IN THE SUPREME COURT OF THE STATE OF NEVADA

GERALD WHATLEY, JR.,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

CASE NO: 88198

RESPONSE TO ORDER TO SHOW CAUSE

On April 17, 2024, this Court issued an Order to Show Cause why this appeal should not be dismissed for lack of jurisdiction because the district court failed to enter a written order "certifying" that Appellant has established a valid appeal deprivation claim and is entitled to a direct appeal per NRAP 4(c)(1)[1]. The district court's failure is a non-jurisdictional defect where the validity and entitlement of Appellant's right to an untimely direct appeal was established in a habeas appeal and now constitutes law of the case.

While it is generally true that "an untimely notice of appeal fails to vest jurisdiction in this court," that body of case law pertains to the 30-day time period

[1] The Rule does not require "certifying" anything, but instead contemplates "entry" of a written order with certain findings. NRAP 4(c)(1).

of NRAP 4(b) which is inapplicable in the present case. *See e.g., Lozada v. State*, 110 Nev. 349, 871 P.2d 944 (1994). Instead, the current appeal arises under NRAP 4(c)(1) for when an untimely direct appeal may be filed. In compliance with that Rule, Appellant filed an appeal deprivation claim in a timely postconviction petition for writ of habeas corpus. *See Whatley*, Docket No. 86185-COA, *infra*. The district court denied the habeas claim but the Court of Appeals reversed and found deficient performance by taking judicial notice of counsel's affidavit filed in the direct appeal and by presuming prejudice. *See Whatley v. District Court*, Docket No. 86185-COA, Order Affirming in Part, Reversing in Part and Remanding (Dec. 28, 2023), pp. 2-4, attached hereto as Exhibit A. The time for seeking rehearing or review by this Court under NRAP 40B expired and remittitur issued on January 22, 2024. *Id*. This final and fully dispositive Order from the Court of Appeals was filed in the district court and now constitutes law of the case in full satisfaction of NRAP 4(c)(1)'s requirement for "findings of fact and conclusions of law finding that the petitioner has established a valid appeal-deprivation claim and is entitled to a direct appeal." While ordinarily an appellate court is not a finder of fact, the Court of Appeals nonetheless made a factual finding based on an affidavit it found filed in another appeal which was not before nor considered by the district court judge. On remand, the district court appointed undersigned counsel for purpose of the direct

appeal who then filed a notice of appeal as contemplated by NRAP 4(c)(3). This appeal is from the original judgment of conviction, not from the habeas case.

The fact that it was the Court of Appeals instead of the district court which made the necessary findings does not affect this Court's jurisdiction to hear the instant appeal. NRAP 4(c)(1) contemplates the situation where the district court grants an appeal deprivation claim in the first instance rather than when an appellate court does so. In those situations, the findings are required to be done by the district court so that the State may challenge them on appeal by filing a motion to dismiss per NRAP 4(c)(4). But when it is the appellate court which determines the propriety and validity of an untimely appeal, the State's opportunity to challenge that ruling is by way of petition for rehearing per NRAP 40 or petition for review per NRAP 40B. A decision of the Court of Appeals is a final decision that is not reviewable by the Supreme Court except on petition for review. NRAP 40B(a). This is the same situation as where a federal court Order determines the validity of an appeal deprivation claim in which case a notice of appeal may be filed without any further order from the state district court. NRAP 4(c)(1)(C). The final disposition by the Court of Appeals in this case together with the filing of a notice of appeal are all that is required to invoke this Court's jurisdiction for an untimely direct appeal.

Dismissal of the instant appeal for a non-jurisdictional defect such as which court made the necessary findings is unnecessary, prejudicial to Appellant, and will

result in undue delay. Through no fault of his own, Appellant's direct appeal has already been delayed by almost two years. The district court may be ordered to file findings of fact and conclusions of law and another notice of appeal be filed, but this will be surplusage and duplicative of the findings already entered by the Court of Appeals and will include judicial notice of things that were never before it. There never was any evidentiary hearing in the district court and Appellant's right to file an untimely direct appeal was established as a matter of law on appeal, not on any question or finding of fact made by the district court judge. Requiring technical compliance with NRAP 4(c)(1) so that the district court simply repeats the findings of the Court of Appeals, will not imbue this Court with any more authority or jurisdiction to entertain the instant appeal than it has right now.

DATED this 18th day of April, 2024.

/s/ Steven S. Owens

STEVEN S. OWENS, ESQ.
Nevada Bar No. 4352
1000 N. Green Valley #440-529
Henderson, NV 89074
(702) 595-1171

Attorney for Appellant

Exhibit A

IN THE SUPREME COURT OF THE STATE OF NEVADA

GERALD LEE WHATLEY, JR.,
Appellant,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK,
Respondent,
and
THE STATE OF NEVADA,
Real Party in Interest.

Supreme Court No. 86185
District Court Case No. A861330;~~C357412~~

FILED

JAN 24 2024

CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"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."
Judgment, as quoted above, entered this 28th day of December,2023.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this January 22, 2024.

Elizabeth A. Brown, Supreme Court Clerk

By: Elyse Hooper
Administrative Assistant

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IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GERALD LEE WHATLEY, JR.,
Appellant,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK,
Respondent.

No. 86185-COA

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Gerald Lee Whatley, Jr., appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on November 16, 2022, and a supplemental petition filed on November 17, 2022. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Whatley first argues the district court erred by denying his claims that counsel was ineffective. To demonstrate ineffective assistance of counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 687. We give deference to the district court's factual findings if supported by substantial evidence and not clearly

erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

Whatley claimed counsel was ineffective for failing to challenge at sentencing his prior convictions for driving under the influence and to argue that they were not certified. Whatley admits the State provided his prior driving-under-the-influence convictions but argued counsel did not challenge whether those convictions were certified. Whatley does not argue that the convictions were not actually certified, nor does he dispute that he was previously convicted of driving under the influence. Thus, Whatley failed to demonstrate counsel was deficient or a reasonable probability of a different outcome at sentencing had counsel challenged the convictions. Accordingly, we conclude the district court did not err by denying this claim.

Whatley also claimed counsel was ineffective for failing to file a timely notice of appeal from his judgment of conviction. When a convicted defendant requests an appeal, counsel has an affirmative duty to perfect the appeal. *See Lozada v. State*, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994). Here, appellate counsel admitted she failed to file a timely notice of appeal based on a misunderstanding with her co-counsel about who was to file the notice of appeal. *See Whatley v. State*, Docket No. 85077 (Response to Order to Show Cause, August 18, 2022); *see also* NRS 47.150(1) ("A judge or court may take judicial notice, whether requested or not."); *Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009) (stating this court "may take judicial notice of facts generally known or capable of verification from a reliable source"). Thus, Whatley has demonstrated counsel was deficient.

However, the district court denied this claim because Whatley failed to demonstrate he was prejudiced by counsel's failure to file a timely notice of appeal. "[W]hen the petitioner has been deprived of the right to appeal due to counsel's deficient performance, the second component (prejudice) may be presumed." *Toston v. State*, 127 Nev. 971, 976, 267 P.3d 795, 799 (2011). This court requested the State to respond to this claim on appeal. In its response, the State argued that presuming prejudice is permissive or rebuttable because of the use of the word "may" in *Toston* and *Lozada*, 110 Nev. at 357, 871 P.2d at 949, and the district court did not abuse its discretion by determining that prejudice had not been demonstrated.

A careful reading of *Lozada* demonstrates that the Nevada Supreme Court did not intend the presumption of prejudice to be a permissive or rebuttable standard. The supreme court found that "we incorrectly required Lozada to establish prejudice in his appeal from the denial of his petition for post-conviction relief. Assuming Lozada's trial counsel failed to perfect an appeal without Lozada's consent, Lozada presumably suffered prejudice because he was deprived of his right to appeal." *Lozada*, 110 Nev. at 357, 871 P.2d at 949; *see also Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000) (holding that "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal"); *United States v. Cronic*, 466 U.S. 648, 659-60 (1984) (holding that the complete denial of counsel at a critical stage warrants the presumption

of prejudice). Thus, because Whatley established counsel was deficient, we conclude that the district court erred by not concluding that prejudice was presumed. Accordingly, we reverse the district court's decision to deny this claim, and we remand this matter to the district court to comply with NRAP 4(c).

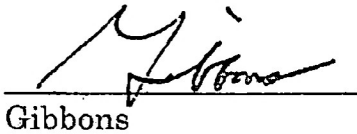
Next, Whatley claims the district court erred by denying his claim that counsel was ineffective for failing to file a motion to suppress the results from his blood draw. This claim was not properly before the district court. Whatley raised this claim for the first time in a pleading filed after the State responded to his petition and supplemental petitions, but the district court had not given Whatley permission to file further pleadings, *see* NRS 34.750(5). And the district court did not consider this claim in its written order below. Therefore, we decline to consider this claim for the first time on appeal. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

Next, Whatley argues the district court erred by denying his claims that the trial court erred at sentencing. Such claims are appropriate to raise on direct appeal. *See* NRS 34.810(1)(b). Therefore, we conclude the district court did not err by denying these claims.

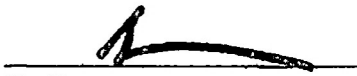
Finally, Whatley argues the district court erred by denying his petition and supplement without giving him sufficient time to reply to the State's response to his petition and supplement. The district court has the discretion to allow a petitioner to file documents to supplement his initial petition, *see* NRS 34.750(5), but the district court did not grant Whatley permission to file additional documents. Because Whatley did not have

permission to file additional documents in support of his petition, he fails to demonstrate he is entitled to relief on this claim. 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.



_____, C.J.
Gibbons



_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Eric Johnson, District Judge
Gerald Lee Whatley, Jr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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THE STATE OF NEVADA,
Real Party in Interest.

Supreme Court No. 86185
District Court Case No. A861330; ~~C357442~~

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: January 22, 2024

Elizabeth A. Brown, Clerk of Court

By: Elyse Hooper
Administrative Assistant

cc (without enclosures):
Hon. Eric Johnson, District Judge
Gerald Lee Whatley, Jr.
Clark County District Attorney \ Alexander G. Chen\ Jonathan VanBoskerck

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on JAN 24 2024.

HEATHER UNGERMANN
Deputy District Court Clerk

RECEIVED
APPEALS
JAN 23 2024
CLERK OF THE COURT

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on April 18th, 2024. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON FORD
Nevada Attorney General

ALEXANDER CHEN
Chief Deputy District Attorney

/s/ Steven S. Owens
STEVEN S. OWENS, ESQ.