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Summary of Abdullah v. State, 129 Nev. Adv. Op. 7

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CRIMINAL LAW - APPELLATE PROCEDURE

Summary

Appeal from a district court order denying a post-conviction petition for a writ of habeas corpus and addressing whether a district court clerk is authorized to prepare and file a notice of appeal on an appellant's behalf.

Disposition

The Court held that a district court clerk lacks authority to prepare and file a notice of appeal on an appellant's behalf unless authorized by statute or court rule. First, NRS 177.075(2) authorizes the district court clerk to prepare and file a notice of appeal on a criminal defendant's behalf when the defendant proceeded to trial without counsel and requested an appeal after being advised of the right to appeal at sentencing. Second, NRAP 4(c) authorizes the district court clerk to prepare and file a notice of appeal from a conviction on a criminal defendant's behalf when the district court directs the clerk to do so, after finding that the defendant established a valid appeal-deprivation claim and is entitled to a direct appeal.

Factual and Procedural History

Appellant Bilal Abdullah (Abdullah) pled guilty to and was convicted of one count of attempted robbery. Abdullah did not appeal, but later filed a post-conviction petition for a writ of habeas corpus and asserted that he asked counsel to appeal his conviction, and counsel refused to file the appeal. The district court granted the petition in part, finding Abdullah had been deprived of his right to direct appeal due to ineffective assistance of counsel. The court ordered the clerk to "to prepare and file a Notice of Appeal from the Judgment of Conviction and Sentence on Defendant's behalf."² The clerk filed a notice of entry of the decision on February 24, 2011, and prepared and filed a notice of appeal on Abdullah's behalf. The notice of appeal designated "the Order entered in this action on February 24, 2011."

Discussion

Justice Hardesty wrote the opinion for the three-justice panel. The State asserted that the Court lacked jurisdiction to consider any issues related to the order denying the post-conviction petition, because Abdullah failed to file a notice of appeal from that order and the district court clerk did not have authority to file this notice on Abdullah's behalf. Abdullah replied that as he was proceeding in proper person at the time the clerk filed the notice, he should not have been required to know that he had to file his own notice of appeal from the order denying his petition.

¹ By Miriam C. Meyer

² NEV. R. APP. P. 4(c).

The decision to appeal rests with the appellant,³ and the district court may prepare and file a notice of appeal on a criminal defendant's behalf in two exceptions. First, when a defendant, who is without counsel, has not plead guilty or is guilty but mentally ill was informed at sentencing of his right to appeal and requests an appeal.⁴ Second, when a post-conviction petitioner demonstrated that he was deprived of his right to appeal from a judgment of conviction, the district court may order the clerk to prepare and file a notice of appeal from the judgment of conviction.⁵ These provisions ensure that a notice of appeal from a judgment of conviction is prepared and filed on behalf of a defendant in two circumstances in which there is a significant risk that the right to appeal will otherwise be lost.

NRS Chapter 34, which governs post-conviction habeas petitions and appeals therefrom, has no provision directing the court or clerk to prepare and file a notice of appeal of an aggrieved litigant's behalf.

Here, the first exception did not apply because Abdullah had counsel and pled guilty. The second exception may have applied because Abdullah alleged he was deprived of his right to appeal, and the district court found that this claim had merit and ordered the clerk to prepare and file a notice of appeal from the conviction and sentence. However, the notice of appeal prepared by the clerk did not designate the judgment of conviction and sentence.

A notice of appeal must "designate the judgment, order or part thereof being appealed"⁶ and a judgment or order that is not included in the notice of appeal is not considered on appeal.⁷ This general rule is flexible because the Court will not dismiss an appeal where the intent to appeal can be reasonably inferred.⁸

Here, the Court could not infer the intent to appeal from the conviction based on the notice of appeal prepared and filed by the district court. In prior decisions, the Court only looked beyond the notice of appeal to the order directly referenced by the notice, to determine what order the appellant intended to appeal.⁹ Here, the notice designated the February 24, 2011 order, and no order was entered on that date; however, the notice of entry of the order denying the post-conviction petition was filed on that date. When a notice of appeal designates the notice of entry of an order, the court may infer that the appellant intended to appeal from the order identified in the notice of entry.¹⁰ Here, to infer an intention to appeal from the judgment of conviction based on the notice, the Court would have had to look beyond the text of the notice of appeal and the notice of entry designated in the notice of appeal to the text of the order referenced in the notice of entry. This would have undermined the general rule that an appealable judgment or order that

³ Jones v. Barnes, 463 U.S. 745, 751 (1983); NEV. REV. STAT. 177.075(2) (2007); NEV. R. APP. P. 3C(C); NEV. R. APP. P. 4(C)(1)(B)(iii).

⁴ NEV. REV. STAT. § 177.075(2) (2007).

⁵ NEV. R. APP. P. 4(c)(1)(B)(i), (iii) (providing a district court clerk may file notice of appeal where petitioner has demonstrated that he was deprived of a direct appeal).

⁶ NEV. R. APP. P. 3(c)(1)(B).

⁷ Collins v. Union Fed. Savs., 97 Nev. 88, 89-90, 624 P.2d 496, 497 (1981).

⁸ *Id.* at 90.

⁹ *See, e.g.*, Krause Inc. v. Little, 117 Nev. 929, 933, 34 P.3d 566, 569 (2001) (looking at referenced judgment notwithstanding the verdict to construe notice of appeal as referring to underlying verdict).

¹⁰ Lemmond v. State, 114 Nev. 219, 220, 954 P.2d 1179, 1179 (1998).

was not designated in the notice cannot be considered on appeal. The Court held it was difficult to reasonably infer from the text of the notice of appeal and the notice of entry of the order designated in the notice of appeal that the intent was to appeal from the judgment of conviction.

Conclusion

The Court concluded that the appeal was not properly before the Court because the district court clerk's notice of appeal, prepared and filed on Abdullah's behalf, could not be construed as an appeal from a judgment of conviction as ordered by the district court. Although the notice could have been construed as notice of appeal from the order denying in part Abdullah's post-conviction petition for a writ of habeas corpus, the district court clerk lacked authority to file such a notice. Therefore, the notice may not invoke the Court's jurisdiction and the Court dismissed the appeal and directed the district court clerk to file a notice of appeal from the judgment of conviction consistent with the district court's order and NRAP 4(c).