

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAY ANTONIO AZCARATE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63448

FILED

JAN 16 2014

FRANCIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Francie K. Lindeman*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.

In an order filed on May 17, 2012, the district court had denied appellant's petition as procedurally barred, finding that the petition was untimely and appellant had not demonstrated good cause pursuant to NRS 34.726(1). This court reversed and remanded that decision, concluding that an evidentiary hearing was warranted on appellant's allegation of good cause to determine whether appellant believed his direct appeal was still pending, whether that belief was objectively reasonable, and whether he filed his petition within a reasonable time after he should have known that his appeal had been resolved. *Azcarate v. State*, Docket No. 60872 (Order of Reversal and Remand, December 12, 2012). Further, this court noted that the district

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).

court had the discretion to appoint counsel to assist appellant in litigating this issue. *Id.*

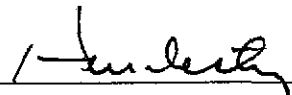
Upon remand, the district court did not appoint counsel but conducted an evidentiary hearing as to whether appellant demonstrated good cause. In announcing its decision, the district court did not make any findings in accordance with this court's May 17, 2012, order but instead "accepted" appellant's allegations regarding cause for the delay, then denied the petition as untimely because appellant failed to demonstrate "actual prejudice."

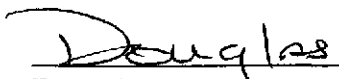
For the reasons discussed below, we conclude that the district court erred in denying the petition without appointing post-conviction counsel. NRS 34.750 provides for the discretionary appointment of post-conviction counsel and sets forth the following factors which the court may consider in making its 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.

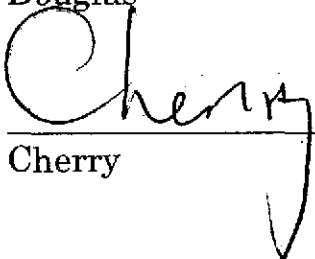
Appellant had moved for the appointment of post-conviction counsel. Appellant is indigent and was represented by appointed counsel at trial and on appeal. His petition arose out of a jury trial, the result of which was a significant sentence: consecutive terms of life without the possibility of parole. Finally, appellant's claim that he was prejudiced because he was prevented from collaterally attacking his conviction suggests that he was unable to comprehend the complex issue of his

procedural bar. The failure to appoint post-conviction counsel prevented the meaningful litigation of appellant's procedural bar and, ultimately, any post-conviction claims. We therefore reverse the district court's denial of appellant's petition and remand this matter for the appointment of counsel to assist appellant in supplementing his petition to demonstrate whether he has cause for the delay and has suffered undue prejudice. 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.
Douglas


_____, J.
Cherry

cc: Hon. Valorie J. Vega, District Judge
Ray Antonio Azcarate
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk