

IN THE SUPREME COURT OF THE STATE OF NEVADA

TROY S. JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45089

FILED

SEP 16 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Ruben*
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; Nancy M. Saitta, Judge.

On November 26, 2003, the district court convicted appellant, pursuant to a guilty plea, of driving and/or being in actual physical control while under the influence and causing death and/or bodily harm.¹ The district court sentenced appellant to serve a term of seven to twenty years in the Nevada State Prison. No direct appeal was taken.

On November 19, 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, the district court declined to appoint counsel to represent appellant. The district court conducted an evidentiary hearing on one issue—whether appellant's trial counsel was ineffective for failing to file a direct appeal on his behalf. On

¹The offense resulted in the death of one victim, a pedestrian, and injuries to a second victim, a motorist.

March 22, 2005, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of counsel.² To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability of a different outcome absent the alleged errors.³ When a conviction is based upon a guilty plea, a petitioner must demonstrate a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.⁴ The court need not consider both prongs if the petitioner makes an insufficient showing on either prong.⁵ A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.⁶

First, appellant claimed that his trial counsel was ineffective for failing to investigate or otherwise bring to the court's attention his medical condition (a head injury in 1998), the medications he was taking

²To the extent that appellant raised any claims independently of the ineffective assistance of counsel claims, those claims were properly denied as they fell outside the narrow scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging the validity of a judgment of conviction based upon a guilty plea. See NRS 34.810(1)(a).

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

⁴See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁵Strickland, 466 U.S. at 697.

⁶Means v. State, 120 Nev. ___, ___, 103 P.3d 25, 33 (2004).

at the time of the accident (Xanax and methadone), and the psychotropic medications he was taking when he entered his plea. Appellant appeared to argue that the head injury and the unidentified psychotropic medications prevented him from adequately understanding the proceedings.

We conclude that appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The record does not support appellant's assertion that he was unable to understand the proceedings.⁷ Appellant answered all questions put to him appropriately and affirmatively informed the district court that he was not taking any medications, prescribed or otherwise, that interfered with his ability to understand the proceedings. Appellant's trial counsel informed the district court at the conclusion of the plea canvass and at the sentencing hearing about appellant's prior head injury. The district court was aware of the medications that appellant was taking at the time of the accident as they formed the factual basis for the charge of driving under the influence. Appellant failed to demonstrate how further discussion of this information would have resulted in a different outcome—either in his decision to enter a guilty plea or in the sentence that he received. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Second, appellant claimed that his trial counsel was ineffective for failing to investigate or challenge false allegations made by the State to the grand jury, the district court and the media about the

⁷See Riker v. State, 111 Nev. 1316, 905 P.2d 706 (1995); see also Godinez v. Moran, 509 U.S. 389 (1993).

blood and urine tests. Appellant further claimed that his trial counsel should have further investigated the blood and urine results.

We conclude that appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to specifically state in the petition how the allegations of the State were false.⁸ The State alleged that the blood and/or urine tests detected heroin and/or morphine, Alprazolam (Xanax), Hydroxyzalprazolam (Xanax metabolite), and methadone and that these substances made appellant incapable of driving safely. Appellant informed the district court during the plea canvass that it was appellant's contention that the morphine was not present at the time of the accident, but was administered by the hospital after the accident. In response to this contention, the State asked appellant to acknowledge that the other substances caused him to drive unsafely, regardless of the source of the morphine. Appellant agreed that there were other substances, and that he had a prescription for the Xanax and methadone. We further note that appellant's trial counsel did seek to have the blood independently examined. The record further reveals that it was appellant's trial counsel's investigation that resulted in a positive test for methadone. Appellant failed to indicate how further investigation would have altered his decision to enter a guilty plea in the instant case. To the extent that appellant claimed that the State misled the district court about the level of Xanax and Xanax metabolites in his system, appellant failed to demonstrate that any further information about the level of Xanax would have changed the outcome of the proceedings. Thus, we conclude that the district court did not err in determining that this claim lacked merit.

⁸See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Third, appellant claimed that his trial counsel was ineffective for failing to spend enough time working on the case. Appellant noted that his trial counsel requested a copy of the blood and urine test results eleven months after he had been appointed to represent appellant. Appellant claimed that this lack of attention rendered his guilty plea unknowing and involuntary.

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate what further steps counsel should have been taken that would have altered the outcome of the proceedings. Appellant failed to demonstrate that the allegedly delayed request for the results established that trial counsel failed to spend sufficient time working on the case. Appellant further failed to demonstrate that his trial counsel's performance rendered his guilty plea invalid.⁹ Thus, we conclude that the district court did not err in determining that this claim lacked merit.

Next, appellant claimed that his trial counsel was ineffective for failing to file a direct appeal. Appellant claimed that he contacted his trial counsel after sentencing and asked if he could appeal. He claimed that he was told that he could not appeal.

This court has held that "[t]rial counsel is ineffective if he or she fails to file a direct appeal after a defendant has requested or expressed a desire for a direct appeal; counsel's performance is deficient and prejudiced is presumed under these facts."¹⁰ As stated earlier, a

⁹See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

¹⁰Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003).

petitioner must prove the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.¹¹

Appellant testified at the evidentiary hearing that he contacted his trial counsel after sentencing and asked him what could be done, and he testified that his trial counsel told him that nothing could be done except to pursue post-conviction remedies. Appellant's trial counsel testified that he remembered a discussion with appellant after sentencing in which appellant was upset, that they discussed an appeal, and that appellant "wanted to appeal his case." Appellant's trial counsel testified that he explained that there were no non-frivolous issues and that he told appellant that he would not file an appeal because of his ethical violation not to file frivolous motions. Appellant's trial counsel further testified that he informed appellant that he could file a notice of appeal on his own within 30 days from entry of the judgment of conviction. He further confirmed appellant's statement regarding post-conviction remedies.

There appeared to be sufficient factual proof to establish that appellant's trial counsel was ineffective for failing to file a direct appeal on appellant's behalf. Accordingly, this court directed the State to show cause why this court should not reverse the district court's decision to deny this claim. The State argues, in response, that it would not oppose an order of remand for the district court to make a factual determination on whether appellant asked his trial counsel for a direct appeal or whether appellant merely inquired about an appeal, but did not ask trial counsel to perfect an appeal.

Having reviewed the documents before this court, we conclude that appellant demonstrated that his trial counsel was ineffective. The

¹¹Means, 120 Nev. at ___, 103 P.3d at 33.

record on appeal establishes that after sentencing appellant expressed dissatisfaction with his conviction and asked his trial counsel what could be done to challenge his conviction. Appellant's trial counsel's own testimony indicates that trial counsel believed that appellant wanted to appeal his conviction. Although appellant's trial counsel may have believed that there were not any non-frivolous issues to argue in a direct appeal, appellant's trial counsel had an obligation to file an appeal because appellant had expressed a desire for an appeal.¹² Prejudice is presumed under the facts presented in this case.¹³ It is unnecessary to remand this matter for further evidentiary proceedings as the record before this court establishes that appellant demonstrated the factual allegation underlying his claim of ineffective assistance of counsel by a preponderance of the evidence. Therefore, we reverse the district court's order in part, and we remand this matter to the district court for the appointment of counsel. Appellant may raise any claims appropriate for a direct appeal in a petition for a writ of habeas corpus filed in the district court pursuant to the remedy set forth in Lozada.¹⁴

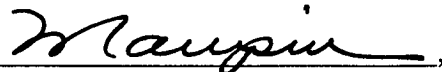
¹²Hathaway, 119 Nev. at 254, 71 P.3d at 507; Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999); Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994). We note that this court has held that there is an exception to counsel's ethical obligation not to raise frivolous issues where counsel must pursue an appeal considered frivolous by counsel. See Ramos v. State, 113 Nev. 1081, 944 P.2d 856 (1997).


¹³Hathaway, 119 Nev. at 254, 71 P.3d at 507.

¹⁴Lozada, 110 Nev. at 359, 871 P.2d at 950. To the extent that appellant argued that the remedy provided for in Lozada is a constitutionally inadequate remedy, we conclude that this claim lacks merit. The Lozada remedy is the functional equivalent to a direct appeal, and this court has recognized that a complete remedy is available pursuant to Lozada. Id.

Having reviewed the record on appeal, we conclude that briefing and oral argument are unwarranted.¹⁵ 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.¹⁶


_____, J.
Maupin


_____, J.
Gibbons


_____, J.
Hardesty

cc: Hon. Nancy M. Saitta, District Judge
Troy S. Johnson
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁵See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁶We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.