IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL R. DULIN-EVANS, AKA MICHAEL R. DULIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46695

MICHAEL R. DULIN-EVANS A/K/A MICHAEL ROBERT DULIN A/K/A MICHAEL ROBERT EVANS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46817

FILED

JUL 12 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Docket No. 46695 is a proper person appeal from an order of the district court denying a motion to withdraw the guilty plea. Docket No. 46817 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; Donald M. Mosley, Judge.

On July 27, 2005, the district court convicted appellant, pursuant to a guilty plea, of one count of possession of a controlled substance. The district court sentenced appellant to serve a term of twelve to forty-eight months in the Nevada State Prison. This court

06-14358

affirmed the judgment of conviction and sentence on direct appeal.[1] The remittitur issued on January 18, 2006.

On December 2, 2005, 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 district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On February 14, 2006, the district court denied appellant's petition. Appellant's appeal from that order was docketed in this court in Docket No. 46817.

On December 15, 2005, appellant filed a proper person motion to withdraw the guilty plea in the district court. The State opposed the motion. On March 16, 2006, the district court denied the motion. Appellant's appeal from that order was docketed in this court in Docket No. 46695.

In his petition and motion, appellant claimed that he received ineffective assistance of counsel and that his guilty plea was not entered knowingly and voluntarily. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for

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[1]Dulin-Evans v. State, Docket No. 45686 (Order of Affirmance, November 16, 2005).

counsel's errors, the results of the proceedings would have been different.[2] In order to establish prejudice sufficient to invalidate a guilty plea, a petitioner must demonstrate that he would not have pleaded guilty and would have insisted on going to trial.[3] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[4] Further, it is the burden of the defendant to establish that his guilty plea was not entered knowingly and voluntarily.[5]

In his petition, appellant first claimed that his trial counsel was ineffective for informing him that trial counsel would argue for probation or drug court when trial counsel did not make any such arguments at sentencing. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Trial counsel argued that the district court should give appellant probation so that he could have an opportunity for drug counseling. Appellant committed the instant offense while he was on parole from a life sentence for a habitual criminal adjudication in a prior conviction. Appellant failed to indicate what further arguments counsel could have made such that the

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

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

[4]Strickland, 466 U.S. at 697.

[5]Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

district court would have given him a different sentence. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed in his petition that his trial counsel was ineffective for advising him to answer "yes" to the district court's questions during the plea canvass and advising appellant not to hinder the plea process. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that this advice was incorrect or that there was a reasonable probability of a different result if he had answered the district court differently. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed in his petition that his trial counsel was ineffective for advising him not to inform the district court that he did not see the Department of Parole and Probation prior to sentencing. Appellant failed to demonstrate that his trial counsel's advice prejudiced him at sentencing. It appears from the record that the Department of Parole and Probation attempted to contact appellant by telephone but were unsuccessful while he was in the custody of the Nevada Department of Corrections. Appellant did not indicate what information he would have provided the Department of Parole and Probation that would have had a reasonable probability of altering the outcome of the sentencing hearing. The district court listened to appellant's allocution statement during the sentencing hearing. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed in his petition that his trial counsel was ineffective for having appellant moved to the jail because she knew it would break down his resistance to the plea negotiations. Appellant failed to demonstrate that his trial counsel's performance was deficient. Appellant's trial counsel explained that appellant should be housed at the Clark County Detention Center because it was difficult to communicate with appellant when he was housed at High Desert State Prison. In entering his guilty plea, appellant acknowledged that he was not coerced. Appellant failed to demonstrate that trial counsel sought to have appellant housed at the jail in order to coerce him into entering a guilty plea. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed in his petition and motion that his trial counsel was ineffective for coercing his guilty plea by advising him that he could be adjudicated a habitual criminal and receive a life sentence. Appellant failed to demonstrate that his trial counsel was ineffective in this regard. Counsel's candid advice about the potential maximum sentence faced is not ineffective. Appellant failed to demonstrate that this advice was incorrect.[6] Therefore, we conclude that the district court did not err in denying this claim.

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[6]See NRS 207.010. We note that appellant was adjudicated a habitual criminal in a prior case and given a life sentence in that case. Appellant committed the instant offense while he was on parole from the life sentence in the prior case.

Sixth, appellant claimed in his petition and his motion that his trial counsel was ineffective for advising him to enter a guilty plea in the instant case because his arrest and subsequent search were illegal and that his trial counsel's advice induced him to enter a guilty plea.[7] Although trial counsel filed a motion to suppress the evidence, appellant alleged that trial counsel advised him to enter a guilty plea rather than prosecute the motion to suppress because the motion to suppress would be denied by the district court. Finally, he claimed that his guilty plea was invalid because of the illegal arrest and search.

Our preliminary review of the record on appeal revealed that the district court may have erroneously denied this claim without first conducting an evidentiary hearing. Trial counsel would be ineffective for advising appellant to enter a guilty plea if the arrest and subsequent search were illegal because the only evidence of the crime, the drugs, would have been excluded at trial. Thus, the relevant inquiry in this case is whether the arrest and search were lawfully conducted. It did not appear from this court's review of the record that the arrest and subsequent search were lawfully conducted in the instant case.

Appellant violated NRS 484.325(4)(b) when he crossed the street against the traffic signal. A violation of NRS 484.325(4)(b) is a

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[7]Appellant also claimed that his appellate counsel was ineffective in failing to challenge the search and seizure on direct appeal. However, appellant did not enter a conditional plea specifically reserving the right to challenge the search and seizure on direct appeal. See generally NRS 174.035(3). Thus, his appellate counsel was not ineffective.

misdemeanor offense.[8] Rather than citing appellant, the police officer arrested appellant for the misdemeanor offense and conducted a search of appellant's person. The police officer testified at the preliminary hearing that he arrested appellant, rather than citing him, pursuant to guidelines enacted by the Las Vegas Metropolitan Police Department called the Downtown Area of Command Strategic Initiative [Downtown Initiative]. Pursuant to the guidelines, the police officer testified that an individual with a criminal record for crimes that occur in the downtown area would be arrested rather than cited.[9] The subsequent search incident to the arrest revealed that appellant was in possession of a controlled substance. Appellant was charged with possession of a controlled substance with the intent to sell, and the State filed a notice of intent to seek habitual criminal adjudication.

NRS 484.795 provides:

> Whenever any person is halted by a peace officer for any violation of this chapter and is not required to be taken before a magistrate, the person may, in the discretion of the peace officer, either be given a traffic citation, or be taken without unnecessary delay before the proper magistrate. He must be taken before the magistrate in any of the following cases:

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[8]NRS 484.999(1).

[9]The police officer testified, "We disproportionately arrest people in a specific area because of the high crime area."

> 1. When the person does not furnish satisfactory evidence of identity or when the peace officer has reasonable and probable grounds to believe the person will disregard a written promise to appear in court;
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> 2. When the person is charged with a violation of NRS 484.701, relating to the refusal of a driver of a vehicle to submit the vehicle to an inspection and test;
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> 3. When the person is charged with a violation of NRS 484.755, relating to the failure or refusal of a driver of a vehicle to submit the vehicle and load to a weighing or to remove excess weight therefrom; or
>
> 4. When the person is charged with a violation of NRS 484.379 [driving under the influence], unless he is incapacitated and is being treated for injuries at the time the peace officer would otherwise be taking him before the magistrate.

In evaluating whether an officer properly exercised his discretion to arrest instead of issuing a citation, this court looks to the reasonableness of the officer's decision. "Reasonableness requires probable cause that a traffic offense has been committed and circumstances that require immediate arrest."[10] The circumstances allowing for mandatory arrest are those set forth in NRS 484.795, and additionally, an officer may arrest when he has "probable cause to believe other criminal misconduct is afoot."[11]

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[10]State v. Bayard, 119 Nev. 241, 247, 71 P.3d 498, 502 (2003).

[11]Id.

Appellant's violation of NRS 484.325(4)(b), crossing against a signal, was not an offense that required mandatory arrest under NRS 484.795.[12] Therefore, the issue turns on whether the police officer had reasonable and probable grounds to believe that appellant would disregard a written promise to appear in court.[13] This court has held that a police officer must "'have trustworthy facts and circumstances which would cause a person of reasonable caution to believe that it is more likely than not' that the person will disregard a written promise to appear."[14]

It appeared from this court's review of the record on appeal that the police officer did not have reasonable and probable grounds to believe that appellant would disregard a written promise to appear in court. The police officer testified that the arrest was based upon appellant's criminal record and the fact that he was in a high crime area. These facts alone are insufficient to indicate that an individual will not appear on a citation. In fact, it would appear that appellant was more likely to appear on the citation because he was on parole at the time he committed the instant offense. There was no testimony from the police

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[12]Further, mandatory arrest was not required pursuant to NRS 484.791.

[13]There is nothing to indicate that appellant did not present satisfactory identification, and therefore, this factor is not implicated in the instant case.

[14]Collins v. State, 113 Nev. 1177, 1180, 946 P.2d 1055, 1058 (1997) (quoting Kessee v. State, 110 Nev. 997, 1002, 879 P.2d 63, 66 (1994)).

officer that appellant was uncooperative or that appellant had failed to appear in any of his prior cases. It appears that the Downtown Initiative may be a violation of separation of powers. The legislature indicated which offenses and circumstances would require mandatory arrest. The Downtown Initiative appears to add a new requirement for mandatory arrest—a person with a criminal record in a high crime area is subject to mandatory arrest. It appears that the police officer never actually exercised his discretion in determining whether to arrest appellant, instead he followed the policy of the Downtown Initiative. From the record before this court, it did not appear that there was any other reason, aside from appellant's criminal record, to arrest and subsequently search appellant in the instant case.[15]

Further, it did not appear that the fact that appellant was on parole at the time he committed the offense would alter this analysis. Although the State argued in its opposition below that the search was lawful because appellant was on parole at the time of the misdemeanor offense and constitutional search and seizure rights do not apply while one

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[15]See Morgan v. State, 120 Nev. 219, 221, 88 P.3d 837, 839 (2004) (determining that circumstances that would allow an officer to arrest an individual rather than citing the individual include: a suspended driver's license for failure to pay fines and a previous failure to appear in court); Collins, 113 Nev. at 1180, 946 P.2d at 1058 (determining that circumstances that would allow an officer to arrest an individual rather than citing the individual include: hostility toward the officer, refusal to produce a license or other requested documents, and crumpling of the citation).

is on parole, the State did not cite any authority for this proposition or provide any argument or documentation that appellant was required to submit to a search as a condition of parole.[16] This court has held that in Nevada a parole search without a warrant requires reasonable grounds to believe that a violation of the parole agreement has occurred.[17] Further, no testimony was presented at the preliminary hearing that the police officer knew appellant was on parole or was conducting a search pursuant to a condition of parole. If the police officer did not know at the time he arrested and searched appellant that he was on parole, later knowledge that appellant was on parole could not be used to retroactively justify the arrest or search.[18]

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[16]Interestingly, the State's argument relating to parole is raised for the first time in the State's opposition to the petition. In its opposition to the motion to suppress, the State did not offer any argument that the search was lawful because appellant was on parole.

[17]Allan v. State, 103 Nev. 512, 514, 746 P.2d 138, 140 (1987) (citing Seim v. State, 95 Nev. 89, 590 P.2d 1152 (1979)). We note that the United States Supreme Court recently decided that a suspicionless search of a parolee pursuant to California law and the parolee's specific parole conditions would not violate the Fourth Amendment. See Samson v. California, ___ S. Ct. ___ , 2006 WL 1666974 (June 19, 2006). It appears that Samson is distinguishable as Nevada does not have a similar statute requiring a parolee to submit to a suspicionless search. However, we note that a copy of appellant's specific conditions of parole is not in the record on appeal, and thus, it is not clear if appellant agreed to a suspicionless search as a condition of parole.

[18]Moreno v. Baca, 431 F.3d 633, 638-41 (9th Cir. 2005).

For these reasons, it appeared that the arrest was unlawful as it violated NRS 484.795, and the subsequent search violated appellant's state constitutional right to be free from an unreasonable search and seizure.[19] The exclusion of evidence would be the appropriate remedy for the violation of the right to be free from an unlawful arrest and unreasonable search. Consequently, trial counsel would be ineffective for advising appellant to enter a guilty plea under these circumstances. Thus, this court directed the State to show cause why the denial of this claim should not be reversed and this matter remanded for further proceedings. The State filed a response indicating that it did not oppose remanding the matter for further proceedings on this claim. Therefore, we reverse the decision of the district court to deny this claim raised in both the petition and motion, and we remand this matter to the district court to conduct an evidentiary hearing on whether appellant's trial counsel was ineffective for advising appellant to enter a guilty plea under these facts. Because of the complexity of the search and seizure issue presented, we conclude that the appointment of post-conviction counsel is essential in this case, and we direct the district court to appoint post-conviction counsel to assist appellant.[20] We further direct that the district court shall cause a copy of

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[19]In Bayard, this court concluded that an arrest in violation of NRS 484.795 would not offend the Fourth Amendment of the United States Constitution, but would violate a defendant's rights under Article 1, Section 18 of the Nevada Constitution. 119 Nev. at 247, 71 P.3d at 502.

[20]See NRS 34.750(1).

this order to be served upon post-conviction counsel within 10 days of confirmation of counsel.

Finally, appellant claimed that his trial counsel promised him that approximately $650 would be returned to appellant. It appears from the record that the State agreed to return whatever sum of money could be verified as winnings from Dotty's Casino. Subsequent to the plea, a stipulation and order was entered on October 14, 2005, that $450.60 would be returned to appellant. It is not clear from the record whether this money has in fact been returned to appellant. Although we conclude that appellant failed to demonstrate that his counsel was ineffective in this regard, we conclude that the issue of whether the money has in fact been returned has not been adequately addressed by the district court. Thus, we direct the district court to address this issue at the evidentiary hearing and enter any appropriate orders to effectuate the October 14, 2005 stipulation and order.

We affirm the district court's order in part and reverse and remand in part. Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.[21] Accordingly, we

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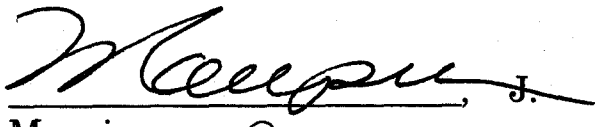
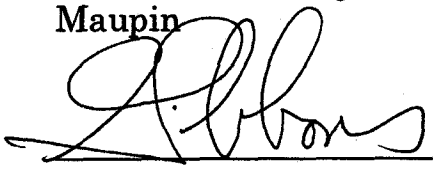
[21]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

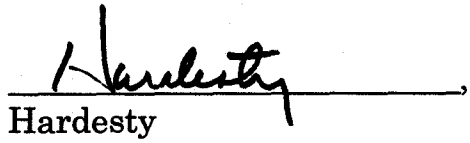
ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[22]



Maupin, J.



Gibbons, J.



Hardesty, J.

cc: Hon. Donald M. Mosley, District Judge
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Michael R. Dulin-Evans
Clark County Clerk

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[22]We 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.