

IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMOTHY W. JOINER,
Appellant,

vs.

THE STATE OF NEVADA; WARDEN,
WELLS CONSERVATION CAMP,
ROBERT HILDRETH AND FRANKIE
SUE DEL PAPA, ATTORNEY
GENERAL,
Respondents.

No. 38578

FILED

AUG 22 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
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 August 10, 2000, the district court convicted appellant, pursuant to a guilty plea, of attempted possession of a forged instrument. The district court sentenced appellant to a maximum term of thirty-four months in the Nevada State Prison with a minimum parole eligibility of twelve months, to be served concurrently with the sentence he was serving at the time. Appellant did not file a direct appeal.

On September 11, 2000, appellant filed in the district court what he characterized as a motion for order correcting clerical errors. The

district court denied the motion on the grounds that it did not find any clerical error, and this court affirmed that judgment.¹

On March 7, 2001, 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 April 18, 2001, the district court denied appellant's petition. This appeal followed.

Our review of the record on appeal revealed that the district court may have erroneously denied appellant's petition without first holding an evidentiary hearing on one of appellant's claims. In his petition, appellant contended that his counsel was ineffective regarding his right to appeal. Specifically, appellant claimed that following sentencing he asked his counsel "what could be done" and counsel replied "nothing." On May 24, 2002, this court ordered the State to show cause why the matter 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,² noting that appellant was

¹Joiner v. State, Docket No. 36883 (Order of Affirmance, March 8, 2001).

²See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

entitled to an evidentiary hearing if he raised claims that, if true, would entitle him to relief.³

On June 24, 2002, the State responded to our order. In its response, the State offers two arguments in opposition to remanding this matter. First, the State argues that appellant did in fact appeal his judgment of conviction in a timely manner, therefore he suffered no prejudice. Second, the State argues, pursuant to Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996), that appellant waived his right to appeal by pleading guilty. The State concludes this court should resolve the direct appeal claim appellant raised in his petition, as well as his claims of ineffective assistance of counsel, and that such a resolution would be appellant's complete remedy.

We conclude that the State's arguments are without merit. First, appellant's appeal from the denial of his motion to correct clerical errors was not a direct appeal. Second, "[b]ecause convicted persons have

³See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984) (when a post-conviction petition for a writ of habeas corpus raises claims supported by specific factual allegations, which, if true, would entitle the petitioner to relief, the petitioner is entitled to an evidentiary hearing unless the record on appeal belies those claims); 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 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.").

the right to counsel on direct appeal, the appointment of counsel is essential to remedy the loss of the right to an appeal."⁴ Thus, 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.

We reverse and remand this case to the district court to conduct an evidentiary hearing on the sole issue of whether appellant's counsel failed to file a direct appeal after appellant expressed an interest in a direct appeal.⁵ In light of this disposition, we decline to address the other claim raised in appellant's petition. 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 or habeas corpus raising the issues appropriate for direct appeal.⁶ Conversely, if the district court determines that appellant's appeal deprivation claim lacks merit, the district court shall

⁴Lozada v. State, 110 Nev. 349, 359, 871 P.2d 944, 950 (1994).

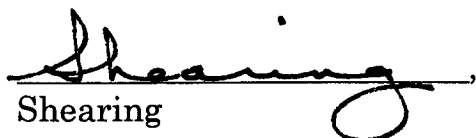
⁵The district court may exercise its discretion to appoint counsel for the evidentiary hearing. See NRS 34.750(1).


⁶See Lozada, 110 Nev. at 359, 871 P.2d at 950 (where it is determined that an appellant was improperly denied the right to a direct appeal, the appellant is allowed to pursue any direct appeal claims in post-conviction petition following the appointment of counsel).


enter a final order resolving all of the claims raised in appellant's March 7, 2001 habeas petition. Appellant may then appeal from any adverse decision.⁷

Accordingly, we

ORDER the judgment of the district court REVERSED and we REMAND this matter to the district court for proceedings consistent with this order.⁸

 _____, J.
Shearing

 _____, J.
Rose

 _____, J.
Becker

cc: Hon. John P. Davis, District Judge
Attorney General/Carson City
Mineral County District Attorney
Timothy W. Joiner

⁷See NRS 34.575.

⁸We have considered all proper person documents filed or received in this matter, and we conclude that appellant is entitled only to the relief described herein.