

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRED D. GEORGE, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47308

FILED

NOV 07 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
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; Valorie Vega, Judge.

On January 31, 2005, the district court convicted appellant, pursuant to a guilty plea, of one count of attempted robbery, victim sixty-five years of age or older. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after ten years. This court dismissed appellant's untimely direct appeal for lack of jurisdiction.¹

On January 6, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

¹George, Jr. v. State, Docket No. 45784 (Order Dismissing Appeal, September 14, 2005).

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 April 18, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that he received ineffective assistance of counsel. 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 counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.² The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.³

First, appellant claimed that his counsel was ineffective for failing to visit appellant and discuss a defense. Appellant stated that he was only able to speak briefly with his counsel during court. Appellant failed to identify how additional visitation with his counsel would have altered his decision to enter a guilty plea. Accordingly, we conclude that the district court did not err in denying this claim.

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

³Strickland v. Washington, 466 U.S. 668, 697 (1984).

Second, appellant claimed that his counsel was ineffective for refusing to provide appellant with a copy of the discovery and arrest report for his case, and for informing appellant he did not have a defense for his case. Appellant failed to demonstrate that had he been provided the discovery and arrest report he would not have entered his guilty plea and would have insisted on proceeding to trial. Further, appellant's candid advice to appellant does not constitute ineffective assistance of counsel. Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant claimed his counsel was ineffective for informing appellant's wife that appellant was guilty and advising appellant's wife that appellant should plead guilty, without first discussing this with appellant. Appellant failed to demonstrate that absent this advice to his wife he would not have entered a guilty plea and would have insisted on proceeding to trial. Accordingly, we conclude the district court did not err in denying this claim.

Fourth, appellant claimed that his counsel was ineffective for waiting until a week before trial in district court case number C198274 to inform appellant that counsel did not have a defense for appellant in that case and for presenting no defense for him at trial in that case. Appellant may not use this case to challenge the actions of his counsel in another case. Accordingly, we conclude the district court did not err in denying this claim.

Fifth, appellant claimed that his counsel was ineffective for informing him that if he did not plead guilty, he could receive four additional life sentences. Appellant was facing charges for one count of burglary while in possession of a deadly weapon and two counts of attempted robbery with the use of a deadly weapon, victim sixty years or older. Appellant was eligible for large habitual criminal treatment on all of these charges.⁴ Therefore, appellant was facing three potential life sentences if convicted on all charges. Even assuming counsel misadvised appellant by informing appellant that he was facing four life sentences rather than three, appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that had he been correctly informed that he was facing three life sentences he would not have entered a guilty plea and would have insisted on proceeding to trial. Accordingly, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that his counsel was ineffective because counsel's lack of interest and preparation for his case forced appellant to plead guilty. This claim is belied by the record.⁵ At the guilty plea canvass, appellant affirmed that he was freely and voluntarily

⁴See NRS 207.010(1)(b) (providing that the punishment for habitual criminal as a category A felony may include life without the possibility of parole, life with the possibility of parole after ten years or a definite term of twenty-five years with the possibility of parole after ten years).

⁵See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

pleading guilty. Further, the guilty plea agreement that appellant signed stated that appellant was signing the agreement voluntarily and appellant was not acting under duress or coercion. Accordingly, we conclude the district court did not err in denying this claim.

Seventh, appellant claimed that his counsel failed to file a notice of appeal on his behalf, despite his timely request that counsel do so. The State responded below that, at the district court's discretion, it did not oppose an evidentiary hearing limited to this issue.

Appellant is entitled to an evidentiary hearing if he raises claims that are not belied by the record and, if true, would entitle him to relief.⁶ If a client expresses a desire to appeal, counsel is obligated to file a notice of appeal on the client's behalf.⁷ Here, it appears that appellant's appeal deprivation claim is not belied by the record, and may, if true, entitle appellant to relief. Accordingly, we conclude that the district court erred by failing to hold an evidentiary hearing on this issue. Therefore, we reverse the district court's denial of this claim and remand this appeal to the district court for an evidentiary hearing on appellant's appeal deprivation claim.

⁶Id. at 502, 686 P.2d at 225.

⁷See Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999); Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003); Roe v. Flores-Ortega, 528 U.S. 470 (2000).

In his petition, appellant also claimed his due process rights were violated because: (1) the State relied on false documents, his counsel failed to identify the false documents, and the district court considered the false documents when adjudicating him a habitual criminal; (2) he was not provided adequate notice that the State was seeking habitual criminal treatment; (3) his habitual criminal adjudication was not determined by a jury; (4) the district court allowed him to stipulate to habitual criminal status and did not exercise discretion when adjudicating him a habitual criminal; (5) the district court did not give him an opportunity to speak at the sentencing hearing; and (6) he did not admit to facts supporting his conviction at the sentencing hearing. These are direct appeal claims that cannot be raised in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based on a guilty plea.⁸ In light of our decision regarding appellant's appeal deprivation claim, we decline to consider these claims at this time. After the evidentiary hearing, if the district court determines that appellant was deprived of a direct appeal, these claims can be raised with the assistance of counsel when filing a Lozada⁹ petition.¹⁰


⁸See NRS 34.810(1)(a).

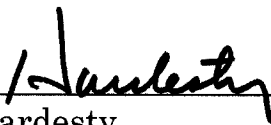
⁹Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

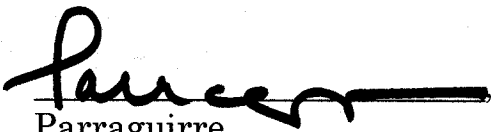
¹⁰If the district court determines that appellant was not denied a direct appeal, the district court shall enter an order denying appellant's appeal deprivation claim and resolving any other outstanding claims.

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.¹¹ 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.¹²


_____, J.
Becker


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Valorie Vega, District Judge
Fred D. George Jr.
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹¹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹²This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.