

IN THE SUPREME COURT OF THE STATE OF NEVADA

MANUEL MALDONADO VALDEZ,

No. 36632

Appellant,

vs.

DIRECTOR, NEVADA DEPARTMENT OF
PRISONS, JACKIE CRAWFORD,

Respondent.

FILED

AUG 08 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On June 16, 1999, the district court convicted appellant, pursuant to a guilty plea, of one count of driving under the influence with two or more prior convictions. The district court sentenced appellant to serve a minimum term of sixteen months to a maximum term of seventy-two months in the Nevada State Prison. In addition, the district court ordered appellant to pay a \$2,500 fine. Appellant did not file a direct appeal.

On July 17, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On August 10, 2000, the district court denied appellant's petition. This appeal followed.

In his petition, appellant argued that the plea agreement had been breached because he had received a sentence greater than the sentence recommended and that his counsel was ineffective in failing to challenge the breach. Appellant

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further argued that his counsel was ineffective for failing to file an appeal despite appellant's four requests to counsel to file a direct appeal.

In denying the petition, the district court reached the merits of the claims. Specifically, the district court concluded that the plea agreement had not been breached. The district court, however, did not address or reach appellant's claim that his counsel was ineffective in failing to file an appeal. Our review of the record on appeal reveals that the district court may have erred in its decision denying appellant's petition.

NRS 34.726(1) provides that the district court shall dismiss a habeas corpus petition that is untimely filed unless the petitioner demonstrates cause for the delay and undue prejudice. Appellant's petition was untimely filed because it was filed thirteen months after entry of the judgment of conviction.¹ Thus, appellant's petition would be procedurally barred absent a demonstration of cause for the delay and undue prejudice.² Appellant argued that he had cause to excuse his delay because he had been transferred to five different institutions since entry of the judgment of conviction. Appellant argued that it was only at the latest institution that he was able to gain the assistance of an inmate law clerk to aid him in the post-conviction proceedings. The district court failed to address whether these arguments amounted to sufficient good cause. It is unclear from the district court's order whether the district court inadvertently overlooked the procedural time bar or whether the district court determined that appellant had demonstrated good cause

¹See NRS 34.726(1).

²See id.

sufficient to overcome the procedural time bar but omitted this finding from the written order. Although we express no opinion as to whether appellant demonstrated good cause for the delay, under these facts, we cannot affirm the decision of the district court, and we remand this matter to the district court for further proceedings to determine whether or not appellant demonstrated adequate cause to excuse his delay.

Moreover, we note that even assuming that the district court had concluded that appellant demonstrated good cause to excuse the untimely filing of his petition but omitted this conclusion from its order, the district court's decision contained an additional defect. The district court failed to address appellant's appeal deprivation claim. Appellant was entitled to an evidentiary hearing if he raised claims that, if true, would have entitled him to relief.³ Appellant argued that his counsel was ineffective for failing to file an appeal despite his four requests to counsel to file a direct appeal. This claim is not belied by the record on appeal and would entitle appellant to relief if true.⁴ Thus, if the district court concluded that appellant had overcome the procedural time bar, the district court should have conducted an evidentiary hearing to determine whether appellant's counsel was ineffective and whether appellant was entitled to the remedy set forth in Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994). We cannot affirm the district court's decision for this additional reason.

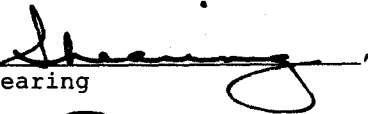
Because the district court failed to address the procedural time bar and because the district court failed to

³See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

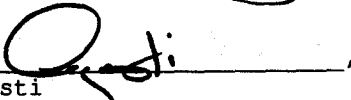
⁴See Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999).

address appellant's appeal deprivation claim, we cannot affirm the order of the district court.⁵ Accordingly, we

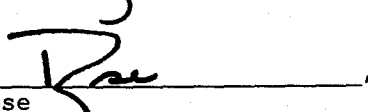
ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.



Shearing J.



Agosti J.



Rose J.

cc: Hon. Jack B. Ames, District Judge
Attorney General
Elko County District Attorney
Manuel Maldonado Valdez
Elko County Clerk

⁵Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).

This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter. We have considered all proper person documents filed or received in this matter. We conclude that appellant is entitled only to the relief described herein.