

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK JOHN DEGRASSE,

No. 37715

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

**FILED**

OCT 10 2001

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[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 December 18, 1996, the district court convicted appellant, pursuant to a guilty plea, of two counts of using a minor in producing pornography. The district court sentenced appellant to serve two concurrent terms of life in the Nevada State Prison with the possibility of parole. Appellant did not file a direct appeal.

On November 21, 1997, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On December 22, 1997, appellant filed a supplement to his petition. The State filed an answer and a motion to dismiss the petition alleging that appellant's petition should be dismissed because it was not in the proper form pursuant to NRS 34.735. Appellant then filed a petition that was in the proper form. In his petition, appellant asserted, among other things, that he asked his attorneys to file a direct appeal and counsel did not file a direct appeal. 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 March 10, 1998, the district court denied appellant's petition. Appellant then appealed this denial.

On November 2, 2000, this court ordered the State to show cause why appellant's appeal should not be remanded to the district court for an evidentiary hearing to determine whether he was deprived his right

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to a direct appeal due to the ineffective assistance of counsel.<sup>1</sup> On December 16, 2000, the State responded to our order and conceded that appellant's claim that his counsel ignored his requests to file a direct appeal after appellant had requested a direct appeal warranted an evidentiary hearing. On January 31, 2001, this court remanded 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>2</sup>

On March 16, 2001, the district court conducted a hearing on appellant's appeal deprivation claim as well as on his other claims in his petition. Appellant was not represented by counsel at the hearing. At the hearing, only one of appellant's trial attorneys was present and testified. Appellant's other trial attorney was not present at the hearing nor was there any explanation for his absence. The district court denied appellant's petition and the claims he raised at the evidentiary hearing. This appeal followed.

At the evidentiary hearing, appellant claimed that he asked his trial attorneys to file a direct appeal and his trial attorneys failed to file a direct appeal.<sup>3</sup> The State presented the testimony from only one attorney, Jeremy Bosler.

Mr. Bosler testified that appellant inquired about an appeal at his sentencing hearing but appellant never affirmatively asked him to file a direct appeal. Mr. Bosler further testified that following appellant's

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<sup>1</sup>Degrass v. State, Docket No. 32033 (Order to Show Cause, November 2, 2000).

<sup>2</sup>Degrass v. State, Docket No. 32033 (Order of Remand, January 31, 2001).

<sup>3</sup>Appellant also claimed that his counsel was ineffective for failing to file a motion to suppress, coercing appellant to plead guilty, failing to show appellant any discovery, failing to show appellant the presentence report, failing to allow appellant to enter an Alford plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), failing to have appellant sign the guilty plea agreement, failing to tell appellant that he had to be evaluated by a psychiatric board before he would be eligible for parole, and failing to have any witnesses testify at appellant's sentencing hearing. We conclude that the district court did not err in denying these claims. See Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996); see also Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990)

inquiry into a direct appeal, he wrote appellant a letter stating what his appeal rights were, what he could appeal from after entering a guilty plea, and the time frame to file a direct appeal. Mr. Bosler stated in the letter that if appellant still wished to appeal, then he should contact him immediately. Mr. Bosler testified that appellant never responded to the letter so he did not file a direct appeal on appellant's behalf. Appellant's other trial attorney did not testify at the evidentiary because he was not present.

Appellant testified that in addition to inquiring of Mr. Bosler about an appeal right, he asked his other attorney, Mr. Gregory, to file a direct appeal. He claimed that he asked Mr. Gregory to file a direct appeal, and that Mr. Gregory gave him his solemn word of honor that he would appeal his case. Appellant expressed his concern and confusion as to the absence of Mr. Gregory. The State did not offer any information regarding Mr. Gregory's absence.

The district court found that appellant did not receive ineffective assistance of counsel and that appellant was not deprived of a direct appeal without his consent. Generally, this court will defer to factual findings of the district court.<sup>4</sup> However, we are unable to defer to the district court's findings in this case because Mr. Gregory was not present at the evidentiary hearing to refute appellant's claim that appellant asked Mr. Gregory to file a direct appeal and that Mr. Gregory failed to file a direct appeal. There was no explanation for Mr. Gregory's absence. Appellant was not represented by counsel, and it appears that the State was responsible for the presence of the witnesses. We conclude that the district court erred in finding that Mr. Gregory did not render ineffective assistance of counsel. The State offered no testimony to refute appellant's allegation that he asked Mr. Gregory to file a direct appeal. Therefore, we conclude that appellant was denied his right to a direct appeal because appellant asked his counsel, Mr. Gregory, to file a direct appeal and Mr. Gregory failed to file a direct appeal.<sup>5</sup> Under these facts,

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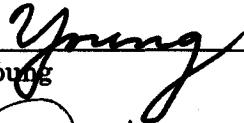
<sup>4</sup>See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).


<sup>5</sup>See Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).


We do not need to address the effectiveness of Mr. Bosler because we conclude that Mr. Gregory rendered ineffective assistance of counsel.

we cannot affirm the order of the district court, and we remand this matter to the district court for the appointment of counsel to represent appellant and to allow appellant to file a post-conviction petition for a writ of habeas corpus raising issues appropriate for direct appeal.<sup>6</sup> Accordingly, we

ORDER the judgment of the district court REVERSED and REMAND this matter to the district court for proceedings consistent with this order.<sup>7</sup>

  
\_\_\_\_\_. J.  
Young

  
\_\_\_\_\_. J.  
Agosti

  
\_\_\_\_\_. J.  
Leavitt

cc: Hon. Steven R. Kosach, District Judge  
Attorney General  
Washoe County District Attorney  
Frank John Degrasse  
Washoe County Clerk

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<sup>6</sup>See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

<sup>7</sup>We have considered all proper person documents filed or received in this matter, and we conclude that appellant is not entitled to any further relief.