

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAURICE S. SMITH,

No. 35766

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

DEC 12 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
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 September 29, 1998, the district court convicted appellant pursuant to a guilty plea, of first-degree murder. The district court sentenced appellant to serve a term of life with the possibility of parole after twenty (20) years in the Nevada State Prison. This court dismissed appellant's untimely direct appeal for lack of jurisdiction.¹

On September 21, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a reply. Pursuant to 34.750 and 34.770, the district court declined to appoint counsel or conduct an evidentiary hearing. On December 15, 1999 the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that he told his trial attorneys to file a notice of appeal and that the attorneys failed to do so. Specifically, appellant claimed that he told his attorney, Mr. Peter LaPorta, that he wished to appeal and Mr. LaPorta informed him the issue of the denial of a motion to suppress would be raised on direct appeal by Ms. Laurel Duffy, appellant's other trial attorney. Appellant further alleged that after Ms. Duffy sent him a letter relating to his appeal rights,

¹Smith v. State, Docket No. 33868 (Order Dismissing Appeal, March 29, 1999).

he contacted her office to inform her that he wanted to appeal. No appeal was filed by either trial attorney.

Our preliminary review of the record on appeal revealed that the district court may have erroneously denied appellant's petition without holding an evidentiary hearing. We noted that appellant is entitled to an evidentiary hearing if he raised claims which, if true, would entitle him to relief and if his claims are not belied by the record.² Thus, on October 23, 2001, we ordered the State to show cause why this appeal should not be remanded to the district court for an evidentiary hearing to determine whether or not counsel's performance fell below an objective standard of reasonableness.³

The State responded to our order on November 27, 2001. The State first argued that appellant waived the issue regarding the motion to suppress by not specifically reserving his right to appeal the district court's denial of this motion.⁴ We agree. It appears from the record that appellant failed to reserve his right to appeal the district court's adverse determination on his motion to suppress. The State next contended that appellant's claim of ineffective assistance of counsel "is merely a bare or naked allegation and [appellant] is not entitled to an evidentiary hearing on the matter."⁵ We disagree. In his habeas petition appellant stated that he received a letter from Ms. Duffy, dated August 26, 1998, advising him of his right to a direct appeal, and further informing him of the need to file his notice of appeal within thirty (30) days of his judgment of conviction.⁶ In his affidavit in support of his habeas petition, appellant contended that he subsequently "phoned [Ms.] Duffy's office, informing her that [he

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

³See Strickland v. Washington, 466 U.S. 668 (1984).

⁴Paragraph six (6) of appellant's guilty plea agreement stated, in pertinent part, that appellant waived his right to "appeal the conviction . . . unless the appeal is based upon reasonable constitutional grounds . . . and except as otherwise provided in subsection 3 of NRS 174.035." NRS 174.035(3) provides, in pertinent part, that "a defendant may enter a conditional plea of guilty . . . reserving in writing the right . . . to a review of the adverse determination of any specified pretrial motion." (Emphasis added.)

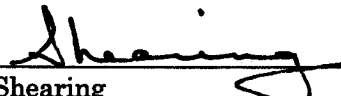
⁵See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

⁶See NRAP 4(a)(2).

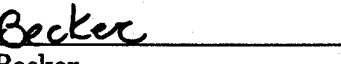
would] like to appeal [his] conviction," and that he left "this message with a legal assistant, or secretary, or agent of that Office, who informed [him] that [Ms.] Duffy would be meeting with [him] on the matter, at the Clark County Detention Center." Ms. Duffy, however, never contacted appellant and neither she nor Mr. LaPorta filed a direct appeal. We conclude that appellant is entitled to an evidentiary hearing because his claims, if true, would entitle him to relief and because they are not belied by the record.⁷

We therefore remand this case to the district court to conduct an evidentiary hearing to determine whether appellant's counsel failed to file a direct appeal after appellant conveyed an interest in a direct appeal. 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 Accordingly, 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. Mark W. Gibbons, District Judge
Attorney General/Carson City
Clark County District Attorney
Maurice Shum Smith
Clark County Clerk

⁷See 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).

⁸See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).