IN THE SUPREME COURT OF THE STATE OF NEVADA

TOMMIE L. MCDOWELL, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38970

FILED

DEC 12 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
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 15, 1994, the district court convicted appellant, pursuant to a jury trial, of one count of second degree murder with the use of a deadly weapon. The district court adjudicated appellant a habitual criminal and sentenced him to serve a term of life in the Nevada State Prison without the possibility of parole. This court dismissed appellant's direct appeal.[1] The remittitur issued on April 21, 1999.

On August 19, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court.[2] The

[1]McDowell v. State, Docket No. 26314 (Order Dismissing Appeal, March 26, 1999).

[2]In his petition, appellant raised the following claims: (1) his trial counsel was ineffective for failing to call Derwin Spencer as a witness, (2) his appellate counsel was ineffective for failing to raise the above issue on

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State opposed the petition. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. On April 24, 2000, the district court took the petition off calendar. On November 1, 2001, appellant filed a motion for the appointment of counsel, a motion to file an amended petition, and an amended petition for a writ of habeas corpus.[3] The district court summarily denied appellant's petitions. This appeal followed.

. . . continued

direct appeal, (3) his trial counsel was ineffective for not asking for a self-defense jury instruction and for not presenting evidence of self-defense at trial, (4) his trial counsel was ineffective for failing to call his former trial counsel as a witness, and (5) the district court improperly discouraged appellant from testifying on his own behalf.

[3]Appellant received the assistance of the federal public defender's office in preparing the petition. In the amended petition, appellant claimed: (1) his trial counsel was ineffective for providing him misinformation about the potential penalty under NRS 207.010 (habitual criminal enhancement) and that this misinformation caused him to decline a favorable plea offer, (2) his trial counsel failed to make any investigation or perform any forensic analysis of the crime scene and blood spatter evidence in support of a self-defense theory, (3) his trial counsel was ineffective for failing to request a self-defense jury instruction, (4) his trial counsel was ineffective for failing to locate and interview Derwin Spencer who would have provided testimony about the volatile and violent nature of the deceased in support of a self-defense theory at trial, (5) the reasonable doubt jury instruction violated the United States Constitution, and (6) his habitual criminal adjudication was improper because there was no weighing of factors or finding that it was just and proper to adjudicate appellant a habitual criminal.

The district court conducted two hearings outside the presence of appellant in the instant case. Ms. Rebecca Blaskey, appellant's former trial counsel, and Mr. Michael Pescetta, Ms. Blaskey's colleague at the Federal Public Defender's Office, were present at a hearing conducted on April 24, 2000.[4] Ms. Blaskey, declined to present testimony or otherwise respond to appellant's allegations of ineffective assistance of counsel in a proceeding conducted outside the presence of appellant. The district judge stated that it was his procedure to screen petitions by requesting former counsel to respond to the claims that counsel provided ineffective assistance, and by then determining in camera whether an evidentiary hearing was required. The district judge further stated:

> This, in my judgment, is a method of screening. I don't mean to suggest that my determination is dispositive always. But it is some, I think, check on the procedure.
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> Because, candidly, to embrace a system where all you have to do is challenge your attorney in writing on a factual issue and you get a hearing, and, perhaps, an attorney and all that and we go through another evidentiary matter, is just something that I think is untenable as a general proposition. We will allow the evidentiary hearing to be reserved in those cases where I think it is appropriate.

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[4]Neither Ms. Blaskey nor Mr. Pescetta appeared at the hearing in a representative capacity on appellant's behalf.

> Now, I'm going to make a rather harsh determination here. If defense counsel in all conscience cannot either consider the waiver that is attendant to the process of presenting the petition for writ of habeas corpus, cannot consider that appropriate, or cannot or will not go down to the prison or wherever it may be, or through correspondence in some fashion acquire a waiver that they feel is appropriate, then, unfortunately, that militates against the defendant's right to . . . petition for [a] writ of habeas corpus and allege ineffective assistance of counsel.
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> Because we can't have it both ways. We're not going to allow the defendant to be heard and say: Well, they're ineffective but my attorney is not going to cooperate in addressing an issue. So we are at a stalemate and so the Court, therefore, must have an evidentiary hearing.
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> I don't think that the defendant should be allowed to force that issue in such a manner, or counsel, candidly. And I am not addressing this to counsel present.

The district court then took the matter off calendar.

On November 28, 2001, the district court conducted a second proceeding outside the presence of appellant. Ms. Blaskey and Mr. Pescetta were again present at the hearing.[5] The district judge repeated his procedure for reviewing claims of ineffective assistance of counsel and acknowledged Ms. Blaskey's reluctance to submit an affidavit. Mr.

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[5]Again, neither Ms. Blaskey nor Mr. Pescetta appeared at the hearing in a representative capacity on appellant's behalf.

Pescetta reiterated his concerns regarding the district judge's procedure and stated that it was the position of the Federal Public Defender's Office that Ms. Blaskey could not ethically advise appellant regarding any waiver of his rights "with respect to an issue that Ms. Blaskey herself is the subject of." The district court concluded the hearing stating:

> First of all, the Court is not going to be hamstrung by the defendant and allow him to be heard to say: My attorney was ineffective, but I'm not going to allow my attorney to explain why she was ineffective or not, and so the Court can just make of it as it will. And that's, basically, where I am.
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> I am not going to embrace a procedure where I appoint counsel to assist a defendant, and former counsel to determine whether or not a waiver should be issued or agreed to between the two. To do so would be to create a never-ending process to the expense of the public, which I don't think is warranted.
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> So what my decision in this particular instance is, as it was on October 7th of 1999, Mr. McDowell either abandons his writ, or in some way fashions a resolution to this attorney/client dilemma.
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> And he can do that, he can hire an attorney, he can entreat Mr. Yohey [the federal public defender appointed to represent appellant in federal habeas corpus proceedings] to intercede. He can do it any way he cares to. But until it is accomplished, the Court cannot entertain the matter further.

A written order summarily denying appellant's petitions was entered after this hearing.

We conclude that the district court erred by refusing to consider appellant's habeas corpus petitions unless appellant and former counsel complied with the procedures as outlined by the district judge.[6] The district court erroneously conditioned appellant's right to an evidentiary hearing on former counsel's testimony or submission of briefs or affidavits responding to the ineffective assistance claims alleged in the petitions.

This court has long held that a petitioner is entitled to an evidentiary hearing when the petitioner raises claims supported by specific factual allegations, not belied by the record, that if true would entitle the petitioner to relief.[7] Contrary to the district court's apparent presumption, the provisions of NRS chapter 34 do not require an evidentiary hearing whenever a petitioner raises a factual issue regarding the representation provided by petitioner's former counsel. Rather, it is the duty of the district court to examine the petitioner's claims in light of the trial court record in determining whether an evidentiary hearing is

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[6]We note that appellant's amended habeas corpus petition was not successive or time-barred. It was properly part of the proceedings relating to the August 19, 1999 habeas corpus petition because the district court took the August 19, 1999 habeas corpus petition off calendar without considering any of the claims on the merits.

[7]Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

warranted.[8] This court has also expressly disapproved of the district court's unauthorized expansion of the record through affidavits or other papers submitted by former counsel in lieu of conducting an evidentiary hearing.[9] Although the district court properly noted that Ms. Blaskey could provide testimony in relation to the claims of ineffective assistance of counsel levied against her,[10] such testimony would have only been properly presented at an evidentiary hearing in appellant's presence conducted in compliance with the requirements of NRS chapter 34. We emphasize, however, that such a hearing is required only when a

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[8]Mann v. State, 118 Nev. __, __, 46 P.3d 1228, 1231 (2002) ("After receiving the petition, answer and supplemental pleadings filed by appointed counsel, if any, the district court must determine whether an evidentiary hearing is necessary.").

[9]Id. (holding that a petitioner's statutory rights are violated when the district court improperly expands the record with affidavits to resolve factual disputes in lieu of conducting an evidentiary hearing when an evidentiary hearing is required); see also Gebers v. State, 118 Nev. ___, 50 P.3d 1092 (2002) (holding that a petitioner's statutory rights are violated when a district court conducts an evidentiary hearing regarding the merits of the claims raised in the petition when the petitioner is not present at the hearing).

[10]See SCR 156(3)(b) (providing that a lawyer may reveal such information to the extent that the lawyer reasonably believes necessary to respond to allegations in any proceeding concerning the lawyer's representation of the client). It would, however, be improper for Ms. Blaskey to advise appellant regarding the waiver of any of his statutory rights under NRS chapter 34 when the representation of Ms. Blaskey is at issue.

petitioner has asserted claims supported by specific factual allegations not belied by the record which, if true, would entitle the petitioner to relief. Moreover, a petitioner is not required to waive any rights pursuant to NRS chapter 34, and the petitioner's former counsel is not required to obtain any such waiver from the petitioner, before a determination is made regarding the petitioner's entitlement to an evidentiary hearing.

Thus, because the district court improperly refused to consider the petitions, we reverse the order of the district court denying appellant's petitions. We remand this matter to a different district court judge for consideration of the habeas corpus petitions filed on August 19, 1999, and November 1, 2001, and for a determination of whether an evidentiary hearing is warranted. If the district court determines that an evidentiary hearing is warranted, the district court shall provide for appellant's presence at the hearing.[11] If the district court determines that an evidentiary hearing is not warranted, and that the claims lack merit, the district court shall enter a final order resolving all of the claims raised in appellant's petitions.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.[12] Accordingly, we

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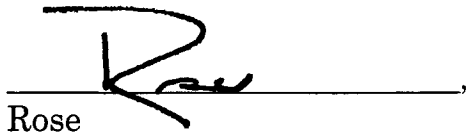
[11]See NRS 34.390. The district court may exercise its discretion to appoint post-conviction counsel. See NRS 34.750. The district court in a final order should resolve all claims raised in the petitions.

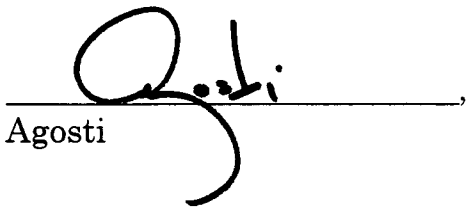
[12]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[13]

_____, C.J.
Young



_____, J.
Rose



_____, J.
Agosti

cc: Hon. Donald M. Mosley, District Judge
Attorney General/Carson City
Clark County District Attorney
Tommie L. McDowell, Jr.
Clark County Clerk

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[13]We have considered all proper person documents filed or received in this matter. We conclude that appellant is entitled only to the relief described herein.