

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GARY A. SILVA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 77691-COA

**FILED**

MAR 19 2020

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Gary A. Silva appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on July 27, 2018, and supplemental petition filed on September 18, 2018. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Silva was convicted, pursuant to a guilty plea, of aggravated stalking. He was placed on probation but was convicted of misdemeanor stalking of a different victim, and the State moved to revoke his probation. The district court revoked his probation and imposed the underlying prison sentence of 6 to 15 years. Silva had retained counsel to represent him in the revocation proceedings, and he asked counsel to file an appeal. Counsel declined to do so. Silva filed the instant postconviction habeas petition in which his sole claim is that counsel was ineffective for failing to appeal Silva's probation revocation. In its response, the State agreed an evidentiary hearing was warranted on this claim. At the date set for oral argument, the district court instead asked the parties to brief an issue both sides had neglected: whether Silva was entitled to the effective assistance of counsel in the revocation proceedings. The district court set a briefing schedule and new hearing date. Rather than conduct the hearing or

entertain oral argument, the district court issued a minute order denying Silva's petition.

Silva contends the district court violated his due process right to be heard when it denied his petition without first entertaining oral argument. He asserts he was prejudiced by the denial of a hearing because he intended to raise additional argument at the hearing. Silva's contention that a hearing was necessary to raise additional argument fails. Silva had an adequate opportunity to raise his arguments in the supplemental briefing. Only rarely will a district court consider new argument raised during a hearing. *Cf. Barnhart v. State*, 122 Nev. 301, 304, 130 P.3d 650, 652 (2006). Moreover, the district court was under no obligation to entertain oral argument. If the district court determined no evidentiary hearing was necessary and the petitioner was not entitled to relief, NRS 34.770(2) authorized the court to dismiss the petition without a hearing. *See also* NRS 34.745(1)(b) (authorizing the district court, after ordering an answer, to "[t]ake other action that the judge or justice deems appropriate"). We therefore conclude Silva failed to demonstrate his due process right was violated or the district court erred by denying his petition without entertaining oral argument.

Silva also contends the district court erred by denying his claim that counsel was ineffective for failing to appeal the revocation of Silva's probation. Silva argues that whether he had the right to the effective assistance of counsel was irrelevant to his claim because, since he had counsel, he was necessarily entitled to counsel's effective assistance. However, "[w]here there is no right to counsel there can be no deprivation of effective assistance of counsel." *McKague v. Warden*, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996). Thus where an offender does not have the

right to effective assistance of counsel, he cannot be heard to complain that counsel failed to appeal. We therefore conclude the district court did not err by inquiring into whether Silva was entitled to the effective assistance of counsel in his probation revocation proceedings.

Silva does not dispute the district court's finding that he did not have a statutory right to the effective assistance of counsel in his revocation proceedings. Accordingly, the issue is whether Silva had a constitutional right to the effective assistance of counsel. There is no absolute right to counsel at a probation revocation hearing. *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). The need for counsel at a probation revocation proceeding is made on a case-by-case basis. *Id.*; see also *Fairchild v. Warden*, 89 Nev. 524, 525, 516 P.2d 106, 107 (1973) (adopting the approach set forth in *Gagnon*).


Counsel is constitutionally required if the probationer makes a colorable claim (1) that he did not commit the alleged violations or (2) that there are justifying or mitigating circumstances which make revocation inappropriate and these circumstances are difficult or complex to develop or present. *Gagnon*, 411 U.S. at 790. Silva stipulated that he violated his probation. In mitigation, he explained the context surrounding his new misdemeanor conviction that resulted in the probation violation. Silva did not demonstrate there were any mitigating circumstances in this matter that were difficult or complex to develop or present. He thus failed to demonstrate he had the right to counsel for the probation revocation proceedings. And because Silva failed to demonstrate he had the right to counsel for those proceedings, he could not demonstrate he was entitled to relief due to the ineffective assistance of counsel. See *McKague*, 112 Nev.

at 164-65, 912 P.2d at 258. We therefore conclude the district court did not err by denying Silva's petition.

Because we conclude Silva's sole claim in his petition lacked merit, we do not reach Silva's remaining arguments that a) he was entitled to appeal from the order for revocation of probation and second amended judgment of conviction and b) probation revocation counsel was obligated to file a notice of appeal. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Michelle Leavitt, District Judge  
Nevada Appeal Group, LLC  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk