

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE ROBERTO COLATO, JR. A/K/A
JOSE GARCIA COLATO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50627

FILED

DEC 03 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from a district court order denying appellant Jose Roberto Colato's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

On July 27, 2004, Colato was convicted, pursuant to a guilty plea, of one count each of attempted murder with the use of a deadly weapon and trafficking in a controlled substance. The district court sentenced Colato to serve two consecutive prison terms of 60-240 months for the attempted murder and a concurrent prison term of 48-180 months for the trafficking. Colato was ordered to pay \$63,244 in restitution. Colato's untimely direct appeal to this court was dismissed due to a lack of jurisdiction.¹

On February 23, 2005, Colato filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Colato and counsel filed a

¹Colato v. State, Docket No. 43876 (Order Dismissing Appeal, November 4, 2004).

supplement to the petition. The State filed a motion to dismiss Colato's petition but requested a hearing to determine whether he was improperly denied his right to a direct appeal in violation of Lozada v. State.² On June 28, 2006, the district court entered an order granting the State's motion, finding that all but one of Colato's claims were either without merit or belied by the record. The district court agreed that Colato was entitled to an evidentiary hearing on his appeal deprivation claim. The district court subsequently conducted an evidentiary hearing and, on November 5, 2007, entered an order denying Colato's petition. This timely appeal followed.

First, Colato contends that the district court erred by finding that counsel was not ineffective for failing to adequately explain that the deadly weapon enhancement must run consecutively to the underlying count of attempted murder. Colato claims that, as a result, he did not enter his plea knowingly, intelligently, and voluntarily. We disagree.

At the evidentiary hearing, Colato's former counsel testified that she explained to him, prior to the entry of his guilty plea, that the deadly weapon enhancement must run consecutively to the underlying charge. Counsel stated that "Colato appeared to understand all the ramifications of the offer that he ultimately pled to." Counsel testified that she reviewed the written plea agreement with Colato, and the agreement, signed by Colato, stated that the sentence imposed for the use of a deadly weapon would run consecutively to the term imposed for the attempted murder. Our review of the plea canvass reveals that the

²110 Nev. 349, 871 P.2d 944 (1994).

district court also informed Colato about the consecutive nature of the deadly weapon enhancement.

In its order denying the petition, the district court found that Colato did not receive ineffective assistance of counsel and that he was properly advised prior to the entry of his guilty plea.³ The district court's factual findings are entitled to deference when reviewed on appeal.⁴ Colato has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, Colato has not demonstrated that the district court erred as a matter of law. Therefore, we conclude that the district court did not err by rejecting this claim.

Second, Colato contends that the district court erred by failing to find that counsel were ineffective for failing to file a timely direct appeal. Colato claims that he informed his appointed public defender and then retained counsel that he wished to pursue a direct appeal and therefore is entitled to the Lozada remedy. We agree.

In Lozada, this court recognized that "an attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction."⁵ If counsel fails to file an appeal after a convicted defendant makes a timely request, the defendant is entitled to the Lozada remedy and may file a post-conviction habeas petition, with the assistance of counsel, raising direct appeal issues

³Strickland v. Washington, 466 U.S. 668 (1984).

⁴See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

⁵Lozada, 110 Nev. at 354, 871 P.2d at 947.

for appellate consideration.⁶ Notably, in order to be afforded the Lozada remedy, a petitioner is not required to present any direct appeal claims or demonstrate that he would have succeeded on appeal; rather, a petitioner must only show that he was deprived of his right to a direct appeal without his consent.⁷ Prejudice is presumed when an appellant instructs counsel to file an appeal and counsel fails to do so.⁸

At the evidentiary hearing and in the two orders denying Colato's petition, the district court failed to make any findings pertaining to his appeal deprivation claim. Colato testified at the evidentiary hearing that approximately two weeks after sentencing, he called his public defender and left a message indicating that he wished to appeal. The public defender did not return his call and Colato's mother subsequently retained Charles Diaz to investigate potential appellate issues. Diaz testified that he "told the public defender's office a half dozen times" that Colato wanted to appeal; Diaz even called and spoke directly with John Petty, the chief appellate deputy public defender. Diaz stated that he filed the notice of appeal on Colato's behalf, one day late, after discovering that the public defender's office failed to do so.

Based on the above, we conclude that the district court erred by not finding that Colato was improperly denied his right to a direct appeal. Accordingly, we reverse the district court order in part and remand this matter to allow Colato, with the assistance of counsel, to file a

⁶Id.

⁷See id. at 357, 871 P.2d at 949.

⁸Mann v. State, 118 Nev. 351, 353-54, 46 P.3d 1228, 1229-30 (2002).

post-conviction petition for a writ of habeas corpus raising direct appeal issues pursuant to Lozada. The district court should then conduct a meaningful review of the claims raised in the Lozada petition.⁹

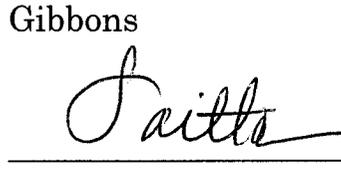
Therefore, having considered Colato's claims and concluded that the district court erred by failing to provide him with the Lozada remedy, we

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.


_____ J.

Cherry

_____ J.

Gibbons

_____ J.

Saitta

⁹It appears that the district court considered the merits of some of Colato's direct appeal claims which were set forth in his proper person and supplemental post-conviction habeas petition without first affording him the Lozada remedy. Despite such consideration, we conclude that Colato did not receive the complete remedy fashioned by this court in Lozada. The Lozada remedy only applies after a determination that a petitioner's right to a direct appeal has been violated. Moreover, the Lozada remedy is incomplete if the petitioner is not afforded counsel to assist in filing the petition raising direct appeal claims. Lozada, 110 Nev. at 359, 871 P.2d at 950.

cc: Hon. Robert H. Perry, District Judge
Mary Lou Wilson
Jose Roberto Colato, Jr.
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk