

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PATRICK NEWELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71418

FILED

JUL 12 2017

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

ORDER OF REVERSAL AND REMAND

Patrick Newell appeals from a district court order dismissing the postconviction petition for a writ of habeas corpus he filed on June 28, 2016.¹ First Judicial District Court, Carson City; James E. Wilson, Judge.

In his petition, Newell claimed the Nevada Department of Corrections (NDOC) was violating NRS 209.4465 by failing to apply the work/study credits he had earned toward his term of imprisonment. The district court found Newell's claim was bare or naked and dismissed his petition. We conclude the district court erred for the following reasons:

First, Newell's claim was supported by the following factual allegations: He was entitled to work/study credits for vocational classes he took between December 2014 and April 13, 2015. He should have received a total of 44 credits for these classes but he only received 22 credits. His September 2015 credit history report showed he had received the 44 credits, but his February 2016 credit history report showed 20 of these credits were inexplicably taken away. And he should have received 10

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

credits for his participation in classes in December 2014, 10 credits for his participation in classes in February 2015, and 2 additional credits for his participation in classes in April 2015. We conclude the district court erred by dismissing Newell's petition without conducting an evidentiary hearing because his allegations were not belied by the record and if true would have entitled him to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

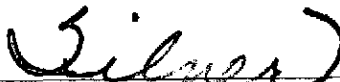
Second, the record contains an affidavit from an NDOC employee refuting allegations Newell made in his habeas petition and the district court's order demonstrates it relied upon this affidavit to make its ruling on the petition. The Nevada Supreme Court has previously held a petitioner's statutory rights are violated when the district court improperly expands the record with the use of affidavits instead of conducting an evidentiary hearing when an evidentiary hearing is required. *Mann v. State*, 118 Nev. 351, 355-56, 46 P.3d 1228, 1231 (2002). We conclude the district court erred by considering the affidavit filed by the State and Newell was prejudiced by this error because he was entitled to an evidentiary hearing on his allegations.


Third, the record demonstrates the district court dismissed Newell's petition without considering Newell's response to the State's motion to dismiss the action. NRS 34.750(4) provides "[t]he petitioner shall respond within 15 days after service to a motion by the state to dismiss the action." Because the State filed a motion to dismiss, Newell had a statutory right to file a response, and the district court had a duty to consider any claims or arguments presented in Newell's response before deciding the State's motion. Although Newell filed a timely response to the State's motion to dismiss, the district court entered its order

dismissing the petition before the response was filed and before the statutory period for filing the response had run. We conclude the district court erred and the error was prejudicial because the failure to consider Newell's response resulted in an order that did not accurately reflect or address Newell's allegations.

For the foregoing reasons, we conclude the district court's order must be reversed and the matter remanded for an evidentiary hearing to determine whether Newell has received all of the statutory work/study credits he is entitled to for classes he participated in during December 2014, February 2015, and April 2015. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.²


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

²This order constitutes our final disposition of this appeal and any subsequent appeal shall be docketed as a new matter.

cc: Hon. James E. Wilson, District Judge
Patrick Newell
Attorney General/Carson City
Carson City Clerk