

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FRANCISCO ENRIQUE VIDAL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72621

FILED

APR 16 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Francisco Enrique Vidal appeals from a district court order denying the postconviction petition for a writ of habeas corpus filed on December 15, 2016, and the supplement filed on January 16, 2017. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Vidal claims the district court erred by finding he was not deprived of his direct appeal. The district court conducted an evidentiary hearing on this issue.

In the written order denying Vidal's petition, the district court found Vidal "was not deprived of a direct appeal." The written order does not identify the basis for this conclusion. However, during the evidentiary hearing, the district court focused on the nature of the direct appeal claims Vidal wanted to raise and whether they were frivolous. Immediately before denying Vidal's appeal deprivation claim, the district court stated, "And if [appellate counsel] determined there is no issue for me to appeal on, then he absolutely has the right to withdraw that notice and not—not pursue that appeal."

The decision to withdraw a direct appeal is not appellate counsel's decision to make. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983)

(“The accused has the ultimate authority to make certain fundamental decisions regarding the case, such as whether to plead guilty, waive a jury, testify on one’s own behalf, or take an appeal.”). Rather, once an appeal is filed, appellate counsel must obtain the appellant’s consent before moving to withdraw the appeal. See NRAP Form 8. “[I]f, in counsel’s estimation, an appeal is without merit, counsel must discuss his or her conclusion with the client and advise the client against pursuing the appeal. If a defendant insists on continuing with the appeal, counsel should file a brief that includes all arguable issues and argues defendant’s appeal as well as possible.” *Ramos v. State*, 113 Nev. 1081, 1084, 944 P.2d 856, 857 (1997) (citing *State v. Cigic*, 639 A.2d 251, 254 (N.H. 1994). “Attorneys must argue for their clients without conceding an appeal is without merit. An action is not frivolous even though the lawyer believes that the client’s position will ultimately not prevail.” *Id.* at 1084-85, 944 P.2d at 858. In those rare instances where this procedure forces counsel to raise a frivolous claim on appeal, the Nevada Supreme Court has “create[d] an exception to the rules of professional conduct to allow the pursuit of a frivolous appeal.” *Id.* at 1085, 944 P.2d at 858.

The parties did not brief this standard of law below. Further, at the evidentiary hearing, Vidal’s appellate counsel testified he did not believe the decision to withdraw an appeal was a decision for the client to make, and the State improperly argued “an attorney cannot file a meritless appeal” and this was the issue before the court. Although Vidal’s postconviction counsel argued the proper standard of law during the evidentiary hearing, he did not identify any authority supporting his understanding of the law. Thus, the district court did not have the benefit


of being adequately advised of the correct standard before ruling on Vidal's appeal deprivation claim.

Because the district court did not apply the correct standard of law and improperly found appellate counsel has the right to withdraw an appeal if he determines there are no non-frivolous issues to raise on appeal, we conclude the district court's order must be reversed and the matter remanded to the district court for reconsideration of its decision in light of *Jones and Ramos*. See *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005) (this court reviews application of the law de novo). Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.¹



_____, C.J.
Silver



_____, J.
Tao



_____, J.
Gibbons

¹The district court need not conduct a new evidentiary hearing on the appeal deprivation claim unless it determines that an additional hearing is necessary in order to determine whether counsel had obtained Vidal's permission before filing the notice of withdrawal of Vidal's direct appeal. We remind the district court that any future order resolving Vidal's petition should contain specific findings of fact and conclusions of law to support its decision. See NRAP 4(b)(5)(B). If upon remand the district court determines Vidal was deprived of a direct appeal, it shall provide Vidal with the remedy set forth in NRAP 4(c). This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

cc: Hon. Douglas W. Herndon, District Judge
Mueller Hinds & Associates
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk