

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAJIED S. ALFORD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39753

FILED

FEB 05 2003

ORDER OF REVERSAL AND REMAND

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

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 March 6, 2001, the district court convicted appellant, pursuant to a guilty plea, of robbery. The district court sentenced appellant to serve a term of thirty-six to one hundred and fifty-six months in the Nevada State Prison. The district court suspended appellant's sentence and placed him on probation for a period not to exceed three years. On August 28, 2001, the district court entered a written order revoking appellant's probation, causing the original sentence to be executed and amending the judgment of conviction to include jail time credit totaling one hundred and nine days. Appellant did not file a direct appeal.

On March 25, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. In his petition, appellant challenged the revocation of his probation. The State opposed the petition and argued that the petition was untimely filed because it was filed more than one year after entry of the judgment of conviction. 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 May 28, 2002, the district court summarily denied appellant's petition. On June 6, 2002, the district court entered specific findings of fact and conclusions of law. This appeal followed.

In his petition, appellant claimed that his counsel appointed for probation revocation proceedings was ineffective for: (1) refusing to file an appeal from the order revoking appellant's probation despite appellant's instructions to do so, (2) failing to object to evidence and testimony given at the probation revocation proceedings in direct violation of appellant's rights, (3) failing to speak with appellant prior to the probation revocation proceedings, (4) failing to investigate appellant's attendance at counseling sessions and his payment of fees, and (5) soliciting unfavorable testimony from appellant's probation officer at the probation revocation hearing. Appellant further claimed: (1) a violation of his right to confront his accusers and his right to be notified of the alleged violations, (2) false testimony was presented at the probation revocation proceedings, and (3) the district court was misled by appellant's probation officer and the district attorney during the probation revocation proceedings.

The district court denied appellant's petition on the ground that it was untimely filed pursuant to NRS 34.726(1). We conclude that the district court erred in applying the procedural time bar of NRS 34.726 to appellant's petition. Appellant did not challenge the validity of his judgment of conviction and sentence in his March 25, 2002 habeas corpus petition; rather, appellant challenged the continued legality of his confinement as a result of alleged errors that occurred during the probation revocation proceedings. NRS 34.726 does not apply to a petition

challenging the continued legality of a petitioner's confinement.¹ Thus, the district court erred in determining that appellant's petition was untimely filed.

The district court's findings of fact and conclusions of law, as prepared by the district attorney, state that appellant's ineffective assistance of counsel claims were without merit because appellant received a substantial benefit from his plea and competent and conscientious representation. The district court further concluded that appellant waived his right to appeal by entry of his guilty plea. Whether appellant received the effective assistance of counsel in entering his plea does not resolve the issue of whether appellant received, or was even entitled to, the effective assistance of counsel at the probation revocation proceedings.² Nor does the language in the written guilty plea agreement function to unequivocally waive appellant's right to appeal from the order revoking his probation.³ The district court did not make any findings or

¹NRS 34.726(1) (setting forth a procedural time bar for "a petition that challenges the validity of a judgment or sentence").

²Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (holding that counsel is required if the probationer requests counsel and makes a colorable claim that (1) he did not commit the alleged violations; or (2) that there are justifying or mitigating circumstances which make revocation inappropriate and these circumstances are difficult or complex to present); Fairchild v. Warden, 89 Nev. 524, 516 P.2d 106 (1973) (adopting the approach set forth in Gagnon v. Scarpelli); McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996) (recognizing that an ineffective assistance of counsel claim will lie only where the defendant has a constitutional or statutory right to the appointment of counsel).


³See Davis v. State, 115 Nev. 17, 19, 974 P.2d 658, 659 (1999) (holding that language in form plea agreement does not unequivocally waive a defendant's right to appeal).


conclusions regarding the specific claims raised by appellant in his petition. Thus, we cannot affirm the district court's order denying appellant's petition, and we reverse the order of the district court and remand for further proceedings on appellant's petition.

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.⁴ Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.⁵


Shearing, J.


Leavitt, J.


Becker, J.

cc: Hon. Joseph T. Bonaventure, District Judge
Majied Sharrieff Alford
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁴See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁵We have considered all proper person documents filed or received in this matter. We conclude that appellant is entitled only to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.