

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTOINE JOSEPH A/K/A ANTOINNE  
JOSEPH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40249

**FILED**

NOV 21 2003

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

ORDER OF REVERSAL AND REMAND

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

On January 22, 1999, the district court convicted Joseph, pursuant to a guilty plea, of one count of robbery with the use of a deadly weapon. The district court sentenced Joseph to serve two consecutive prison terms of 36 to 96 months. Joseph did not file a direct appeal.

On August 13, 1999, Joseph filed a proper person post-conviction petition for a writ of habeas corpus. The district court did not appoint counsel to represent Joseph or conduct an evidentiary hearing. On November 22, 1999, the district court denied Joseph's petition. Joseph appealed, and this court remanded the case to the district court with instructions to conduct an evidentiary hearing to determine whether Joseph was deprived of his right to a direct appeal.<sup>1</sup>

On July 11, 2002, the district court conducted the evidentiary hearing. At the hearing, Joseph testified that, immediately after he was sentenced, he asked his counsel, David Lee Phillips, to file an appeal on

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<sup>1</sup>Joseph v. State, Docket No. 35369 (Order of Reversal and Remand, February 12, 2002).

his behalf because Joseph was unhappy with his sentence. Joseph also testified that Phillips told him he would file the appeal, but Phillips neither filed the appeal nor ever contacted Joseph again.

Phillips also testified at the evidentiary hearing. Phillips testified that, although he remembered talking to Joseph and his relatives about an appeal, Phillips did not remember whether anybody requested that he file an appeal. Further, Phillips did not testify about his general practice or describe the standard procedures he follows when a client requests a direct appeal. On August 14, 2002, the district court denied Joseph's petition, finding: "Phillips did not have an obligation to file an appeal, even if [Joseph] had requested it." We conclude the district court erred in denying the petition.

In Lozada v. State, this court recognized that "an attorney has duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction."<sup>2</sup> If counsel fails to file an appeal after a convicted defendant makes a timely request that counsel do so, the defendant is entitled to the Lozada remedy, namely, to file a post-conviction habeas petition, with the assistance of counsel, raising direct appeal issues for appellate consideration.<sup>3</sup> Notably, in order to be afforded the Lozada remedy, a petitioner is not required to present any direct appeal claims or to demonstrate that he would have succeeded on appeal but for counsel's conduct; rather, a petitioner must only show that he was deprived of his right to a direct appeal without his consent.<sup>4</sup>

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<sup>2</sup>Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994).

<sup>3</sup>Id.

<sup>4</sup>See id. at 357, 871 P.2d at 949.

In this case, the district court's refusal to afford Joseph the Lozada remedy was primarily based upon the district court's finding that Joseph failed to demonstrate prejudice at the evidentiary hearing. Specifically, the district court found that Joseph had waived any direct appeal claims by pleading guilty and, further, found that trial counsel had an ethical obligation not to file an appeal alleging "frivolous matters if that's the only ground that was set forth."<sup>5</sup> As discussed above, however, a petitioner need not show that a direct appeal would have succeeded to be afforded the remedy described in Lozada. Because Joseph demonstrated he was deprived of his right to a direct appeal due to his counsel's conduct, the district court should have provided Joseph with the Lozada remedy without consideration of whether Joseph was prejudiced by counsel's deficient conduct.<sup>6</sup>

Accordingly, we reverse the district court order, and we remand this matter to the district court to allow Joseph, with the assistance of counsel, to file a post-conviction petition for a writ of habeas corpus raising direct appeal issues pursuant to Lozada. The district court

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<sup>5</sup>We note that the district court erred in its conclusions. A defendant who pleads guilty still has a limited right to appeal. See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Moreover, counsel has an ethical duty to file an appeal despite his belief that the appeal will not prevail. See Ramos v. State, 113 Nev. 1081, 1084-85, 944 P.2d 856, 858 (1997) ("An action is not frivolous even though the lawyer believes that the client's position will ultimately not prevail.").

<sup>6</sup>See Lozada, 110 Nev. at 357, 871 P.2d at 949 (holding that "prejudice may be presumed for purposes of establishing the ineffective assistance of counsel when counsel's conduct completely denies a convicted defendant an appeal").

should then conduct a meaningful review of the claims raised in the Lozada petition, considering whether they were waived by the guilty plea or would have succeeded on the merits.<sup>7</sup>

Having considered Joseph's claim and concluded that the district court erred in failing to provide him with the Lozada remedy, we

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

  
\_\_\_\_\_, J.  
Rose

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

  
\_\_\_\_\_, J.  
Maupin

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<sup>7</sup>It appears that the district court considered the merits of some of Joseph's direct appeal claims, which were set forth in his original proper person post-conviction habeas petition, without first affording him the Lozada remedy. Despite such consideration, we conclude Joseph did not receive the complete remedy fashioned by this court in Lozada. The Lozada remedy only applies after a determination that a petitioner's right to a direct appeal has been violated. Here, the district court determined that Joseph was not deprived of his right to a direct appeal. Likewise, the Lozada remedy is incomplete if the petitioner is not afforded counsel to assist in filing the petition for a writ of habeas corpus raising direct appeal claims. Id. at 359, 871 P.2d at 950. Joseph's original petition raising direct appeal claims was prepared without the assistance of counsel.

cc: Hon. Michael L. Douglas, District Judge  
Lizzie R. Hatcher  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk