

IN THE SUPREME COURT OF THE STATE OF NEVADA

RODERICK SAWYER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 42634

FILED

OCT 08 2004

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

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT  
THE JUDGMENT OF CONVICTION

This is a proper person appeal from an order of the district court denying appellant Roderick Sawyer's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

On September 27, 2000, the district court convicted Sawyer, pursuant to a guilty plea, of burglary while in possession of a deadly weapon (count I), and attempted robbery with the use of a deadly weapon (count II). The district court sentenced Sawyer to serve a term of 26 to 120 months in the Nevada State Prison for count I, to be served concurrently with two consecutive terms of 16 to 72 months for count II. The district court suspended Sawyer's sentence and placed him on probation for a fixed period of five years. On December 30, 2002, the district court entered a written order revoking Sawyer's probation, causing

the original sentence to be executed. This court dismissed Sawyer's untimely appeal from the order revoking probation for lack of jurisdiction.<sup>1</sup>

On August 25, 2003, Sawyer filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent Sawyer. On December 11, 2003, the district court conducted an evidentiary hearing, and subsequently denied Sawyer's petition. This appeal followed.

In his petition, Sawyer contended that the attorney who represented him at his probation revocation proceeding, John Momot, was ineffective for failing to file an appeal on his behalf.

We initially 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.<sup>2</sup> In the context of a probation revocation proceeding, counsel is constitutionally required only 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 that are difficult or complex to present.<sup>3</sup> It appears that the district court conceded

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<sup>1</sup>Sawyer v. State, Docket No. 41258 (Order Dismissing Appeal, April 28, 2003).

<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, 525, 516 P.2d 106, 107 (1973) (adopting the approach set forth in Gagnon).

that Sawyer was entitled to the effective assistance of counsel because the district court reviewed his claim without any discussion concerning whether Sawyer was entitled to the effective assistance of counsel in his probation revocation proceeding. Therefore, we will review Sawyer's ineffective assistance of counsel claim on the merits.

"[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>4</sup> Here, Sawyer contended that he asked attorney Momot to file an appeal from the order revoking probation, but Momot failed to do so. During the evidentiary hearing, however, Momot testified that Sawyer did not ask him to file an appeal. The district court determined that Momot was the more credible witness, and concluded that Sawyer therefore failed to demonstrate that Momot was ineffective with respect to this claim. The district court's determination was supported by substantial evidence and was not clearly wrong.<sup>5</sup> Therefore, the district court did not err in denying Sawyer relief on this claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Sawyer is not entitled to relief and that briefing and oral argument are unwarranted.<sup>6</sup> However, our review of the judgment of conviction reveals an error. The amended judgment of

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<sup>4</sup>Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003).

<sup>5</sup>See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

<sup>6</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

conviction provides that Sawyer was convicted of burglary, rather than burglary while in possession of a deadly weapon, in count I. We therefore conclude that this matter should be remanded to the district court for correction of this error. Accordingly, we

ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.

Becker, J.  
Becker

Agosti, J.  
Agosti

Gibbons, J.  
Gibbons

cc: Hon. Valorie Vega, District Judge  
Roderick Sawyer  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk