

IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRY PHILLIPS A/K/A TERRY
ROBIN PHILLIPS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40840

FILED

FEB 10 2004

ORDER OF REVERSAL AND REMAND

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

This is a proper person appeal from orders of the district court denying appellant Terry Phillips' post-conviction petition for a writ of habeas corpus and motion for prisoner transportation.

On November 6, 2001, the district court convicted Phillips, pursuant to a guilty plea, of possession of a controlled substance with intent to sell (count I), and possession of a firearm by an ex-felon (count II). The district court sentenced Phillips to serve a term of 16 to 48 months in the Nevada State Prison for count I, and a consecutive 28 to 72 months for count II. No direct appeal was taken.

On October 31, 2002, Phillips filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Phillips filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Phillips or to conduct an evidentiary hearing. On December 3, 2002, Phillips filed a motion for prisoner transportation. The district court denied the motion on December 26, 2002. On January 13, 2003, the

district court denied Phillips' petition for a writ of habeas corpus. This appeal followed.

In his petition, Phillips alleged, among other things, that his trial counsel was ineffective for failing to file an appeal, despite a request that he do so. Our review of the record on appeal revealed that the district court may have erroneously denied Phillips' petition without conducting an evidentiary hearing. Phillips was entitled to an evidentiary hearing if he raised claims which, if true, would have entitled him to relief, and if his claims were not belied by the record.¹ In this case, it appeared that Phillips' claim that his counsel did not file a direct appeal after Phillips conveyed an interest in a direct appeal may not have been belied by the record and would, if true, entitle him to relief.² Thus, the district court may have erred in failing to hold an evidentiary hearing on this issue as to whether counsel's performance fell below an objective standard of reasonableness.

On January 13, 2004, we ordered the State to show cause why we should not remand this matter to the district court for an evidentiary hearing to determine whether Phillips is entitled to relief on his appeal deprivation claim. The State responded to our order on January 28, 2004.

¹See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

²See Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994) ("[A]n attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction").

The State does not oppose this case being remanded to the district court and concedes that Phillips' claim is not belied by the existing record. Accordingly, we remand this case to the district court to conduct an evidentiary hearing to determine whether Phillips' counsel failed to file a direct appeal after he expressed an interest in a direct appeal.³ If the district court determines that Phillips was denied his right to a direct appeal, the district court shall appoint counsel to represent Phillips and shall permit Phillips to file a petition for a writ of habeas corpus raising issues appropriate for direct appeal.⁴


Having reviewed the record on appeal, and for the reasons set forth above, we conclude that briefing and oral argument are unwarranted in this matter.⁵ Accordingly, we


³In his petition, Phillips also alleged that the State violated the terms of the plea agreement, and that his counsel was ineffective for failing to object to this violation. In light of our 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 Phillips' petition. If the district court determines that Phillips was deprived of a direct appeal without his consent, Phillips' claim that the State violated the terms of the plea agreement may be raised by appointed counsel in the petition filed pursuant to Lozada, 110 Nev. at 359, 871 P.2d 950.

⁴See id.

⁵See Lockett 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.⁶


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. Jackie Glass, District Judge
Terry Phillips
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁶This order constitutes our final disposition of this appeal. Any subsequent appeal from an order of the district court denying Phillips' appeal deprivation claim and the claims not reached in this order shall be docketed as a new matter. We have considered all proper person documents filed or received in this matter. We conclude that Phillips is entitled only to the relief described herein.