

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH MICHAEL SMITH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 37072

**FILED**

MAR 27 2002

ORDER OF REVERSAL AND REMAND

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

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 September 9, 1999, the district court convicted appellant, pursuant to a guilty plea, of one count of first degree murder (Count I) and two counts of child abuse and neglect (Counts II and III). The district court sentenced appellant to serve a term of life with the possibility of parole for Count I, a minimum term of 60 months to a maximum term of 240 months for Count II, and a minimum term of 60 months to a maximum term of 240 months for Count III, in the Nevada State Prison. All terms were ordered to run consecutively. Appellant was awarded 491 days of credit for time served. No direct appeal was taken.

On August 10, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

State opposed the petition. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On November 7, 2000, the district court entered a written order denying appellant's petition. This appeal followed.

In his petition, appellant claimed, among other things, that he expressed to his counsel his desire to file a direct appeal and his counsel refused to do so.<sup>1</sup> Our preliminary review of the record on appeal revealed that the district court may have erroneously denied appellant's petition without holding an evidentiary hearing on this issue. We noted that appellant was entitled to an evidentiary hearing if he raised claims which, if true, would have entitled him to relief and if his claims were not belied by the record.<sup>2</sup> Thus, on November 19, 2001, this court ordered the State

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<sup>1</sup>Appellant also raised multiple claims that his counsel was ineffective prior to the entry of his guilty plea, that his guilty plea was involuntarily entered, and that his counsel was ineffective at sentencing. We have considered these claims and conclude that they lack merit. Therefore, the district court did not err in denying these claims. See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996); Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994); Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975).

<sup>2</sup>See Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999) (holding that if a criminal defendant expresses a desire to appeal, counsel is obligated to file a notice of appeal on defendant's behalf); see also *continued on next page . . .*

to show cause why this appeal should not be remanded to the district court for an evidentiary hearing to determine whether or not counsel's performance fell below an objective standard of reasonableness.<sup>3</sup> The State responded to our order on December 21, 2001. The State contended (1) that appellant had waived his right to appeal except on limited issues by pleading guilty, (2) that appellant's claim that his guilty plea was involuntary could not have been raised on direct appeal, and therefore, his counsel could not have been ineffective for failing to file a direct appeal, and (3) that appellant has not shown any meritorious claims that could have been raised on direct appeal.

We conclude that the State's arguments are without merit. First, appellant's signing of the guilty plea agreement did not

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Thomas v. State, 115 Nev. 148, 151, 979 P.2d 222, 224 (1999) (holding that where an appellant "expressed a desire to appeal . . . appellant's counsel had a duty . . . to perfect an appeal on appellant's behalf."); see also Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994); see also Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

<sup>3</sup>Smith v. State, Docket No. 37072 (Order to Show Cause, November 19, 2001).

unequivocally waive his right to a direct appeal.<sup>4</sup> Appellant did not waive his right to an appeal “based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings.”<sup>5</sup> These are the exact grounds identified in NRS 177.015(4) as legitimate grounds for direct appeal when the conviction is based on a guilty plea.<sup>6</sup> Second, assuming appellant's claim is true, he is not required to demonstrate prejudice: prejudice is presumed where an appellant instructs counsel to file an appeal and counsel fails to do so.<sup>7</sup> Further, “[b]ecause convicted persons have the right to counsel on direct appeal, the appointment of

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<sup>4</sup>See generally Davis, 115 Nev. 17, 19, 974 P.2d 658, 659 (holding that the language in the form plea agreement is not an unequivocal waiver of the right to appeal).

<sup>5</sup>Id.

<sup>6</sup>Id.

<sup>7</sup>See generally Roe v. Flores-Ortega, 528 U.S. 470, 483 (2000) (holding that where “the complete denial of counsel [on appeal] mandates a presumption of prejudice (citations omitted). . . . [t]he even more serious denial of the entire judicial proceeding itself, which a defendant wanted . . . and to which he had a right, similarly demands a presumption of prejudice.”); see also Lozada, 110 Nev. at 356, 871 P.2d at 948 (“[P]rejudice may be presumed on claims based on the ineffective assistance of counsel when a petitioner has been deprived of the right to appeal.”) (citing Fawaz v. State, 105 Nev. 682, 683, 783 P.2d 425, 426 (1989)).

counsel is essential to remedy the loss of the right to an appeal."<sup>8</sup> Although the State is correct that appellant may not challenge the voluntariness of his plea on direct appeal, neither the State nor the district court may presume that appellant has raised or thoroughly addressed all of the issues he would have raised on direct appeal because he did not have the assistance of counsel in pursuing potential direct appeal claims.

Accordingly, we remand this case to the district court to conduct an evidentiary hearing to determine whether appellant's counsel failed to file a direct appeal after appellant expressed an interest in a direct appeal.<sup>9</sup> If the district court determines that appellant was denied his right to a direct appeal, the district court shall appoint counsel to represent appellant and shall permit appellant to file a petition for a writ of habeas corpus raising issues appropriate for direct appeal.<sup>10</sup> We therefore


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<sup>8</sup>Lozada, 110 Nev. at 359, 871 P.2d at 950.


<sup>9</sup>The district court may exercise its discretion to appoint counsel for the evidentiary hearing. See NRS 34.750(1).

<sup>10</sup>See Lozada, 110 Nev. 349, 871 P.2d 944.

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.<sup>11</sup>

 J.  
Shearing

 J.  
Rose

 J.  
Becker

cc: Hon. John S. McGroarty, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Joseph Michael Smith  
Clark County Clerk

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<sup>11</sup>We have considered all proper person documents filed or received in this matter, and we conclude that no further relief is warranted.