 151, 979 P.2d at 224; see also Mann v. State, 118 Nev. ___, ___, 46 P.3d 1228, 1229-30 (2002).

⁸See generally Roe v. Flores-Ortega, 528 U.S. 470, 483 (2000) (holding that where "the complete denial of counsel [on appeal] mandates a presumption of prejudice (citations omitted) . . . [t]he even more serious denial of the entire judicial proceeding itself, which a defendant wanted . . . and to which he had a right, similarly demands a presumption of prejudice"); see also Lozada v. State, 110 Nev. 349, 356, 871 P.2d 944, 948 (1994) ("[P]rejudice may be presumed on claims based on the ineffective assistance of counsel when a petitioner has been deprived of the right to

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Further, "[b]ecause convicted persons have the right to counsel on direct appeal, the appointment of counsel is essential to remedy the loss of the right to an appeal."⁹ Thus, neither the State nor the district court may presume that Jenkins has raised or thoroughly addressed all of the issues he would have raised on direct appeal because he did not have the assistance of counsel in pursuing potential direct appeal claims.

We therefore reverse the district court's order in its entirety and remand this case to the district court to conduct an evidentiary hearing on two issues: (1) whether Jenkins' attorneys failed to file a direct appeal after he expressed an interest in a direct appeal, and (2) whether Jenkins' appellate counsel failed to file a notice of appeal from the denial of the new trial motion after, and if, he expressed such an interest.¹⁰ If the district court determines that Jenkins was denied his right to a direct appeal, the district court shall appoint counsel to represent Jenkins and permit him to file a petition for a writ of habeas corpus raising issues appropriate for direct appeal.¹¹ Conversely, if the district court

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appeal.") (citing Fawaz v. State, 105 Nev. 682, 683, 783 P.2d 425, 426 (1989)).

⁹Lozada, 110 Nev. at 359, 871 P.2d at 950 (1994).

¹⁰The district court may exercise its discretion to appoint counsel for the evidentiary hearing. See NRS 34.750(1).

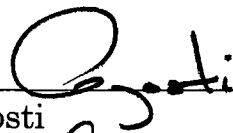
¹¹See Lozada, 110 Nev. at 359, 871 P.2d at 950 (where it is determined that an appellant was improperly denied the right to a direct appeal, the appellant is allowed to pursue any direct appeal issues in a
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determines that Jenkins' appeal deprivation claim lacks merit, the district court shall enter a final order resolving all of the claims raised in his April 16, 1999, habeas petition. Jenkins may then appeal from any adverse decision.¹²

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.¹³

 _____, J.
Young

 _____, J.
Agosti

 _____, J.
Leavitt

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post-conviction petition following the appointment of counsel); see also Mann, 118 Nev. at ___, 46 P.3d at 1231.

¹²See NRS 34.575.

¹³Because we conclude that an evidentiary hearing is necessary, we decline to reach the merits of Jenkins' other claims. We have also considered all proper person documents filed or received in this matter, and conclude that no further relief is warranted at this time. We also conclude that oral argument and briefing are unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Jeffrey D. Sobel, District Judge
Roger Jenkins
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk