

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHN HENRY, II,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70535

FILED

MAR 28 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

Appellant John Henry, II, appeals from a district court order denying the postconviction petition for a writ of habeas corpus he filed on February 23, 2016.¹ Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.

Henry claims the district court erred by rejecting his claim that defense counsel was ineffective for failing to investigate the home invasion charge and discover he could not be charged with an invasion of his own home.² Our review of the record reveals the district court erred by rejecting this claim without conducting an evidentiary hearing. A

¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

²Henry does not challenge the denial of the remaining claims raised in his petition below.

petitioner is entitled to an evidentiary hearing if he asserts specific factual allegations that are not belied or repelled by the record and that, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Henry asserted that he was a lawful resident of the home he was accused of invading. The district court denied the claim, finding Henry failed to provide any factual record or evidence supporting his claim and he provided nothing more than bare allegations that he was a lawful occupant of the home. This finding is not supported by the record. Documents in the record, including the Las Vegas Metropolitan Police Department's warrant declaration, state Henry lived at the home he was accused of invading. Here, if his factual assertion is true, he *may* be entitled to relief because "a person cannot commit the crime of home invasion by forcibly entering his or her own home if that person is a lawful occupant or resident of the home." *Truesdell v. State*, 129 Nev. 194, 202, 304 P.3d 396, 401 (2013).

Because Henry's ineffective-assistance-of-counsel claim stated a specific factual allegation that was not belied by the record and *may*

entitle him to relief,³ we conclude it was error for the district court to deny this claim without an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.⁴


_____, C.J.
Silver


_____, J.
Gibbons

³Because Henry was charged with multiple offenses, we express no opinion as to the ultimate merit of this claim.

⁴Upon remand, the district court may exercise its discretion to consider the factors set forth in NRS 34.750(1) and appoint postconviction counsel.

We have considered all of the documents filed in this appeal and conclude no additional relief is warranted. As this order constitutes our final disposition of this appeal, any subsequent appeal shall be docketed as a new matter.

TAO, J., concurring:

I concur. On remand, the district court's attention is directed to a letter signed by Henry's trial counsel dated June 16, 2016, that was not originally presented to the district court when it heard argument on the petition in May 2016 but was subsequently appended to the notice of appeal.


_____, J.
Tao

cc: Hon. Kerry Louise Earley, District Judge
John Henry, II
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk