

IN THE SUPREME COURT OF THE STATE OF NEVADA

DARREL M. ROBINSON A/K/A
MARION ANDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46647

FILED

SEP 20 2006

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 and post-sentence motion to withdraw a guilty plea. Eight Judicial District Court, Clark County; Jackie Glass, Judge.

On January 3, 2005, the district court convicted appellant, pursuant to a guilty plea, of robbery with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of 60 to 180 months in the Nevada State Prison. No direct appeal was taken.

On June 22, 2005, appellant filed a post-conviction petition for a writ of habeas corpus in the district court. On November 22, 2005, appellant filed a motion in the district court to withdraw his guilty plea. The State opposed the petition and the motion. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. On February 10, 2006, after conducting an evidentiary hearing, the district court denied the petition. On February 28, 2006, the district court denied appellant's motion to withdraw a guilty plea. This appeal followed.

Motion to Withdraw Guilty Plea

In his motion, appellant contended that his guilty plea was unknowingly entered because his counsel erroneously informed him that if he went to trial he would automatically be adjudicated a habitual criminal, when in reality, the district court had discretion to adjudicate appellant a habitual criminal.

After the imposition of a sentence, the district court will allow the withdrawal of a guilty plea only to correct a manifest injustice.¹ A guilty plea is presumptively valid, and appellant carries the burden of establishing that his plea was not entered knowingly and intelligently.² In determining the validity of a guilty plea, this court looks to the totality of the circumstances.³ This court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.⁴

A review of the record reveals that the State agreed not to seek adjudication as a habitual criminal if appellant agreed to plead guilty. If appellant had insisted on proceeding to trial and was found to be guilty by jury verdict, appellant faced adjudication as a habitual criminal. Informing a defendant of the maximum sentence faced is not deficient. Appellant benefited from pleading guilty by not only avoiding adjudication

¹NRS 176.165.

²Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

³State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

⁴Hubbard, 110 Nev. 671, 877 P.2d 519.

as a habitual criminal, but by avoiding facing additional charges of burglary and possession of a firearm by an ex-felon. We therefore conclude that appellant failed to establish that permitting him to withdraw his guilty plea was necessary to correct a manifest injustice, and the district court did not err in denying appellant's motion.

Petition for a Writ of Habeas Corpus

In his petition, appellant claimed that his plea was involuntarily and unknowingly entered because he was under the influence of prescription medication and alcohol. As stated earlier, this court looks to the totality of the circumstances to determine the validity of a guilty plea.⁵

Appellant failed to demonstrate that his plea was involuntarily or unknowingly entered. The district court canvassed appellant on his understanding of the charges, the plea agreement, and the consequences of pleading guilty. Appellant agreed that he was entering his guilty plea freely and voluntarily. There is no indication from the record that appellant was impaired or that he did not understand the district court's questions, and he answered all the questions appropriately. The guilty plea agreement, which appellant stated he had read, understood, and signed, stated that he was not under the influence of any intoxicating liquor, a controlled substance or other drug at the time of signing the plea agreement or in the proceedings surrounding the entry of his guilty plea. Appellant's counsel certified that appellant was not under the influence of an intoxicating liquor, a controlled substance or other

⁵Freese, 116 Nev. 1097, 13 P.3d 442; Bryant, 102 Nev. 268, 721 P.2d 364.

drug at the time that he consulted with appellant regarding his guilty plea. The totality of the circumstances indicate that appellant entered his plea voluntarily and knowingly. Thus, the district court did not err in denying this claim.

Next, appellant claimed that his trial counsel was ineffective for failing to file a direct appeal after appellant expressed a desire to do so. Counsel testified at the evidentiary hearing that appellant expressed a desire to appeal, that counsel discussed the probability that his claims would not be successful, and quoted appellant a fee to retain him to file an appeal. Counsel further testified that appellant never paid him the fee to retain him to file a direct appeal, and thus, he did not file a direct appeal for appellant.

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."⁶ A petitioner must prove the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.⁷

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.

NRAP 3C(b) provides:

Trial counsel shall be responsible for filing the notice of appeal, rough draft transcript request

⁶Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003).

⁷Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

form, and fast track statement and for consulting with appellate counsel for the case regarding the appellate issues that are raised. Trial counsel shall arrange their calendars and adjust their public or private contracts for compensation to accommodate the additional duties imposed by this Rule.

(Emphasis added). Thus, because a direct appeal in this case would have been subject to the fact track provisions of NRAP 3C, it appeared that after appellant expressed a desire to appeal, his counsel in the proceedings leading to his conviction would have been obligated to file a direct appeal without charging appellant an additional fee.

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 responded that pursuant to Hathaway, "appellant's appeal deprivation claim has merit and he was entitled to a Lozada⁸ petition wherein he could pursue his direct appeal issues by way of post-conviction petition for writ of habeas corpus."

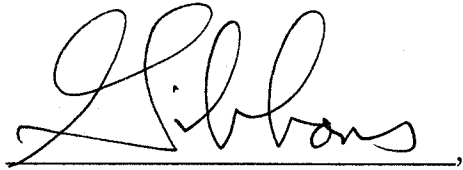
Having reviewed the documents before this court, we conclude that appellant demonstrated that his trial counsel was ineffective for failing to file a direct appeal. The record on appeal establishes that after sentencing, appellant expressed dissatisfaction with his conviction and asked his trial counsel what could be done to challenge his conviction. Appellant's trial counsel's own testimony indicated that trial counsel believed that appellant wanted to appeal his conviction.

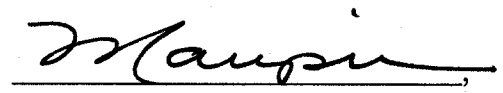
⁸Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

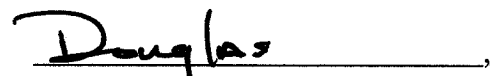
Therefore, we reverse the district court's order in part, and we remand this matter to the district court. The district court shall appoint counsel to represent appellant and appellant may raise any claims appropriate for a direct appeal in a petition for a writ of habeas corpus filed in the district court pursuant to the remedy set forth in Lozada.⁹

Having reviewed the record on appeal, we conclude that briefing and oral argument are unwarranted.¹⁰ 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.¹¹


_____, J.
Gibbons


_____, J.
Maupin


_____, J.
Douglas

⁹Id. at 359, 871 P.2d at 950. In his petition, appellant also claimed that the district court erred in not allowing additional time for his counsel to review his case file. This claim is more properly raised on direct appeal. Thus, we decline to reach this claim in this proceeding in light of our disposition.

¹⁰See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹¹This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

cc: Honorable Jackie Glass, District Judge
Marion Anderson
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk