

IN THE SUPREME COURT OF THE STATE OF NEVADA

GEORGE ANDREW ROBINSON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 44353 **FILED**

MAY 27 2005

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

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

On September 17, 2003, the district court convicted appellant, pursuant to a guilty plea, of three counts of driving and/or being in actual physical control while under the influence of intoxicating liquor resulting in death and/or substantial bodily harm.<sup>1</sup> The district court sentenced appellant to serve three consecutive terms of 48 to 192 months in the Nevada State Prison. Appellant did not file a direct appeal.

On August 27, 2004, appellant 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 and 34.770, the

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<sup>1</sup>On November 10, 2004, the district court entered an amended judgment of conviction.

district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On November 19, 2004, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that his conviction and sentence are invalid and he was denied due process and equal protection of the law because: (1) the district court failed to order an evaluation, as mandated by NRS 484.3796, to determine whether he is an alcohol or drug abuser and whether he could be successfully treated; (2) the statute he was charged under, NRS 484.3795, is unconstitutional; (3) he was not informed of his due process right, pursuant to NRS 175.381(2), to move for acquittal notwithstanding his plea; (4) his sentence exceeds sentences imposed for some category A felonies; and (5) the testimony presented at sentencing inflamed the passion of the court, making it impossible for the court to reasonably determine an appropriate sentence. These claims fell outside of the narrow scope of issues that may be raised in a post-conviction petition challenging a judgment of conviction based on a guilty plea.<sup>2</sup> Therefore, the district court did not err in denying these claims.

Appellant also argued that he received ineffective assistance of trial counsel. To state a claim of ineffective assistance of trial counsel sufficient to invalidate a guilty plea, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.<sup>3</sup>

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<sup>2</sup>See NRS 34.810(1)(a).

<sup>3</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

A petitioner must further establish "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."<sup>4</sup> The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>5</sup>

First, appellant claimed that his counsel was ineffective for failing to move for an acquittal notwithstanding his plea pursuant to NRS 175.381(2). We conclude that the district court did not err in denying this claim. NRS 175.381(2) does not provide for a motion for acquittal following the entry of a guilty plea. Therefore, appellant did not demonstrate that his counsel was ineffective for failing to file such a motion.

Next, appellant claimed that his counsel was ineffective for failing to properly prepare for the sentencing hearing. Within this claim, appellant failed to specifically identify what additional preparation his counsel should have engaged in. However, based upon our review of the petition, it appears that appellant believed his counsel was ineffective for failing to make the district court aware of its noncompliance with NRS 484.3796. Our review of the record reveals that although the district court sentenced appellant under NRS 484.3795, the district court did not order the evaluation and appellant's counsel did not object. Further, the State has informed this court that an evaluation in compliance with NRS

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<sup>4</sup>Hill v. Lockhart, 474 U.S. 52, 59 (1985); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

<sup>5</sup>See Strickland, 466 U.S. at 697.

484.3796 has still not been conducted for appellant. We conclude that appellant's petition was supported by sufficient factual allegations not belied by the record and, therefore, the district court erred by denying this claim.<sup>6</sup>

NRS 484.3796 provides that, before sentencing an offender pursuant to NRS 484.3795, the district court "shall require that the offender be evaluated to determine whether he is an abuser of alcohol or drugs and whether he can be treated successfully for his condition." The evaluation serves the purpose of making an offender eligible for an in-prison treatment program if the evaluation indicates that alcohol rehabilitation would be successful.<sup>7</sup> To ensure that the policy behind NRS 484.3796 is carried out, we conclude that the proper remedy under the circumstances of this case is to remand the case to the district court for the limited purpose of ordering an evaluation pursuant to NRS 484.3796. The results of that evaluation shall immediately be forwarded to the director of the Department of Corrections for consideration of appellant's eligibility for treatment programs while under his current sentence of incarceration.

Having reviewed the record on appeal, we conclude that briefing and oral argument are unwarranted.<sup>8</sup> Accordingly, we

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<sup>6</sup>See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

<sup>7</sup>NRS 209.427.

<sup>8</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for further proceedings consistent with this order.<sup>9</sup>

Becker, C.J.  
Becker

Rose, J.  
Rose

Hardesty, J.  
Hardesty

cc: Hon. Donald M. Mosley, District Judge  
George Andrew Robinson  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>9</sup>This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.