

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT WRIGHT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44687

FILED

APR 22 2005

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On August 18, 2004, the district court convicted appellant, pursuant to a guilty plea, of one count of burglary with the assistance of a child. The district court sentenced appellant to serve two consecutive terms of twelve to forty-eight months in the Nevada State Prison. No direct appeal was filed.

On November 16, 2004, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Additionally, appellant filed an affidavit in support of his habeas corpus petition. The State opposed the petition. Appellant filed a response. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On February 7, 2005, the district court denied appellant's petition. This appeal followed.

The district court denied the petition on the grounds that appellant had failed to file a petition in the proper form pursuant to NRS 34.735 and that appellant had failed to verify his petition pursuant to NRS 34.730. Based upon our review of the record on appeal, we conclude that the district court erred in its reasoning denying the petition. Appellant's petition substantially complied with the informational requirements set forth in NRS 34.735. Although appellant did not verify the November 16, 2004 petition itself, appellant filed a supporting affidavit one week later in which he swore under the penalty of perjury that the information presented was true and correct.¹ This affidavit sufficiently complied with the verification requirement.² However, we conclude that the district court reached the correct result in denying the petition for the reasons discussed below.

¹See Miles v. State, 120 Nev. ___, 91 P.3d 588 (2004) (determining that the district court has discretion to permit the petitioner to cure a verification defect). In the instant case, appellant submitted an affidavit rectifying his previous lack of verification within the time for filing a habeas corpus petition. See NRS 34.726(1). The record reveals that the district court implicitly permitted this amendment when it filed the affidavit and stated in its final order that it had considered the "documents on file herein."

²See NRS 34.735 (setting forth a statement of verification that the petitioner declares under penalty of perjury); NRS 208.165 ("A prisoner may execute any instrument by signing his name immediately following a declaration 'under penalty of perjury' with the same legal effect as if he had acknowledged it or sworn to its truth before a person authorized to administer oaths.").

In his petition, appellant contended that his trial counsel was ineffective for failing to file a direct appeal. Appellant claimed that his counsel could have argued on appeal that he was improperly charged with the "assistance of a child" enhancement because the enhancement was not set forth as a separate count. Appellant claimed that this was a "dead bang winner" of an issue.

The record on appeal reveals that appellant was advised of his limited right to appeal in the written guilty plea agreement.³ Specifically, appellant was advised that by entry of his plea he waived his "right to appeal the conviction . . . unless the appeal is based upon reasonable constitutional jurisdictional or other grounds that challenge the legality of the proceedings" Appellant does not allege that he asked counsel to file a direct appeal and nothing in the record suggests that a direct appeal in appellant's case had a reasonable likelihood of success.⁴ The "assistance of a child" enhancement was properly charged in the instant case.⁵ Therefore, appellant failed to demonstrate that trial counsel was ineffective in this regard.


³See Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).


⁴See Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999); see also Roe v. Flores-Ortega, 528 U.S. 470 (2000); Davis, 115 Nev. at 20, 974 P.2d at 660.

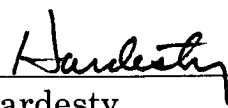
⁵NRS 193.162(2) provides that "[t]his section does not create a separate offense but provides an additional penalty for the primary offense, whose imposition is contingent upon the finding of the prescribed fact." Thus, the "assistance of a child" enhancement was properly included in the count setting forth the primary offense and not as a separate count.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

cc: Hon. Joseph T. Bonaventure, District Judge
Robert Wright
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁶See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).