

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL PATRICK ADAMS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60136

FILED

JUN 14 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Handwritten Signature*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This appeal was initiated by the filing of a proper person notice of appeal at the conclusion of post-conviction proceedings. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On May 25, 2011, appellant filed a proper person post-conviction petition for a writ of habeas corpus and requested the appointment of counsel to assist him with the post-conviction proceedings. The district court had appellant's former appellate counsel, Ms. Cynthia Dustin, review the petition. The minutes for June 6, 2011, indicate that Ms. Dustin did not find any legal issues. The district court subsequently denied appellant's request for the appointment of counsel and a renewed request for counsel. The district court did, however, determine that an evidentiary hearing was necessary. At the evidentiary hearing, appellant requested additional time and the appointment of counsel to help him with subpoenas as his witnesses were not present for the hearing. The district court questioned the need for the witnesses, and denied the request for additional time and the appointment of counsel. While the district court proceeded to hear testimony from appellant's former trial counsel, Mr. Osvaldo Fumo, appellant told the court that he was not ready to proceed because his witnesses were not present. The district court asked him if he


wished to proceed, and appellant answered that he did not. The district court considered the petition withdrawn and closed the proceedings. Based upon our review of the record on appeal, we conclude that the district court erred in failing to appoint counsel for the reasons discussed below.

NRS 34.750 provides for the discretionary appointment of post-conviction counsel and sets forth the following factors which the court may consider in making its determination to appoint counsel: the petitioner's indigency, the severity of the consequences to the petitioner, the difficulty of those issues presented, whether the petitioner is unable to comprehend the proceedings, and whether counsel is necessary to proceed with discovery. The determination of whether counsel should be appointed is not necessarily dependent upon whether a petitioner raises issues in a petition which, if true, would entitle the petitioner to relief.

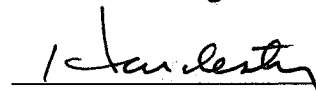
Appellant's petition arose out of a trial. Appellant was represented by appointed counsel in prior proceedings. Appellant is serving a significant sentence. In addition, appellant moved for the appointment of counsel and claimed that he was indigent. The failure to appoint post-conviction counsel prevented a meaningful litigation of the petition. We are especially troubled by the district court's use of appellant's former appellate counsel as a barometer as to whether he should receive the appointment of counsel. The factors of NRS 34.750(1) govern the appointment of counsel, not the opinion of an attorney who has a potential conflict of interest as she represented him in the same proceedings that he was challenging. We are also troubled by the fact that appellant's petition was withdrawn without anyone informing him of the consequences of doing so. Thus, we reverse the district court's decision

and remand this matter for the appointment of counsel to assist appellant in the post-conviction proceedings.¹ Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.²


_____, J.
Saitta


_____, J.
Pickering


_____, J.
Hardesty

¹We note that because the district court had an affidavit from appellant's former trial counsel filed in the court refuting the claim of ineffective assistance of trial counsel, an evidentiary hearing is required in this case. See Mann v. State, 118 Nev. 351, 46 P.3d 1228 (2002).

While we agree with the district court that an evidentiary hearing is not a retrial and that the list of appellant's witnesses was not likely necessary or relevant for the purposes of the evidentiary hearing, we are confident that appellant's post-conviction counsel will make thoughtful decisions about the witnesses to call for the hearing. The district court is, of course, allowed to limit the scope of an evidentiary hearing, but may not prevent a petitioner from meeting his burden of demonstrating the facts supporting his claims.

²We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

cc: Hon. Donald M. Mosley, District Judge
Daniel Patrick Adams
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk