

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER SOUND O'NEILL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 39143

FILED

DEC 18 2002

ORDER OF REVERSAL AND REMAND

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

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On May 5, 1995, the district court convicted appellant, pursuant to a jury verdict, of robbery with the use of a deadly weapon. The district court adjudicated appellant a habitual criminal and sentenced him to a term of life with the possibility of parole. This court dismissed appellant's untimely appeal from his judgment of conviction for lack of jurisdiction.<sup>1</sup>

On March 12, 1996, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On March 26, 1996, the district court summarily denied appellant's petition, incorrectly stating that the district court did not have jurisdiction over appellant's petition because his direct appeal was still pending in this court. Appellant then filed a "notice of error" regarding the order

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<sup>1</sup>See O'Neill v. State, Docket No. 27987 (Order Dismissing Appeal, February 23, 1996).

dismissing appellant's petition in the district court. The district court reconsidered appellant's petition and on April 19, 1996 entered its findings of facts and conclusions of law denying the petition. This court subsequently dismissed appellant's appeal because we concluded that he filed an untimely notice of appeal.<sup>2</sup>

On December 19, 2001, appellant filed his second proper person post-conviction petition for a writ of habeas corpus in the district court. The district court denied appellant's petition as successive. This appeal followed.

Appellant filed his petition more than six years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.<sup>3</sup> Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.<sup>4</sup> Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.<sup>5</sup>

To establish good cause to excuse a procedural default, a petitioner must demonstrate that some impediment external to the defense prevented him from complying with the state procedural default

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<sup>2</sup>See O'Neill v. State, Docket No. 31754 (Order Dismissing Appeal, February 24, 1998).

<sup>3</sup>See NRS 34.726; see also Dickerson v. State, 114 Nev. 1084, 967 P.2d 1132 (1998).

<sup>4</sup>See NRS 34.810(1)(b), (2).

<sup>5</sup>See NRS 34.726; NRS 34.810(1)(b), (3).

rules.<sup>6</sup> In an attempt to excuse the procedural defaults, appellant contends that the district court incorrectly dismissed his first petition in which he claimed, among other things, that he was denied the effective assistance of counsel because his trial counsel refused to file a notice of appeal on his behalf. He also claims that this court incorrectly dismissed as untimely his appeal from the district court's dismissal of his first petition. We agree that appellant can successfully demonstrate good cause and prejudice to excuse the procedural defaults.<sup>7</sup>

In appellant's first timely petition, he claimed, among other claims, that his counsel was ineffective for refusing to file a direct appeal on appellant's behalf. The district court failed to conduct an evidentiary hearing and denied appellant's petition. This court has held that an appellant is entitled to an evidentiary hearing if he raises claims, which if true, would entitle him to relief and if his claims are not belied by the

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

<sup>7</sup>We note that appellant also attempts to demonstrate good cause by claiming that he was denied the appointment of post-conviction counsel, he is uneducated in the law, and he was in lock-down which prevented him access to the law library. These claims do not establish good cause to excuse the procedural bars. See NRS 34.750 (the district court may appoint post-conviction counsel for indigent petitioners.); cf. NRS 34.820(1)(a) (if petitioner has been sentenced to death and it is his first post-conviction petition, the district court shall appoint counsel to represent petitioner); see also Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988); Lozada, 110 Nev. 349, 871 P.2d 944.

record.<sup>8</sup> Here, appellant's claim that his counsel refused to file a direct appeal on his behalf does not appear to be belied by the record and, if true, would entitle him to relief.<sup>9</sup> Thus, the district court erred in failing to conduct an evidentiary hearing on appellant's appeal deprivation claim.

Approximately two years later, appellant appealed the district court's dismissal of his petition. This court subsequently denied appellant's appeal as untimely. Appellant, however, was never served by the clerk of the district court with notice of entry of order.<sup>10</sup> This court has held that "under NRS 34.575(1) and NRS 34.830, the time to file a notice of appeal from an order denying a post-conviction habeas petition does not commence to run until notice of entry of an order denying the petition has been separately served by the district court on both the petitioner and the petitioner's counsel."<sup>11</sup> Here, the district court clerk properly served notice of entry of the district court's April 19, 1996 order on appellant's counsel,

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<sup>8</sup>See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

<sup>9</sup>See Lozada, 110 Nev. 349, 871 P.2d 944; Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999) (if the client expresses a desire to appeal, counsel is obligated to file a notice of appeal on the client's behalf); Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999) (counsel is obligated to advise appellant of the right to a direct appeal and to perfect a direct appeal on appellant's behalf if a direct appeal claim exists that has a reasonable likelihood of success).

<sup>10</sup>See NRS 34.830(2), (3).

<sup>11</sup>See Klein v. Warden, 118 Nev. \_\_\_, \_\_\_, 43 P.3d 1029, 1032 (2002) (citing Lemmond v. State, 114 Nev. 219, 954 P.2d 1179 (1998)).

but did not separately serve appellant. Because appellant was never served with notice of entry of order, the thirty-day appeal period provided by NRS 34.575(1) never commenced to run.<sup>12</sup> Therefore, appellant's notice of appeal from the April 19, 1996 dismissal of his first petition was timely filed, and this court incorrectly denied it as untimely.

We conclude that the district court's failure to recognize that appellant had presented a timely, cognizable claim based on the ineffective assistance of counsel in his first petition and this court's erroneous denial of appellant's appeal from the dismissal of his first petition constitute impediments external to the defense, and thus good cause to excuse the filing of his present successive and untimely petition where he again raised the claim that his counsel was ineffective for refusing to file a direct appeal on his behalf.<sup>13</sup> Moreover, prejudice is presumed for such a deprivation of counsel.<sup>14</sup>

We remand this case to the district court to conduct an evidentiary hearing to determine whether appellant's trial counsel deprived him of the right to file a direct appeal.<sup>15</sup> If the district court determines that appellant was deprived of a direct appeal without his

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<sup>12</sup>See id.

<sup>13</sup>See Lozada, 110 Nev. at 357-58, 871 P.2d at 949.

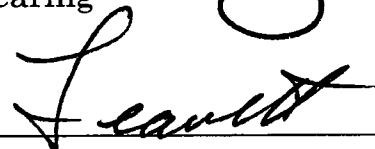
<sup>14</sup>See id. at 356, 871 P.2d at 948.


<sup>15</sup>See Davis, 115 Nev. 17, 974 P.2d 658; Thomas, 115 Nev. 148, 979 P.2d 222. The district court may exercise its discretion and appoint appellant counsel for the evidentiary hearing. See NRS 34.750.

consent, 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.<sup>16</sup> If the district court denies appellant relief, he may then file an appeal from that denial in this court.<sup>17</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.

  
\_\_\_\_\_, J.  
Shearing

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

  
\_\_\_\_\_, J.  
Becker

cc: Hon. Steven P. Elliott, District Judge  
Attorney General/Carson City  
Washoe County District Attorney  
Nathalie Huynh  
Washoe District Court Clerk

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<sup>16</sup>See Lozada, 110 Nev. at 359, 871 P.2d at 950.

<sup>17</sup>In light of this court's determination that an evidentiary hearing is necessary, we decline to reach the merits of any of the claims that appellant raises in his petition.