

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTOINE JOSEPH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 35369

FILED

FEB 12 2002

ORDER OF REVERSAL AND REMAND

JANETIE M. BLOOM
CLERK OF SUPREME COURT
BY *Richard*
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 January 22, 1999, the district court convicted appellant pursuant to a guilty plea, of one count of robbery with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of thirty-six to ninety-six months in the Nevada State Prison. Appellant did not file a direct appeal.

On August 13, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus. The district court did not appoint counsel or conduct an evidentiary hearing, and denied appellant's petition on November 22, 1999. This appeal followed.

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 "[h]is attorney failed and/or refused to pursue an appeal despite [appellant's] request for him to do so." We concluded that appellant's claim might not be belied by the record and would, if true, entitle him to an evidentiary hearing.¹ 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

¹See 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); 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.").

whether or not counsel's performance fell below an objective standard of reasonableness.²

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 attorney failed to file a direct appeal after appellant asked him to do so is a bare or naked allegation that does not entitle appellant to an evidentiary hearing.³ 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 for failing to object to the State's alleged breach of appellant's plea agreement 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

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

³See 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).

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 claim that his attorney failed to file a direct appeal after appellant requested that he do so entitles him to an evidentiary hearing; appellant's claim as written is sufficiently specific regarding his counsel's allegedly deficient conduct.⁴ 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 appeal and counsel fails to do so.⁵ Further, "[b]ecause convicted persons have the right to counsel on direct appeal, the appointment of counsel is

⁴See Davis, 115 Nev. at 20, 974 P.2d at 660; Thomas, 115 Nev. at 151, 979 P.2d at 224.

⁵See 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 appeal.") (citing Fawaz v. State, 105 Nev. 682, 683, 783 P.2d 425, 426 (1989)).

essential to remedy the loss of the right to an appeal."⁶ 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.⁷ 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.⁸ Conversely, if the district court determines that appellant's appeal deprivation claim lacks

⁶Lozada, 110 Nev. at 359, 871 P.2d at 950 (1994).


⁷The district court may exercise its discretion to appoint counsel for the evidentiary hearing. See NRS 34.750(1).


⁸See 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).

merit, the district court shall enter a final order resolving all of the claims raised in appellant's August 13, 1999 habeas petition.⁹ Appellant may then appeal from any adverse decision.¹⁰

Accordingly, we

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


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

⁹In 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.

¹⁰See NRS 34.575.

cc: Hon. Michael L. Douglas, District Judge
Attorney General/Carson City
Clark County District Attorney
Antoine Joseph
Clark County Clerk