

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL LEONETTI A/K/A MICHAEL
BIONDO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39531

FILED

AUG 20 2002

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

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from an order of the district court denying appellant's habeas corpus petition labeled, "good cause exists for the filing of a second or successive petition for a writ of habeas corpus."

On October 24, 2000, the district court convicted appellant, pursuant to a guilty plea, of one count of attempted sexual assault of a minor under the age of sixteen. The district court sentenced appellant to serve a minimum term of ninety-six months to a maximum term of two hundred and forty months in the Nevada State Prison. This court dismissed appellant's direct appeal.¹

On May 9, 2001, while his direct appeal was pending in this court, appellant filed a proper person post-conviction petition for a writ of habeas corpus and a motion to withdraw a guilty plea in the district

¹Leonetti v. State, Docket No. 36980 (Order Dismissing Appeal, January 2, 2002).

court.² The State opposed the petition and motion. Appellant filed a response. On August 27, 2001, Mr. Taylor, appellant's appellate counsel, appeared in the district court. Mr. Taylor advised the district court that it lacked jurisdiction to consider the habeas corpus petition and motion because the direct appeal was pending in this court. The district court took the matters off calendar and never resolved the merits of the claims raised in appellant's May 9, 2001 habeas corpus petition and motion to withdraw a guilty plea.

On February 19, 2002, after this court had dismissed appellant's direct appeal, appellant filed the following proper person documents: (1) a motion to return his habeas corpus petition to the court's calendar; (2) a document labeled, "judicial notice" relating to the appointment of counsel, (3) a motion to renew appellant's motion for an evidentiary hearing, motion for the appointment of counsel, and motion for assignment of an investigator, (4) and a supplemental habeas corpus petition. On March 4, 2002, the district court orally denied appellant's motion to place his habeas corpus petition on the court's calendar. The State opposed appellant's judicial notice, and the district court denied relief. On March 13, 2002, appellant filed a habeas corpus petition labeled, "good cause exists for the filing of a second or successive petition

²On July 27, 2001, the district court entered a written order stating that Mr. William J. Taylor was being appointed to represent appellant in the habeas corpus proceedings. This appears to have been a clerical error. The district court minutes indicate that Mr. Taylor was appointed for the direct appeal and not for the habeas corpus proceedings.

for writ of habeas corpus.” The State opposed appellant’s good cause petition. On April 9, 2002, the district court denied appellant’s good cause petition. This appeal followed.

In his petition, appellant argued that he had good cause to file a second habeas corpus petition because his first habeas corpus petition was never denied on the merits. We agree. We conclude that the district court erred in denying appellant’s good cause petition. The district court minutes for August 27, 2001, clearly indicate that appellant’s May 9, 2001 habeas corpus petition was taken off calendar and never resolved on the merits by the district court.³ Therefore, because appellant’s first timely habeas corpus petition was never resolved on the merits due to actions taken by the district court, appellant had good cause to file a second habeas corpus petition.⁴ We reverse the order of the district court denying appellant’s petition for good cause, and we remand this matter to the district court to consider on the merits appellant’s May 9, 2001 habeas corpus petition, appellant’s May 9, 2001 motion to withdraw a guilty plea,

³We note that the district court did not lack jurisdiction to consider the May 9, 2001 habeas corpus petition and motion to withdraw a guilty plea. No rule of law prevents the district court from entertaining a habeas corpus petition or a motion to withdraw a guilty plea while a direct appeal from the judgment of conviction is pending in this court. See, e.g., Huneycutt v. Huneycutt, 94 Nev. 79, 575 P.2d 585 (1978); see also Sheriff v. Gleave, 104 Nev. 496, 761 P.2d 416 (1988) (holding that habeas corpus is an independent proceeding); Varwig v. State, 104 Nev. 40, 752 P.2d 760 (1988).

⁴Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994) (holding that good cause must be an impediment external to the defense).

and all of the subsequent documents filed by appellant in an effort to litigate his petition and motion.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.⁵ Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.⁶


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. John S. McGroarty, District Judge
Attorney General/Carson City
Clark County District Attorney
Michael Leonetti
Clark County Clerk

⁵See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁶We have considered all proper person documents filed or received in this matter. We conclude that appellant is entitled only to the relief described herein.