

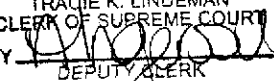
IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES EDWARD MCDONALD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63335

FILED

FEB 19 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from an order denying a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant filed a timely petition on February 6, 2013. In his petition, appellant claimed that his counsel was ineffective for failing to investigate his competency and present the issue before the district court and failing to investigate the possibility of an insanity defense. Appellant asserted that months after he was convicted in this case, he was determined to be incompetent in another district court case. The district court denied the petition without appointing counsel or conducting an evidentiary hearing.

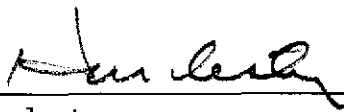
¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. *See Lockett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

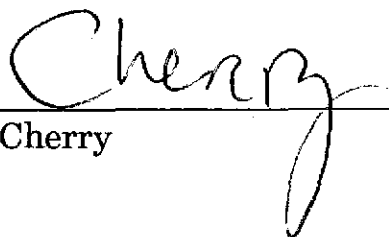
NRS 34.750 provides for the discretionary appointment of post-conviction counsel and sets forth the following factors which the court may consider in making its determination to appoint counsel: the petitioner's indigency, the severity of the consequences to the petitioner, the difficulty of those issues 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. We conclude that the district court erred in denying the petition without appointing counsel for the reasons discussed below.

Appellant moved for the appointment of counsel and claimed that he was indigent. More importantly, appellant's petition arose out of a trial with potentially complex issues related to his competency. Although the record contains indications that counsel and the court were aware of appellant's mental health issues, there was no competency evaluation conducted prior to trial in this case and the record is silent regarding the investigation and actions taken by counsel given appellant's prior mental health history. NRS 178.405(1) requires the suspension of trial proceedings "if doubt arises as to the competence of the defendant . . . until the question of competence is determined." Also weighing in favor of the appointment of post-conviction counsel is the fact that appellant was adjudicated a habitual criminal and is serving a significant sentence of 8 to 20 years. The failure to appoint post-conviction counsel prevented a meaningful litigation of the petition. Thus, we reverse the district court's denial of appellant's petition and remand this matter for the appointment

of counsel to assist appellant in the post-conviction proceedings. 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.
Hardesty


_____, J.
Cherry

DOUGLAS, J., dissenting:

I dissent from the majority's decision to reverse the denial of the petition because I believe the district court did not abuse its discretion in declining to appoint counsel in the instant case. The appointment of counsel in post-conviction proceedings is discretionary, and appellant did not satisfy the factors that weigh in favor of the appointment of counsel. *See* NRS 34.750(1). Appellant's petition was well-pleaded and indicated that he did not have any difficulty understanding the post-conviction proceedings. *See* NRS 34.750(1)(b). And, although appellant's conviction arose from a jury trial, the issues presented in this case were not difficult and can be resolved based upon the record on appeal before the court. *See* NRS 34.750(1)(a), (c).

The record supports the district court's determination that appellant failed to demonstrate that his counsel was ineffective regarding his mental health issues. See *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Counsel was aware of appellant's mental health issues and addressed appellant's mental health at sentencing. The record further shows that appellant engaged in several discussions with the district court during the proceedings, including a dialogue regarding the possibility of remaining on bond after the jury returned a verdict and a lengthy allocution at sentencing. Under these circumstances, appellant failed to demonstrate that he was incompetent—that he did not understand the proceedings or charges and was unable to assist his counsel during trial and sentencing in this case.² See NRS 178.400(2); *Melchor-Gloria v. State*, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983); see also *Dusky v. United States*, 362 U.S. 402 (1960). Thus, he failed to demonstrate that his counsel's failure to take further action

²To the extent that appellant claimed that but for his incompetency he would have accepted a plea offer, which included negotiations for two district court cases, appellant failed to demonstrate that his counsel was ineffective in this regard. Appellant acknowledged that trial counsel informed him of the plea offer, and appellant's statement that he "may have felt inclined to accept" the plea offer falls far short of demonstrating that his trial counsel was ineffective. See *Lafler v. Cooper*, 566 U.S. ___, ___, 132 S. Ct. 1376, 1385, 1391 (2012) (recognizing that a petitioner must demonstrate that there is a reasonable probability that he and the trial court would have accepted a guilty plea and that the offer's terms would have been less severe).

