

IN THE SUPREME COURT OF THE STATE OF NEVADA

BENNY LEE BUTLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 35346

FILED

FEB 14 2002

ORDER OF REVERSAL AND REMAND

JANE E. M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

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 August 19, 1998, the district court convicted appellant pursuant to an Alford¹ plea, of one count of sexual assault (Count I) and one count of battery with intent to commit a crime (Count II). The district court sentenced appellant to serve in the Nevada State Prison a term of life with the possibility of parole in ten years for Count I, and a term of sixty to one hundred and seventy months for Count II, to run concurrently with Count I. Appellant did not file a direct appeal.

On August 6, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On November 22, 1999, the district court denied appellant's petition. This appeal followed.

¹North Carolina v. Alford, 400 U.S. 25 (1970).

Our review of the record on appeal revealed that the district court may have erroneously denied appellant's petition without conducting an evidentiary hearing. In his petition, appellant claimed, among other things, that his attorney, after originally stating that he would file a direct appeal on appellant's behalf, failed to do so. Specifically, appellant contended that his attorney misinformed him that "once [appellant had] signed the plea, he had waived his appeal rights," and that, therefore, counsel would not file an appeal on appellant's behalf. We concluded that appellant's claim might not be belied by the record and would, if true, entitle him to an evidentiary hearing.² Accordingly, on December 17, 2001, 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 counsel's performance fell below an objective standard of reasonableness.³

On January 16, 2002 the State responded to our order. In its answer, the State offers two arguments in opposition to remanding this matter. First, the State argues, pursuant to Hargrove, that appellant's claim that his counsel misinformed him regarding waiver of his right to

²See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (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); see Lozada v. State, 110 Nev. 349, 356, 871 P.2d 944, 948-49 (1994); see generally Davis v. State, 115 Nev. 17, 974 P.2d 658 (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 and that the language in the form plea agreement is not an unequivocal waiver of the right to appeal).

³See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

direct appeal and his counsel's subsequent refusal to file an appeal is a bare or naked allegation that does not entitle appellant to an evidentiary hearing.⁴ Second, the State contends that appellant will suffer no prejudice from the loss of his right to direct appeal. Specifically, the State argues (1) that appellant raised all of his possible direct appeal claims in his habeas petition, and (2) that appellant's claim that his counsel was ineffective could not have been raised on direct appeal and is thus properly before this court. Therefore, the State concludes, this court should resolve the direct appeal claims appellant raised in his petition, as well as his claim of ineffective assistance of counsel, and that such a resolution would be appellant's complete remedy.

We conclude that the State's arguments are without merit. First, if true, appellant's appeal deprivation claim entitles him to an evidentiary hearing; appellant's claim as written is sufficiently specific regarding his counsel's allegedly deficient conduct.⁵ Second, assuming appellant's claim is true, he is not required to demonstrate prejudice: prejudice is presumed where an appellant instructs counsel to file an

⁴See Hargrove, 110 Nev. at 502, 686 P.2d at 225 (holding that bare and naked claims unsupported by any specific factual allegations will not entitle defendant to relief).

⁵See generally Lozada, 110 Nev. 349, 871 P.2d 944; see also Davis, 115 Nev. at 20, 974 P.2d at 660.

appeal and counsel fails to do so.⁶ 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."⁷ Thus, neither the State nor the district court may presume that appellant 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 the sole issue of whether appellant's counsel failed to file a direct appeal after appellant expressed an interest in a direct appeal.⁸ 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

⁶See 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, 110 Nev. at 356, 871 P.2d at 948 ("[P]rejudice may be presumed on claims based on the ineffective assistance of counsel when a petitioner has been deprived of the right to appeal.") (citing Fawaz v. State, 105 Nev. 682, 683, 783 P.2d 425, 426 (1989)).

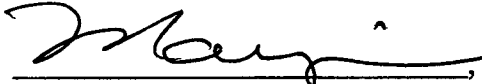
⁷Lozada, 110 Nev. at 359, 871 P.2d at 950.

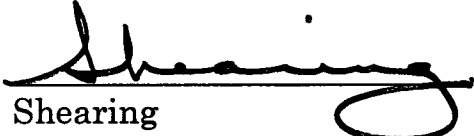
⁸The district court may exercise its discretion to appoint counsel for the evidentiary hearing. See NRS 34.750(1).


corpus raising issues appropriate for direct appeal.⁹ Conversely, if the district court determines that appellant's appeal deprivation claim lacks merit, the district court shall enter a final order resolving all of the claims raised in appellant's August 6, 1999, habeas petition.¹⁰ Appellant may then appeal from any adverse decision.¹¹

Accordingly, we

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


_____, C.J.
Maupin


_____, J.
Shearing


_____, J.
Rose

⁹See 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 post-conviction petition following the appointment of counsel).

¹⁰In light of this court's determination that an evidentiary hearing is necessary, we decline to reach the merits of any of the claims appellant raised in the instant petition for a writ of habeas corpus as they are more appropriate for direct appeal consideration or touch upon claims more appropriately raised on direct appeal.

¹¹See NRS 34.575.

¹²We have received and considered appellant's "Reply to State's Answer to Order to Show Cause," and we conclude that no further relief is warranted at this time.

cc: Hon. Michael L. Douglas, District Judge
Attorney General/Carson City
Clark County District Attorney
Benny Lee Butler
Clark County Clerk