

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN NOWELL,

No. 38372

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE JOHN
S. MCGROARTY, DISTRICT JUDGE
AND CRAIG L. HENDRICKS,

FILED

NOV 16 2001

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

Respondents,

and

THE STATE OF NEVADA,

Real Party in Interest.

ORDER GRANTING PETITION

This proper person petition for a writ of mandamus seeks an order compelling the district court to provide petitioner with the remedy outlined in Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

Following his August 23, 1995 conviction of five counts of burglary, appellant filed two post-conviction petitions for writs of habeas corpus in the district court.¹ Appellant argued that he had been deprived of a direct appeal. The district court denied both petitions, and petitioner filed appeals from the orders denying his petitions. On appeal, this court remanded the matters to the district court for an evidentiary hearing to determine whether petitioner knowingly and voluntarily waived his right to a direct appeal, and for any further proceedings pursuant to Lozada.² At a hearing held on January 28, 1999, the district court granted

¹The first petition was filed on January 31, 1996, and the second petition was filed on June 25, 1997.

²Nowell v. State, Docket Nos. 28779, 30992, 30993 (Order of Remand, October 2, 1998). This court also concluded that the remaining contentions raised in the petitions lacked merit.

petitioner's post-conviction petition with respect to the Lozada claim. The district court appointed Mr. Carmine Colucci, Esq. to represent petitioner and to raise direct appeal issues in a post-conviction petition pursuant to Lozada.

Petitioner did not at this point pursue the remedy set forth in Lozada. Rather, petitioner alleges that he then filed two motions to have Mr. Colucci withdraw from representation because petitioner believed Mr. Colucci mishandled the matter. Petitioner further alleges that Mr. Colucci filed his own motion to withdraw from representation. On May 13, 1999, the district court granted his motion to have Mr. Colucci withdraw from representation. Petitioner alleges that the district court did not appoint him new counsel in order for him to pursue the Lozada remedy and did not inquire into whether petitioner needed new counsel. Petitioner then sought relief in the federal court. The federal court denied relief on March 19, 2001, because petitioner had not exhausted his State remedies. Petitioner then moved in the district court to have counsel appointed. The district court denied the motion, and this court dismissed his subsequent appeal for lack of jurisdiction.³

In the instant petition for a writ of mandamus, petitioner argues that he continues to be deprived of his right to a direct appeal. Petitioner seeks an order compelling the district court to provide him with the remedy outlined in Lozada. Petitioner argues that he did not intend to abandon his petition. Petitioner appears to be concerned that the State is trying to impose a deadline on his perfection of the Lozada remedy when the district court's order apparently contained no such deadline.

In Lozada, this court determined that the appropriate remedy to cure the deprivation of the right to a direct appeal would be to "raise in a petition for a writ of habeas corpus any issues which he could have raised on direct appeal."⁴ This court further observed that "[a] complete remedy will exist, however, only if the district court grants [the petitioner] counsel to assist him in the preparation of a petition for a writ of habeas

³Nowell v. State, Docket No. 38023 (Order Dismissing Appeal, July 31, 2001).

⁴110 Nev. at 359, 871 P.2d at 950.

corpus.”⁵ Thus, the appointment of counsel is essential to the Lozada remedy.⁶

Given the importance of the appointment of counsel to the Lozada remedy, it appeared that the district court may have erred in failing to appoint new counsel to represent petitioner after allowing Mr. Colucci to withdraw from representation on May 13, 1999. Therefore, this court ordered the State to show cause why the writ should not be granted. On October 15, 2001, the State responded that it did not oppose the granting of the writ under the particular circumstances of this case. Accordingly, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to appoint petitioner counsel and to permit petitioner the opportunity to prepare and file a habeas corpus petition raising direct appeal claims within a reasonable length of time to pursue the remedy outlined in Lozada.


Shearing J.


Rose J.


Becker J.

cc: Hon. John S. McGroarty, District Judge
Attorney General/Carson City
Clark County District Attorney
Brian Nowell
Clark County Clerk

⁵Id.

⁶In fact, a criminal defendant has no constitutionally-protected right to represent himself in a direct appeal. See Martinez v. Court of Appeal of California, 528 U.S. 152 (2000); Blandino v. State, 112 Nev. 352, 914 P.2d 624 (1996).