

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELMER WINIFRED DYER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39026

FILED

DEC 12 2002

JAY TITMUS, CLERK
CLERK OF SUPREME COURT
BY *J. Richard*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

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 and motion for the appointment of counsel.

On January 5, 2001, the district court convicted appellant, pursuant to a guilty plea, of one count of battery constituting domestic violence (third offense), and one count of burglary while in possession of a firearm. The district court sentenced appellant to serve terms totaling four to twenty years in the Nevada State Prison. No direct appeal was taken.

On September 10, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On that same date, appellant filed a motion for the appointment of counsel. The State opposed the petition. Appellant filed a reply. 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 December

14, 2001, the district court summarily denied appellant's petition and motion. On January 8, 2002, the district court entered specific findings of fact and conclusions of law denying appellant's petition. This appeal followed.

First, appellant claimed that his trial counsel was ineffective at the preliminary hearing for failing to present a defense, object to the district attorney's leading questions of the victim, introduce documents, call appellant as a witness, call expert witnesses and cross-examine the State's witnesses. Appellant also claimed that his trial counsel was ineffective for failing to explain to him that he was being illegally charged. We conclude that the district court did not err in denying these claims. Appellant failed to support these claims with specific factual allegations, which if true, would have entitled him to relief.¹ Thus, appellant failed to demonstrate that his counsel was ineffective.² We affirm the district court's order to the extent it denied these claims.

Appellant also alleged that his trial counsel failed to file an appeal despite the fact that appellant asked counsel to do so.³ This court's preliminary review of the record on appeal revealed that the district court

¹Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

²Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

³Although this allegation was not included in the grounds section on the form petition, this allegation was raised several times on the face of the petition.

may have erroneously denied appellant's petition without conducting an evidentiary hearing on this claim. Appellant was entitled to an evidentiary hearing if he raised claims that, if true, would have entitled him to relief and if his claims were not belied by the record.⁴ This court has further held that if a client expresses a desire to appeal, counsel is obligated to file a notice of appeal on the client's behalf.⁵ Here, appellant's claim was not belied by the record on appeal, and appellant's claim, if true, may entitle him to an evidentiary hearing. Thus, it appeared that the district court may have erroneously denied appellant's petition without first conducting an evidentiary hearing on appellant's appeal deprivation claim. This court ordered the State to show cause why this appeal 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.⁶ The State has responded to this court's order and states that it does not oppose an order of remand for an evidentiary hearing on the issue of whether or not appellant was deprived of a direct appeal due to the ineffective assistance of counsel.

Accordingly, we reverse the order of the district court in part, and we remand this case to the district court to conduct an evidentiary hearing to determine whether appellant's counsel failed to file a direct

⁴Hargrove, 100 Nev. 498, 686 P.2d 222 .

⁵Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).

⁶Strickland v. Washington, 466 U.S. 668 (1984).

appeal after appellant requested a direct appeal.⁷ The district court may exercise its discretion as to whether to appoint post-conviction counsel to assist appellant at the evidentiary hearing.⁸ 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 of habeas corpus raising issues appropriate for direct appeal.⁹

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.¹⁰ Accordingly, we

⁷In his petition, appellant also alleged that the criminal complaint and information were defective and that his conviction violated the prohibition against cruel and unusual punishment. In light of this disposition relating to the appeal deprivation claim, we decline to reach the merits of these claims. If the district court determines that the appeal deprivation claim lacks merit, the district court shall resolve these claims in the final order denying his petition. If the district court determines that appellant was deprived of a direct appeal without his consent, these claims may be raised by appointed counsel in the petition filed pursuant to Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

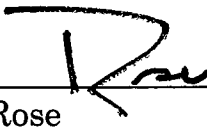
⁸NRS 34.750. We note that the State indicates that it does not object to the appointment of post-conviction counsel to assist appellant at the evidentiary hearing.

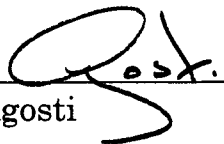
⁹Lozada, 110 Nev. 349, 871 P.2d 944.

¹⁰Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.¹¹

 _____, C.J.
Young

 _____, J.
Rose

 _____, J.
Agosti

cc: Hon. Jeffrey D. Sobel, District Judge
Attorney General/Carson City
Clark County District Attorney
Elmer Winifred Dyer
Clark County Clerk

¹¹This order constitutes our final disposition of this appeal. Any subsequent appeal from an order of the district court denying appellant's appeal deprivation claim and the claims not reached in this order shall be docketed as a new matter.