

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY EDWARD THOMAS,
Appellant
vs.
THE STATE OF NEVADA,
Respondent

No. 35303

FILED

JUN 05 2002

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

ORDER OF REVERSAL AND REMAND

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

On July 31, 1998, the district court convicted appellant, pursuant to a jury trial, of one count of conspiracy to commit murder, one count of attempted murder with the use of a deadly weapon, and one count of battery with the use of a deadly weapon. The district court ordered that the battery offense merged with the offense of attempted murder and sentenced appellant to serve consecutive terms totaling a minimum of ten years and a maximum of thirty years. This court dismissed appellant's untimely direct appeal for lack of jurisdiction.¹

On February 25, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant filed several supplements to the petition. The State opposed the petition. On October 28, 1999, after conducting a hearing outside the

¹Thomas v. State, Docket No. 33323 (Order Dismissing Appeal, December 30, 1998).

presence of appellant, the district court denied the petition. This appeal followed.

In his petition, appellant claimed that his trial counsel was ineffective for: (1) failing to inform appellant of the right to appeal, the procedures and time frame for filing an appeal, and the right to the appointment of counsel on appeal, (2) failing to file a notice of appeal within thirty days of entry of the judgment of conviction, and (3) failing to inform the court about appellant's financial status in order to ensure the assistance of appointed counsel on appeal.² The district court concluded that appellant failed to demonstrate that his counsel was ineffective and denied the petition without conducting an evidentiary hearing. Based upon our review of the record on appeal, we conclude that the district court's findings of fact were not supported by the record and that the district court's conclusions of law were not correct law.

First, the district court concluded appellant's claim that his counsel failed to inform of his right to appeal was belied by the record because appellant had constructive notice of the right to appeal. The district court concluded that appellant had constructive notice of the right to appeal because of an exchange that occurred during sentencing between appellant's co-defendant's counsel and the district court.³ We conclude

²Appellant was represented by Mr. John Duffy during the trial and by Mr. Osvaldo Fumo at sentencing.

³The following exchange occurred at sentencing:

Co-Defendant's Counsel: Your Honor, while we're still on the record, there's no doubt, I believe, that [the co-defendant] will be seeking an appeal. Now,

continued on next page . . .

that the district court erred in concluding that appellant's claim was belied by the record on appeal. This court has held that trial counsel must inform his or her client of the right to appeal from a conviction arising from a jury trial and that counsel's failure to do so is unreasonable, and results in presumed prejudice to the defendant.⁴ "This duty includes informing the client of the procedures for filing an appeal as well as the advantages and disadvantages of filing an appeal."⁵ The exchange at sentencing did not provide appellant with adequate notice of the right to appeal because it did not inform appellant of the procedures for filing and appeal or the advantages and disadvantages of filing an appeal. More importantly, this exchange did not inform appellant of the time frame for filing an appeal. The record does not contain any other information to belie appellant's claim that his counsel failed to inform him of the right to appeal.⁶

... continued

for the record, I'd ask the Court at this time to appoint appellate counsel on the matter.

The Court: Well, are you going to file a Notice of Appeal? Are you retained in this matter?

Co-Defendant's Counsel: No, Your Honor. I'm Court appointed at the time of sentencing and for revocation.

The Court: I don't have a list right here at the moment to appoint.

⁴Lozada v. State, 110 Nev. 349, 354-57, 871 P.2d 944, 947-49 (1994).

⁵Id. at 356, 871 P.2d at 948.

⁶Mann v. State, 118 Nev. __, __ P.3d __ (Adv. Op. No. 36, May 17, 2002) ("A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made.").

Next, the district court concluded that Mr. Fumo, appellant's attorney at sentencing, was not responsible for perfecting an appeal on appellant's behalf because Mr. Fumo was appointed for the limited purpose of sentencing.⁷ Based upon our review of the record on appeal, we conclude that the district court erred in concluding that Mr. Fumo did not have a responsibility to appellant to inform him about his right to a direct appeal. As stated above, counsel has an obligation to inform a defendant convicted by a jury of the right to a direct appeal. Mr. Fumo was appellant's attorney of record at the time of sentencing. When Mr. Fumo accepted appointment as counsel at the sentencing hearing, Mr. Fumo's legal responsibility was not limited solely to the sentencing hearing. Mr. Fumo, as appellant's attorney of record, had an obligation to inform appellant about the right to appeal. To find otherwise would result in the denial of counsel altogether because the district court had already allowed Mr. Duffy to withdraw from the case. Thus, contrary to the district court's findings and conclusions, it was Mr. Fumo's obligation to inform appellant about his right to appeal and to file an appeal on appellant's behalf if so instructed.

Next, the district court concluded that appellant's ineffective assistance of counsel claim lacked merit because appellant did not ask Mr. Fumo to file a notice of appeal on his behalf. We conclude that the district court erred. For the reasons discussed above, appellant's counsel had an obligation to inform appellant about the right to appeal and the procedures for taking an appeal. Whether or not appellant had requested

⁷Mr. Duffy, appellant's appointed counsel during the trial, withdrew at sentencing.

an appeal was irrelevant to the issue of whether counsel had an obligation to inform appellant about the right to appeal.

For the reasons discussed above, we cannot conclude that the district court properly determined that appellant's claims of ineffective assistance of counsel lacked merit. Because appellant raised claims that if true would have entitled him to an evidentiary hearing, we conclude that the district court improperly denied the petition without first conducting an evidentiary hearing.⁸ The district court's failure to conduct an evidentiary hearing in appellant's presence deprived appellant of the opportunity to present testimony and evidence in support of his claims, to cross-examine his former attorneys, Mr. Duffy and Mr. Fumo, and to respond to the statements of Mr. Duffy and Mr. Fumo. We, therefore, reverse the order of the district court and remand the matter to the district court to conduct an evidentiary hearing in the presence of appellant.⁹ If the district court determines that appellant was denied his right to a direct appeal, the district court shall appoint counsel to represent appellant and shall permit appellant to file a petition for a writ of habeas corpus raising issues appropriate for direct appeal.¹⁰


⁸Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

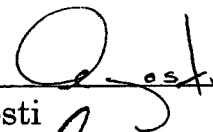
⁹The district court may consider whether or not to exercise its discretion to appoint post-conviction counsel to assist appellant during the evidentiary hearing. NRS 34.750.


¹⁰Lozada, 110 Nev. at 359, 871 P.2d at 950.

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.¹¹ Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this mater to the district court for proceedings consistent with this order.¹²


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Donald M. Mosley, District Judge
Attorney General/Carson City
Clark County District Attorney
Anthony Edward Thomas
Clark County Clerk

¹¹See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹²This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.