

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAJIED ALFORD A/K/A MAJIED  
SHARRIEFF ALFORD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 41634

FILED

MAY 06 2004

JANETTE M. BROWN  
CLERK OF SUPREME COURT  
BY *J. Ribick*  
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

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 an appeal from the order revoking probation.

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. On appeal, this court concluded that the district court had erroneously determined that the petition was procedurally barred, and this court remanded the matter to the district court to consider the merits of appellant's claims.<sup>1</sup> On remand, the district court denied appellant's petition. 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 relied upon to revoke probation, (2) false testimony was presented at the probation revocation proceedings, and (3) the district court was misled during the probation revocation proceedings.

Preliminarily, we note that this court has recognized that an ineffective assistance of counsel claim will lie only where the defendant

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<sup>1</sup>Alford v. State, Docket No. 39753 (Order of Reversal and Remand, February 5, 2003).

has a constitutional or statutory right to the appointment of counsel.<sup>2</sup> In the context of probation revocation proceedings, counsel is constitutionally 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.<sup>3</sup> It appears that the district court conceded that appellant was entitled to the effective assistance of counsel because the district court reviewed appellant's claims of ineffective assistance of counsel without any reference as to whether appellant was entitled to the effective assistance of counsel in the probation revocation proceedings. Therefore, appellant's ineffective assistance of counsel claims will be reviewed on the merits.

This court's review of this appeal revealed that the district court may have erred in denying appellant's petition without first conducting an evidentiary hearing. Appellant is entitled to an evidentiary hearing if he raises claims that, if true, would entitle him to relief and if his claims are not belied by the record.<sup>4</sup> "[C]ounsel is ineffective if he or she fails to file a direct appeal after a defendant has requested or expressed a desire for a direct appeal; counsel's performance is deficient and prejudice is presumed under these facts."<sup>5</sup> Here, it appeared that

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<sup>2</sup>McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996).

<sup>3</sup>Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973); Fairchild v. Warden, 89 Nev. 524, 516 P.2d 106 (1973) (adopting the approach set forth in Gagnon v. Scarpelli).

<sup>4</sup>See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

<sup>5</sup>Hathaway v. State, 119 Nev. \_\_\_, \_\_\_, 71 P.3d 503, 507 (2003).

appellant's claim that his counsel failed to file an appeal from the order revoking probation, despite the fact that appellant instructed him to do so, is not belied by the record, and would, if true, entitle appellant to relief. Further, the record on appeal did not refute appellant's claims that his due process rights may have been violated at the probation revocation hearing.<sup>6</sup> Thus, this court directed 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 appellant's counsel's performance fell below an objective standard of reasonableness. The State filed a timely response indicating that the State did not oppose a remand for an

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<sup>6</sup>Specifically, this court notes that the record does not refute appellant's claim that he may not have received adequate notice of the violations where it appears that the violation that he received notice for was not considered by the district court in revoking probation and where it appears that the district court relied upon violations for which he did not receive notice to revoke his probation. See NRS 176A.600(1)(c); compare Jaeger v. State, 113 Nev. 1275, 1283-84, 948 P.2d 1185, 1190 (1997) (providing that the district court may consider a violation for which the petitioner did not receive notice), with id. at 1285, 948 P.2d at 1191 (Shearing, C.J., concurring) (recognizing that after the district court has determined that the State has proven the violations alleged, the district court may consider other relevant factors, such as a defendant's record on probation, in determining whether to revoke probation). Further, to the extent that the district court did rely upon the violation for which he received notice, the violation stemming from the arrest for burglary, the record does not refute appellant's claim that his right to confront the witnesses against him may have been infringed upon by the failure to call the arresting officers to testify. See Hornback v. Warden, 97 Nev. 98, 100-01, 625 P.2d 83, 84 (1981) (holding that the probationer's right to confront his accusers was violated when the arresting officer was not required to be present for the revocation hearing and the probationer challenged the accuracy of a police report).

evidentiary hearing to determine whether appellant's counsel's performance fell below an objective standard of reasonableness.

Accordingly, we reverse in its entirety the order of the district court denying appellant's petition and remand this matter to the district court to conduct an evidentiary hearing on whether appellant's counsel's performance fell below an objective standard of reasonableness.<sup>7</sup> The district court may in its discretion appoint counsel to assist appellant in the post-conviction proceedings.<sup>8</sup> If the district court determines that appellant was deprived of an appeal from the order revoking probation without his 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 an appeal from an order revoking probation.<sup>9</sup>

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and further briefing are unwarranted in this matter.<sup>10</sup> Accordingly, we

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<sup>7</sup>Appellant's three due process claims are related to the appeal deprivation claims—these are claims that he would have raised on direct appeal from the order revoking probation. Thus, the district court shall consider whether these claims gave rise to a circumstance requiring counsel to pursue a direct appeal from the order revoking probation. See Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Because the remainder of appellant's ineffective assistance of counsel claims are related to the due process claims, we decline to consider these claims at this time. Any final order issued by the district court shall reach all of the claims raised in appellant's petition.

<sup>8</sup>See NRS 34.750.

<sup>9</sup>See Lozada v. State, 110 Nev. 349, 359, 871 P.2d 944, 950 (1994).

<sup>10</sup>See 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.<sup>11</sup>

Becker, J.  
Becker

Agosti, J.  
Agosti

Gibbons, J.  
Gibbons

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

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<sup>11</sup>We have reviewed all documents that appellant has submitted in  
proper person to the clerk of this court in this matter, and we conclude  
that appellant is entitled only to the relief described herein.