

IN THE SUPREME COURT OF THE STATE OF NEVADA

BYRON ELROY CRUTCHER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46767

FILED

SEP 13 2006

ORDER OF AFFIRMANCE

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

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 January 23, 1997, the district court convicted appellant, pursuant to a guilty plea, of robbery, victim 65 years of age or older. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after 10 years. This court dismissed appellant's untimely direct appeal for lack of jurisdiction.¹

On January 22, 1998, appellant filed a proper person post-conviction petition for a writ of habeas corpus with the district court in which appellant raised an appeal deprivation claim. The district court denied appellant's petition. On appeal, this court concluded that appellant was deprived of his right to a direct appeal, reversed the district court's

¹Crutcher v. State, Docket No. 30361 (Order Dismissing Appeal, May 27, 1997).

order and remanded,² directing the district court to appoint counsel to assist appellant in filing a petition for a writ of habeas corpus raising any issues that appellant could have raised on direct appeal pursuant to Lozada v. State.³

Appellant's Lozada counsel filed a supplemental brief in support of appellant's petition for a writ of habeas corpus. After conducting an evidentiary hearing, the district court denied appellant's petition. This court affirmed the denial of the petition on appeal.⁴

On October 20, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed and moved to dismiss the petition. Appellant filed a reply. 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, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that his Lozada counsel was ineffective. Because Lozada counsel was appointed to assist appellant in raising direct appeal claims, appellant's claims of ineffective assistance of Lozada counsel were properly addressed as claims of ineffective assistance of appellate counsel. To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's

²Crutcher v. State, Docket No. 32140 (Order of Reversal and Remand, September 26, 2000).

³110 Nev. 349, 871 P.2d 944 (1994).

⁴Crutcher v. State, Docket No. 42355 (Order of Affirmance, September 20, 2005).

performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal.⁵ Appellate counsel is not required to raise every non-frivolous issue on appeal.⁶ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.⁷

First, appellant claimed that his Lozada counsel was ineffective for failing to argue that the trial court denied him his right to counsel on direct appeal, the district court never saw the prior convictions used for adjudicating him a habitual criminal, and the Lozada remedy is unconstitutional. These claims are belied by the record.⁸ Lozada counsel argued these claims, and this court affirmed the denial of these claims on appeal.⁹ Accordingly, we conclude the district court did not err in denying these claims.

Second, appellant claimed that his Lozada counsel was ineffective for failing to argue that the district attorney did not file an amended information as required by NRS 207.010. Appellant failed to

⁵Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing Strickland v. Washington, 466 U.S. 668 (1984)).

⁶Jones v. Barnes, 463 U.S. 745, 751 (1983).

⁷Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

⁸See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that a petitioner is not entitled to an evidentiary hearing on claims that are belied or repelled by the record).

⁹See Crutcher v. State, Docket No. 42355 (Order of Affirmance, September 20, 2005).

demonstrate that this claim had a reasonable probability of success on appeal. On October 8, 1996, the State filed an amended information in the district court that contained a count seeking habitual criminal adjudication pursuant to NRS 207.010 and alleged each of appellant's prior convictions. Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant claimed that his Lozada counsel was ineffective for failing to argue that the district court never held a hearing to determine the validity of his prior convictions before adjudicating him a habitual criminal. Appellant failed to demonstrate that this claim had a reasonable probability of success on appeal. Under NRS 207.016(3), the district court is required to conduct a hearing to determine the issue of prior convictions only if a defendant denies a prior conviction. The record on appeal reveals that appellant's trial counsel did not object to the prior convictions. Further, appellant did not deny his prior convictions, rather he stated a non-specific, general challenge to the constitutional validity of the prior convictions. Because appellant did not deny his prior convictions, a hearing to determine the issue of the prior convictions was not necessary. Accordingly, we conclude the district court did not err in denying this claim.

Fourth, appellant claimed that his Lozada counsel was ineffective for failing to argue that the State's pre-trial charging of appellant as a habitual criminal violated the spirit of this court's holding in Scott v. State.¹⁰ Appellant failed to demonstrate that this claim had a

¹⁰See Scott v. State, 110 Nev. 622, 877 P.2d 503 (1994).

reasonable probability of success on appeal. In Scott this court held that the State's post-conviction filing of a habitual criminal charge rendered Scott's waiver of the right to counsel unknowing and unintelligent.¹¹ The holding in Scott is inapposite. Although appellant waived his right to counsel at the preliminary hearing, the record reveals that, unlike Scott, appellant was aware that he was facing habitual criminal adjudication at the time he waived his right to counsel. Further, the count for habitual criminality was properly included in the information charging appellant with the primary offense.¹² Accordingly, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that his Lozada counsel was ineffective for failing to argue that the mandatory wording in NRS 207.010 creates a liberty interest. Appellant failed to demonstrate that his Lozada counsel was ineffective. Appellant failed to identify what liberty interest is created by NRS 207.010 and failed to demonstrate that he was denied any liberty interest. Accordingly, we conclude the district court did not err in denying this claim.

Sixth, appellant claimed that his Lozada counsel was ineffective for failing to argue that the district court erred by denying his trial counsel's motion for a new preliminary hearing. Appellant failed to demonstrate that this claim had a reasonable probability of success on appeal. This claim is not supported by the record. It does not appear that the district court denied appellant's motion for a new preliminary hearing.

¹¹Id. at 626, 877 P.2d at 506.

¹²See NRS 207.010(2); NRS 207.016(2).

Rather, it appears that appellant's trial counsel moved to withdraw the motion after appellant entered into plea negotiations with the State. Further, by pleading guilty appellant waived any claims relating to the deprivation of constitutional rights that occurred prior to the entry of his guilty plea.¹³ Accordingly, we conclude the district court did not err in denying this claim.

Seventh, appellant claimed that his Lozada counsel was ineffective for failing to argue that the district court erred by failing to reconcile an error that occurred on one of the plea agreements appellant entered into as part of a plea package for this case. Specifically, appellant asserted that the plea agreement in a separate case stated that as part of the plea package appellant agreed to plead guilty to robbery in this case. Appellant claimed that the plea agreement in the other case did not include an older victim enhancement with the robbery charge. Appellant failed to demonstrate that this claim had a reasonable probability of success on appeal. Appellant cannot challenge in this case errors that may have occurred in a separate case. Further, it is clear from the written guilty plea agreement and appellant's responses at the plea canvass that in this case appellant intended to plead guilty to and was convicted of robbery, victim 65 years of age or older. Accordingly, we conclude the district court did not err in denying this claim.

Eighth, appellant claimed that his Lozada counsel was ineffective for failing to argue that the district court was biased in favor of the State. Appellant failed to demonstrate that his Lozada counsel was

¹³See Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975).

ineffective. Appellant's claim of bias was a bare and naked allegation that was unsupported by specific facts.¹⁴ Accordingly, we conclude the district court did not err in denying this claim.

Ninth, appellant claimed that his Lozada counsel was ineffective for failing to argue that the Lozada remedy was improperly being applied to appellant retroactively. Appellant failed to demonstrate that this claim had a reasonable probability of success on appeal. Appellant was convicted for crimes that he committed after the Lozada remedy became effective. Therefore, there is no retroactive application of the Lozada remedy as to appellant. Accordingly, we conclude the district court did not err in denying this claim.

Tenth, appellant claimed that his Lozada counsel was ineffective for failing to argue that the justice court committed reversible error by not allowing standby or advisory counsel to assist petitioner. Appellant failed to demonstrate that his Lozada counsel was ineffective. By pleading guilty appellant waived any claims relating to the deprivation of constitutional rights that occurred prior to the entry of his guilty plea.¹⁵ Further, this claim is not supported by the record. Appellant unequivocally asked to represent himself at the preliminary hearing. Appellant did not ask for the appointment of new counsel or request the aid of standby or advisory counsel. Accordingly, we conclude the district court did not err in denying this claim.

¹⁴See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

¹⁵See Webb, 91 Nev. at 470, 538 P.2d at 165.

Eleventh, appellant claimed that his Lozada counsel was ineffective for failing to argue that the guilty plea was invalid because appellant did not admit to the elements of robbery, victim 65 years of age or older, at the plea canvass, and the district court improperly relied upon the preliminary hearing transcript to support the plea. Appellant failed to demonstrate that his Lozada counsel was ineffective. This claim is a challenge to the validity of the guilty plea and such a challenge is not permitted on direct appeal.¹⁶

Further, the claim lacked merit. The record reveals that appellant testified to the facts supporting the charge at the preliminary hearing, and a copy of the hearing transcript was provided to the district court. Further, in the guilty plea agreement, which appellant testified he read, signed and understood, and at the plea canvass, appellant acknowledged that he was pleading guilty to robbery, victim age 65 years or older as was alleged in the charging document. The record as a whole reveals that appellant entered his plea with an understanding of the elements of the offense charged,¹⁷ and appellant made or adopted factual statements sufficient to constitute an admission of guilt.¹⁸ Accordingly, we conclude that the district court did not err in denying this claim.

Twelfth, appellant claimed that his Lozada counsel was ineffective for failing to argue that he was actually innocent. Specifically,

¹⁶See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 367-68 (1986).

¹⁷See id. at 273, 721 P.2d at 368.

¹⁸See Croft v. State, 99 Nev. 502, 505, 665 P.2d 248, 250 (1983).

appellant claimed that because the victim's testimony was conflicting, no reasonable juror would have convicted him of the crime. Appellant failed to demonstrate that his Lozada counsel was ineffective. This claim is a challenge to the validity of the guilty plea and such a challenge is not permitted on direct appeal.¹⁹ Further, the claim lacked merit. Appellant's testimony at the preliminary hearing was, in and of itself, sufficient to constitute an admission to robbery, victim age 65 years or older. Accordingly, we conclude the district court did not err in denying this claim.

Thirteenth, appellant claimed that his Lozada counsel was ineffective on appeal from the denial of his Lozada petition for failing to argue that the district court erred by not including federal or constitutional citations in the order denying his petition. Appellant failed to demonstrate that his Lozada counsel was ineffective. The order denying appellant's Lozada petition included citation to federal case law, and this court affirmed the denial of his petition on appeal. Appellant failed to demonstrate that additional citation to federal or constitutional law in the order denying appellant's petition would have resulted in a different outcome on appeal. Accordingly, we conclude the district court did not err in denying this claim.


Fourteenth, appellant claimed that his Lozada counsel was ineffective on appeal from the denial of his Lozada petition for failing to file a timely opposition to a motion to strike appellant's proper person reply brief. Appellant failed to demonstrate that the filing of a timely

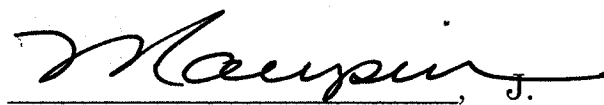
¹⁹See Bryant, 102 Nev. at 272, 721 P.2d at 367-68.

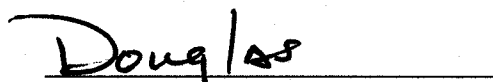
response to the State's motion to strike would have resulted in a different outcome on appeal. This court specifically stated that it granted the State's motion to strike appellant's proper person reply brief on the merits of the motion, not because of counsel's failure to file a timely response to the motion.²⁰ Accordingly, we conclude the district court did not err in denying this claim.

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.²¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Maupin


_____, J.
Douglas

²⁰Crutcher v. State, Docket No. 42355 (Order Denying Reconsideration and Returning Proper Person Submission, November 18, 2004).

²¹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Nancy M. Saitta, District Judge
Byron Elroy Crutcher
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk