

IN THE SUPREME COURT OF THE STATE OF NEVADA

KHALID ALEXANDER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42182

FILED

OCT 27 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is a proper person appeal from an order of the district court denying appellant Khalid Alexander's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On March 8, 2002, the district court convicted Alexander, pursuant to a guilty plea, of possession of a controlled substance with intent to sell. The district court sentenced Alexander to serve a term of 19 to 48 months in the Nevada State Prison. The district court suspended Alexander's sentence and placed him on probation for a period not to exceed five years. No direct appeal was taken.

On December 18, 2002, the district court entered a written order revoking Alexander's probation, causing the original sentence to be executed and amending the judgment of conviction to include jail time credit totaling 121 days. Alexander did not file an appeal from the order revoking probation.

On May 28, 2003, Alexander filed a proper person post-conviction petition for a writ of habeas corpus in the district court

challenging the revocation of his probation. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Alexander or to conduct an evidentiary hearing. On September 23, 2003, the district court denied Alexander's petition. This appeal followed.

In his petition, Alexander raised several claims of ineffective assistance of counsel.¹ To state a claim of ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's errors, there is a reasonable probability that the outcome of the proceedings would have been different.²

First, Alexander claimed that his counsel was ineffective for advising his witnesses, Donna and Clayton Kelly, not to appear at his final probation revocation hearing. Even assuming that counsel's failure to call

¹We note that this court has recognized that an ineffective assistance of counsel claim will lie only where the defendant has a constitutional or statutory right to the appointment of counsel. See McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996). It appears that the district court conceded that Alexander was entitled to the effective assistance of counsel because the district court reviewed his claims of ineffective assistance of counsel without any reference as to whether appellant was entitled to effective assistance of counsel in the probation revocation proceeding. Therefore, Alexander's ineffective assistance of counsel claims will be reviewed on the merits. See Gagnon v. Scarpelli, 411 U.S. 778 (1973); Fairchild v. Warden, 89 Nev. 524, 516 P.2d 106 (1973) (adopting the approach set forth in Gagnon).

²See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

the Kellys to testify constituted deficient performance, we conclude that Alexander failed to demonstrate that he suffered any prejudice from counsel's omission. Alexander was alleged to have committed three probation violations. Thus, even if Clayton Kelly's testimony had disproved one of the allegations, Alexander faced two other allegations, either of which would have supported a revocation. Moreover, Alexander failed to explain the nature of Donna Kelly's testimony.³ Accordingly, we conclude Alexander's claim is without merit.

Second, Alexander argued that his counsel was ineffective for failing to assert his right of confrontation and for not challenging the evidence against him. Alexander complained that his counsel should have cross-examined his probation officer, Brian Zana. However, Alexander failed to explain what cross-examination he desired his counsel to undertake.⁴ He also failed to identify what evidence he believed his counsel should have challenged. We conclude that Alexander failed to demonstrate he was prejudiced by counsel's omission. Securing reinstatement would have been difficult in light of the district court's previous reinstatement of Alexander's probation after a violation. Accordingly, we conclude that counsel was not ineffective in this regard.

Third, Alexander argued that his counsel was ineffective for failing to provide him a copy of the report from his final revocation hearing. Alexander admitted in his petition that he obtained a copy of the

³See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

⁴See id.

report within weeks after the hearing. Alexander also claimed that his counsel was ineffective for failing to provide him a copy of the report from his preliminary inquiry hearing. We conclude that, even assuming counsel's performance was deficient in failing to provide Alexander with these reports, he failed to demonstrate any resulting prejudice from counsel's omission. Accordingly, we conclude that Alexander's claim is without merit.

Finally, Alexander contended that his counsel was ineffective for failing to perfect an appeal from the district court's order revoking his probation. Specifically, Alexander asserted that he attempted to contact his counsel numerous times to request his counsel to file an appeal from the revocation order. Alexander claimed he received no response from counsel and subsequently attempted to file a motion to vacate the revocation order.⁵ Alexander contended that the district court, pursuant to Eighth Judicial District Court Rule 3.70, did not file his motion, but rather forwarded it to his counsel. Alexander asserted that his counsel took no action on the motion.

Our preliminary review of this appeal revealed that the district court may have erroneously denied Alexander's petition without first conducting an evidentiary hearing. Alexander is entitled to an evidentiary hearing if he raises claims that, if true, would entitle him to

⁵There is no indication in the record when Alexander attempted to file his motion to vacate the revocation order.

relief and if his claims are not belied by the record.⁶ This court has held that if a criminal defendant expresses a desire to appeal, counsel is obligated to file a notice of appeal on the defendant's behalf.⁷ Prejudice is presumed where a defendant expresses a desire to appeal and counsel fails to do so.⁸ Here, it appeared that Alexander expressed a desire to appeal the district court's order revoking his probation and that his counsel's unavailability prevented him from presenting his claim on appeal. Alexander's claim is not belied by the record, and would, if true, entitle him to relief. Therefore, 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 counsel's performance fell below an objective standard of reasonableness. The State filed a timely response.

Having considered the State's response, we conclude that this case should be remanded to determine whether counsel's performance fell below an objective standard of reasonableness in failing to file an appeal on Alexander's behalf.⁹ We affirm the district court order to the extent it denied Alexander's other ineffective assistance of counsel claims.

⁶See Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

⁷Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999); Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994).


⁸Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003); Lozada, 110 Nev. at 357, 871 P.2d at 949.


⁹In his petition, Alexander also claimed that: he did not receive a "constitutionally firm" preliminary inquiry hearing because the hearing officer was not impartial and did not base his recommendation to revoke

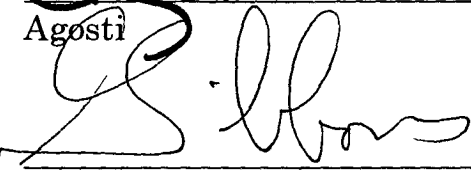
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Having reviewed the record on appeal, and for the reasons set forth above, we conclude that briefing and oral argument are unwarranted.¹⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.¹¹


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

... continued

Alexander's probation on probable cause; "the revocation hearing lacked due process as there was no confrontation of evidence submitted"; there was insufficient evidence to support a revocation of his probation; and the final revocation hearing was not conducted by an impartial body. In light of our order, we decline to consider these claims. The district court shall resolve these claims in any final order resolving Alexander's appeal deprivation claim.

¹⁰See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹¹We have reviewed all documents that Alexander has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted.