

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN LEWIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46956

FILED

AUG 24 2006

ORDER OF AFFIRMANCE

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

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

On June 26, 2003, appellant Kevin Lewis was convicted, pursuant to a guilty plea, of one count each of robbery with the use of a deadly weapon and conspiracy to commit robbery. The district court sentenced Lewis to serve two consecutive prison terms of 72 to 180 months for the robbery count and a concurrent prison term of 28 to 72 months for the conspiracy count. Lewis did not file a direct appeal.

On April 12, 2004, Lewis filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. The district court appointed counsel to represent Lewis, and counsel filed a supplement to the petition. The State filed a motion for partial dismissal of the petition, and Lewis opposed the motion. The district court granted the State's motion, dismissing some of Lewis's claims. After conducting an evidentiary hearing on Lewis's remaining claims, the district court denied the petition. This appeal followed.

First, Lewis claims that the district court erred by denying his petition because defense counsel was ineffective for failing to file a notice

of appeal. In particular, Lewis argues that defense counsel should have filed an appeal because he requested one. Additionally, Lewis argues that, even absent a request for an appeal, defense counsel should have filed an appeal because there were issues "worthy of direct appellate review," including (1) whether the district court erred in denying the presentence oral motion to withdraw the guilty plea and appointment of alternate counsel;¹ and (2) whether Lewis's constitutional right to a speedy trial was violated. We conclude that the district court did not abuse its discretion in denying Lewis's claim.

"[T]here is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to pursue a direct appeal" unless the defendant inquires about an appeal or there exists a direct appeal claim that has a reasonable likelihood of success.² Here, the district court found Lewis failed to demonstrate that he requested an appeal. The district court's factual finding is supported by substantial evidence. In particular, defense counsel Peter Digesti testified at the post-conviction hearing that Lewis never requested an appeal. Although Lewis testified to the contrary, explaining that he asked for an

¹To the extent that Lewis alleges defense counsel was ineffective because the attorney-client relationship had deteriorated to the point that there was an actual conflict of interest, we reject that allegation. The district court found "no basis at law" to allow defense counsel to withdraw. That finding is supported by substantial evidence, including defense counsel's acknowledgement that he had spoken with Lewis numerous times and was prepared to go to trial had Lewis not decided to enter a guilty plea. Cf. Young v. State, 120 Nev. 963, 968-69, 102 P.3d 572, 576 (2004).

²See Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999).

appeal but Digesti just walked away, the district court acted within its discretion in finding his testimony not credible.

Moreover, the district court did not err by finding that defense counsel acted reasonably by concluding that, absent a specific request for an appeal, no appeal was warranted. Lewis waived his claim involving the appointment of alternate counsel and his speedy trial rights by pleading guilty without expressly preserving the right to raise these issues.³ Although Lewis could have filed an appeal challenging both the severity of his sentence and the district court's denial of his presentence motion to withdraw the guilty plea, those claims had no reasonable likelihood of success. There is no indication in the record that the district court abused its discretion at sentencing,⁴ or that the guilty plea was not voluntary, knowing and intelligent.⁵ Accordingly, we conclude that the district court did not err by rejecting Lewis's appeal deprivation claim.

Second, Lewis contends that defense counsel was ineffective for failing to investigate. The district court rejected Lewis's claim, finding that defense counsel conducted a reasonable investigation. We conclude that the district court's finding is supported by substantial evidence.⁶

At the post-conviction hearing, defense counsel testified about his investigation in the case. Specifically, defense counsel testified that he discussed the case numerous times with Lewis and requested the names and addresses of alibi witnesses, but Lewis never provided them.

³See NRS 174.035(3).

⁴See Silks v. State, 92 Nev. 91, 545 P.2d 1159 (1976).

⁵See State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000).

⁶See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Additionally, after reviewing the police reports and the preliminary hearing testimony, defense counsel advised Lewis that he had no viable defense. Defense counsel explained that the State had a good case against Lewis because he was identified by eyewitnesses to the robbery, and Lewis and his codefendants were caught by police fleeing the scene of the robbery with evidence of the crime inside the vehicle. Although Lewis testified at the post-conviction hearing that he was innocent and had provided defense counsel with the names of the actual perpetrators, the district court found Lewis's testimony not credible. Accordingly, the district court did not abuse its discretion by finding that defense counsel conducted an adequate investigation.

Third, Lewis contends that the district court erred by denying his petition because his guilty plea was invalid. In particular, Lewis contends that his guilty plea was coerced by defense counsel or, alternatively, he did not believe that defense counsel "was adequately representing him so he gave up and pled guilty." In a related argument, Lewis contends that defense counsel was ineffective for recommending the guilty plea because Lewis maintained his innocence and the plea was a "straight up guilty plea with no benefit to the bargain." The district court rejected Lewis's claim, finding that the guilty plea was knowing, voluntary and intelligent. We conclude that the district court's finding is supported by substantial evidence.⁷

Prior to entering the guilty plea, Lewis was thoroughly canvassed and signed a written plea agreement. At the plea canvass, defense counsel advised the court that Lewis was pleading "straight up," and Lewis acknowledged that (1) no one made promises or threatened him

⁷See Riker v. State, 111 Nev. 1316, 1322, 905 P.2d 706, 710 (1995).

to enter a guilty plea; (2) he had discussed the charged crimes and possible defenses with counsel; and (3) he was satisfied with his legal representation. Although when canvassed Lewis initially denied committing the crime, he subsequently admitted culpability, explaining that he was driver of the car getaway car in the armed robbery, and he was present in the car when guns were being thrown out during the police pursuit.

Moreover, at the post-conviction hearing, defense counsel testified about the circumstances leading up to the acceptance of the plea bargain. Defense counsel explained that he never told Lewis the guilty plea was in his best interest, but only advises his clients of "what they're looking at, and whether or not it's in their best interest is their decision." Defense counsel also testified that Lewis had previously rejected a more favorable offer from the State. Particularly, Lewis had three criminal cases pending involving two separate armed robberies and a home invasion. The State initially offered to dismiss either one of the armed robbery cases or the home invasion case in exchange for guilty pleas in two of the pending cases. Lewis rejected the offer because he did not want to plead guilty in the other cases and, instead, decided to plead "straight up" to the instant robbery. Although Lewis testified at the post-conviction hearing that he pleaded guilty based on defense counsel's promise that federal charges involving the firearm would be dismissed, the district court found that testimony not credible.⁸ Accordingly, the district court did not abuse its discretion by rejecting Lewis's claims regarding the validity of his guilty plea.

⁸Although not dismissed pursuant to the plea bargain, the federal charges were never prosecuted.

Fourth, Lewis contends that the district court abused its discretion by denying his petition because defense counsel was ineffective for failing to protect his constitutional and statutory rights to a speedy preliminary hearing and trial. Specifically, Lewis argues that defense counsel acted unreasonably in agreeing to continue the proceedings because he acted without Lewis's consent. The district court rejected Lewis's contention, ruling that he failed to show prejudice because a motion to dismiss based on a speedy trial violation would have been denied. In particular, the district court found that defense counsel had authority to consent to the continuances and the delays in the proceedings were reasonable and necessary. We conclude that the district court did not err in its ruling.

The record indicates that Lewis was arrested on November 14, 2001. The preliminary hearing, originally set for December 3, 2001, was continued several times by stipulation or for the appearance of counsel, and was eventually held on May 22, 2002. On June 6, 2002, Lewis invoked his right to a speedy trial; he pleaded guilty on February 10, 2003. The record indicates that, despite Lewis's invocation of his right to a speedy trial, the district court continued the trial because defense counsel had scheduling conflicts, Lewis was being tried with two co-defendants who had waived their speedy trial rights, and the parties intended to file pretrial motions. Because there was good cause for the continuances in the proceedings, Lewis has failed to show that defense counsel acted deficiently with respect to his statutory right to a speedy trial.⁹ Similarly,

⁹See Huebner v. State, 103 Nev. 29, 31, 731 P.2d 1330, 1332 (1987) (providing that statutory right to a speedy trial is mandatory only when there is a lack of good cause for delay); Schultz v. State, 91 Nev. 290, 292,

Lewis has failed to show that defense counsel acted deficiently with respect to his constitutional right to a speedy trial.¹⁰ There is no indication that Lewis was prejudiced by the delay in the proceedings; he does not allege that valuable evidence or witnesses were lost due to the delay and, subsequently, he pleaded guilty thereby waiving his speedy trial rights.¹¹ Accordingly, we conclude the district court did not err by rejecting Lewis's claim that his counsel was ineffective for failing to protect his statutory and constitutional speedy trial rights.

Finally, Lewis argues that he was deprived of his Sixth Amendment right to counsel because it took thirty days for the district court to appoint him counsel. We disagree. Preliminarily, we note that Lewis failed to preserve this issue for review by raising it in the district court.¹² Nonetheless, our review of the record indicates that Lewis was not deprived of the right to counsel. Lewis was arrested on November 14, 2001. The Washoe County Public Defender was appointed twelve days later on November 26. Although the public defender subsequently appointed a conflict attorney to represent Lewis on November 30, and

535 P.2d 166, 167 (1975) (holding that trial counsel has authority authorized to waive statutory right to a speedy trial).

¹⁰See U.S. Const. amend. VI; Barker v. Wingo, 407 U.S. 514, 530 (1972).

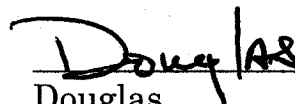
¹¹Cf. Barker, 407 U.S. at 534; State v. Fain, 105 Nev. 567, 779 P.2d 965 (1989) (holding that 4 1/2 year delay did not violate the appellant's right to a speedy trial because no specific witness, piece of evidence, or defense theory was lost due to the delay).


¹²See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004).

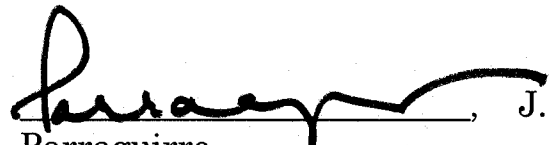
again, on December 14, the record indicates that Lewis was represented by appointed conflict counsel at the preliminary hearing and all other critical stages of the proceeding.¹³ Accordingly, Lewis was not deprived of his constitutional right to counsel.

Having considered Lewis's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

 _____, J.
Douglas

 _____, J.
Becker

 _____, J.
Parraguirre

cc: Hon. Janet J. Berry, District Judge
Karla K. Butko
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

¹³Barton v. State, 96 Nev. 267, 268, 607 P.2d 586, 587 (1980) (concluding that Sixth Amendment right to counsel only attached at critical stage of the proceedings).