

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID RAY SMITH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 42018

FILED

JUN 28 2004

ORDER DISMISSING APPEAL

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

This is an appeal from an order of the district court denying in part and granting in part appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court; Lee A. Gates, Judge.

On May 1, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent appellant, and counsel filed a supplement to appellant's petition. The State filed a response and opposition to both the petition and the supplemental petition. The district court conducted an evidentiary hearing, and on August 7, 2003, entered an order denying appellant's claims that his guilty plea was invalid and that counsel was ineffective regarding the entry of the plea. The district court, however, granted appellant's petition in part, finding that appellant requested that his counsel file a direct appeal and that counsel failed to do so. Accordingly, pursuant to Lozada v. State,<sup>1</sup> the district court concluded that appellant could present direct appeal issues in his petition for a writ of habeas corpus. Appellant filed a notice of appeal from the district court's order.

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<sup>1</sup>110 Nev. 349, 871 P.2d 944 (1994).

From our review of the record on appeal, it appeared that the district court's decision was not a final appealable determination. Specifically, the district court ordered further proceedings in regard to appellant's petition. Accordingly, on May 25, 2004, this court ordered appellant's counsel Gary E. Gowen to show cause why this appeal should not be dismissed for lack of jurisdiction.

On June 7, 2004, Gowen filed a response in which he contends that the order appealed from is final, because although the district court found that appellant should be allowed to raise direct appeal issues in this proceeding, there are no direct appeal issues that may be raised.<sup>2</sup> Specifically, Gowen argues that appellant waived his right to appeal and because trial counsel did not move to withdraw appellant's guilty plea, "there was no issue which could have been appealed to this Court on direct appeal."

Gowen's argument that appellant waived his right to appeal is based on a paragraph in the plea agreement that informed appellant that as a result of his plea, he waived the right to appeal "unless the appeal is based upon reasonable constitutional jurisdictional or other grounds that challenge the legality of the proceedings and except as otherwise provided in subsection 3 of NRS 174.035." This language is taken from NRS

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<sup>2</sup>Gowen's response is riddled with typographical errors, incomplete sentences and grammatical errors. It fails to conform to the high standards of diligence, professionalism and competence expected of appellate counsel. See State, Emp. Sec. Dep't. v. Taylor, 100 Nev. 318, 683 P.2d 1 (1984). Moreover, it is difficult to discern what Gowen is attempting to argue. Nonetheless, this court has endeavored to discern Gowen's arguments and address them.

177.015(4). In Davis v. State,<sup>3</sup> we held that this language does not constitute an unequivocal waiver of the right to appeal. Rather, "[q]uoting the statutory language in a plea agreement merely informs the defendant of the limitations of a potential appeal; it alerts the defendant who pleads guilty to the permissible scope of his appeal as a matter of law."<sup>4</sup> We therefore conclude that appellant did not waive his right to appeal entirely.

Gowen correctly points out that the issues that may be raised on direct appeal from a judgment of conviction pursuant to a guilty plea are limited.<sup>5</sup> It is true, that by pleading guilty, a defendant waives all errors that occurred prior to entry of his guilty plea, including the deprivation of constitutional rights.<sup>6</sup>

Gowen appears to argue that no appeal may be taken from a guilty plea except regarding the denial of a motion to withdraw the plea. As we have previously held, however:

This court's prior precedents do not preclude a direct appeal from a defendant whose conviction is based on a guilty plea. Instead, we have held that challenges to the validity of a guilty plea and

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<sup>3</sup>115 Nev. 17, 19, 974 P.2d 658, 659 (1999).

<sup>4</sup>Id.

<sup>5</sup>Gowen cites to NRS 176.035(3) in support of this proposition. This court assumes that this is a typographical error, as the statutory provision cited deals with whether sentences are to run concurrently or consecutively.

<sup>6</sup>See Tollett v. Henderson, 411 U.S. 258, 267 (1973); Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975).

claims of ineffective assistance of trial and appellate counsel must be first pursued in post-conviction proceedings in the district court. Nevertheless, all other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings. These claims could include a challenge to the constitutional validity of the statute on which the conviction was based; a challenge to the sentence imposed on constitutional or other grounds; a claim that the state breached the plea agreement at sentencing; a challenge to the procedures employed that led to the entry of the plea, if that challenge does not address the voluntariness of the plea; and a claim that the district court entertained an actual bias or that there were other conditions that rendered the proceedings unfair. This list is intended to be illustrative rather than inclusive.<sup>7</sup>

As this holding of the court illustrates, there are issues that may be raised in a direct appeal from a judgment of conviction pursuant to a guilty plea. In this case, appellant testified at the evidentiary hearing that he wished to challenge on direct appeal the length of his sentence and whether the sentence exceeded the "cap" imposed by the plea agreement. While we express no opinion as to the merits of these two issues, the district court found that appellant was deprived by his prior trial counsel of his right to a direct appeal. Pursuant to Lozada, the district court afforded appellant the opportunity to present such direct appeal issues to

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<sup>7</sup>Franklin v. State, 110 Nev. 750, 751-52, 877 P.2d 1058, 1059 (1994) (citations omitted), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

the district court, along with any others that appellant might wish to raise that are appropriate for direct appeal. Should Gowen persist in refusing to file a supplemental petition raising direct appeal issues, he will only be perpetuating the ineffective assistance of counsel that the district court found was committed by former trial counsel.

In sum, it is clear that the district court's order is not final, because the direct appeal issues have yet to be presented or decided. This court expects Gowen to raise in the district court, in a supplemental petition for a writ of habeas corpus, any issues which appellant could have raised on direct appeal. After consideration of those issues, the district court shall enter findings of fact, conclusions of law and a judgment in conformity with NRS 34.830. If the district court denies appellant relief, appellant may appeal the denial to this court, upon the filing of a timely notice of appeal.


Finally, we note that appellant's initial petition was actually filed a few days after the one year deadline for filing a petition pursuant to NRS 34.726(1). Apparently, the State filed a motion to dismiss the petition based on its untimeliness, but the pleadings relating to that motion have not been provided to this court. Moreover, the record before this court does not contain written findings and conclusions of the district court on the issue of whether appellant demonstrated good cause to overcome the procedural bar set forth in NRS 34.726(1). Accordingly, the district court's final order resolving this petition shall set forth explicit findings and conclusions addressing this issue.

Based on the foregoing, we conclude that the district court has not yet entered a final order in this matter. We therefore lack jurisdiction to entertain this appeal, and we

ORDER this appeal DISMISSED.<sup>8</sup>

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

  
\_\_\_\_\_, J.  
Agosti

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Lee A. Gates, District Judge  
Gary E. Gowen  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>8</sup>Although this court has elected to file the appendix submitted, we note that it does not comply with the arrangement and form requirements of the Nevada Rules of Appellate Procedure. See NRAP 3C(e)(2); NRAP 30(c); NRAP 32(a). Specifically, the documents are not arranged in chronological order and the index is not alphabetized. Counsel is cautioned that failure to comply with the requirements for appendices in the future may result in the appendix being returned, unfiled, to be correctly prepared. See NRAP 32(c). Failure to comply may also result in the imposition of sanctions by this court. See NRAP 3C(n).