

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN WEST,

No. 35764

Appellant,

vs.

WARDEN, NEVADA STATE PRISON,
JOHN IGNACIO,

Respondent.

FILED

DEC 17 2001

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

ORDER OF REVERSAL AND REMAND

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

On January 4, 1999, West was convicted, pursuant to a guilty plea, of one count of leaving the scene of an accident involving personal injury (Count I) and one count of misdemeanor driving under the influence of alcohol (Count II). On Count I, the district court sentenced West to serve a prison term of 10 years with parole eligibility after 4 years. The district court then suspended execution of the sentence and placed West on probation for a period not to exceed 5 years. As a condition of his probation, the district court ordered West to abstain from alcohol and attend a substance abuse program. On Count II, the district court sentenced West to serve 7 days in jail.

On February 23, 1999, a probation revocation hearing was held. At the hearing, West admitted to drinking alcohol thereby violating a condition of his probation. The district court exercised its discretion and entered an order revoking West's probation on February 25, 1999. On March 1, 1999, West's parents wrote a letter to West's counsel informing him that they had "General Power of Attorney to act on [West's] behalf while he [was] incarcerated." The letter also stated: "As of this day, we are asking you to file the appropriate paperwork for an appeal for his sentence received February 23, 1999." Rather than file an appeal, West's counsel responded:

My obligation to your son does not require me to acknowledge naked assertions concerning your authority to speak on behalf of your son. I know of

no basis of which to appeal your son's case. He does, however, have the opportunity to consider post-conviction relief as detailed in Nevada Revised Statutes 34.720-34.830. Such petition for post-conviction relief must be filed within one year of the judgment of conviction.

West's counsel never filed an appeal from the district court order revoking probation.

On July 15, 1999, West filed a post-conviction petition for a writ of habeas corpus, alleging that his counsel was ineffective for failing to effectuate an appeal on his behalf. Without conducting an evidentiary hearing, the district court denied the petition. West filed the instant appeal.

West contends that the district court erred in denying his petition without conducting an evidentiary hearing because his counsel was ineffective for failing to file an appeal as he requested. Specifically, West contends that his counsel failed to file a notice of appeal "without this Petitioner's consent." We agree with West that his counsel had an obligation to file an appeal provided West expressed a desire to challenge the order revoking his probation.

We have held that trial counsel has an obligation to perfect an appeal if the defendant expresses a desire to do so.¹ Moreover, once a defendant demonstrates that his counsel failed to pursue a direct appeal contrary to his request, a defendant need not show that he was prejudiced by counsel's conduct because prejudice is presumed.² Accordingly, counsel's failure to perfect the appeal after a defendant has requested one constitutes ineffective assistance of counsel, regardless of whether the defendant set forth any meritorious appellate issues or was advised of his right to appeal.³

In the instant case, we conclude that the district court erred in denying West's petition without conducting an evidentiary hearing on

¹Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994); see also Didomenico v. State, 110 Nev. 861, 877 P.2d 1069 (1994).

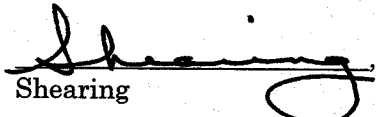
²Lozada, 110 Nev. at 356-59, 871 P.2d at 948-49; see also Rodriguez v. United States, 395 U.S. 327 (1969).

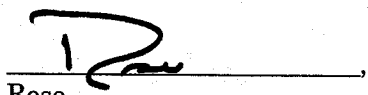
³See Lozada, 110 Nev. at 354, 871 P.2d at 947 (holding that counsel "has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction").

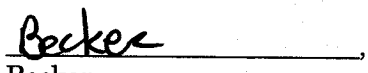
whether West effectively advised his counsel that he wished to pursue an appeal. West is entitled to an evidentiary hearing because he presented a cognizable claim that he was denied an appeal without his consent.⁴ An evidentiary hearing is necessary to determine whether West himself actually requested that his attorney pursue an appeal. Additionally, a hearing is warranted to determine whether West's parents actually had a general power of attorney and, if so, whether that power granted them authority to make decisions concerning West's appeal. If the district court determines that West effectively requested an appeal from the order revoking probation, then West is entitled to raise issues appealing the order revoking probation in a habeas corpus petition.⁵

Having considered West's contention and concluded that an evidentiary hearing is necessary to resolve this matter, we

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


Shearing J.


Rose J.


Becker J.

cc: Hon. John P. Davis, District Judge
Attorney General/Carson City
Nye County District Attorney/Tonopah
Glynn B. Cartledge
Nye County Clerk

⁴See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

⁵See Lozada, 110 Nev. at 359, 871 P.2d at 950.