IN THE SUPREME COURT OF THE STATE OF NEVADA

CURTIS CHARLES BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47460

FILED

DEC 26 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
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; Jackie Glass, Judge.

On June 14, 2005, the district court convicted appellant, pursuant to a guilty plea, of attempted sexual assault of a minor under fourteen years of age. The district court sentenced appellant to serve a term of fifteen years in the Nevada State Prison. Appellant did not file a direct appeal.

On January 30, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On March 13, 2006, appellant filed a supplement to the petition. The State opposed the petition. Appellant filed a response to the opposition. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. After conducting an evidentiary hearing, the district court denied appellant's petition on July 7, 2006. 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

06-26345

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.[1] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[2] "[A] habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence."[3] Factual findings of the district court that are supported by substantial evidence and are not clearly wrong are entitled to deference when reviewed on appeal.[4]

First, appellant claimed that his counsel was ineffective for continuing the preliminary hearing in order to allow the victim to appear.[5] Appellant failed to demonstrate that his counsel was ineffective. The record on appeal indicates that at least some of the continuances were requested so the parties could continue plea negotiations, and it took approximately two months before the parties settled the plea negotiations.

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

[2]Strickland v. Washington, 466 U.S. 668, 697 (1984).

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

[4]Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

[5]To the extent that appellant raised this claim outside the context of his ineffective assistance of counsel claim, the claim fell outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a conviction based on a guilty plea. See NRS 34.810(1)(a).

The record further indicates that appellant received a substantial benefit by entering a guilty plea. By pleading guilty to attempted sexual assault of a minor under fourteen years of age, appellant avoided going to trial on a count of sexual assault of a minor under sixteen years of age and the State agreed not to oppose imposition of the sentence to run concurrent with the sentence in another case. Accordingly, we conclude the district court did not err in denying this claim.

Second, appellant claimed that his counsel was ineffective for advising him to waive his preliminary hearing. Appellant failed to demonstrate that his counsel was ineffective. The record on appeal indicates that appellant's waiver of the preliminary hearing was a conditional waiver; if a disagreement arose regarding the agreed upon plea deal, appellant was entitled to return to the justice court for a preliminary hearing. Appellant failed to demonstrate that absent his counsel's advice to waive the preliminary hearing he would not have pleaded guilty and would have proceeded to trial. Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant claimed that his counsel was ineffective for failing to investigate case facts, interview the victim, prepare for trial, and adequately advise appellant. Appellant failed to demonstrate that his counsel was ineffective. These claims are bare and naked allegations unsupported by specific facts.[6] Accordingly, we conclude that the district court did not err in denying these claims.

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[6]See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Fourth, appellant claimed that his counsel was ineffective and his guilty plea was involuntary because his counsel failed to inform him that the statute of limitations had run for the crime he was charged with. Appellant failed to demonstrate that his counsel was ineffective or that his plea was involuntarily entered.[7] The record on appeal indicates that a criminal complaint was filed on November 19, 1997, charging appellant with sexual assault for an act that occurred in 1994. Because the complaint was filed within four years after the commission of the sexual assault, the statute of limitations had not run and the complaint was timely filed.[8] Accordingly, we conclude the district court did not err in denying this claim.

Fifth, appellant claimed that his counsel was ineffective for failing to file a notice of appeal despite a request that counsel do so. The district court conducted an evidentiary hearing limited to this issue.

This court has held that if a defendant expresses a desire to appeal, counsel is obligated to file a notice of appeal on the defendant's

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[7]See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986) (holding that a guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

[8]See 1985 Nev. Stat., ch. 658, § 10, at 2167 (NRS 171.085(1)).

behalf.[9] Prejudice is presumed where a defendant expresses a desire to appeal and counsel fails to do so.[10]

In support of his appeal deprivation claim, appellant, in his response to the State's opposition, attached a copy of a letter appellant purportedly sent to his counsel requesting an appeal, an affidavit from Eduardo Licon stating he witnessed appellant send the letter requesting an appeal, and an affidavit from William Morris stating that Morris relayed a message to appellant's counsel to file an appeal on appellant's behalf. At the evidentiary hearing, appellant began to reference the letter and affidavits and the State objected on hearsay grounds. The court sustained the objection. Appellant then proceeded to question his counsel about whether his counsel recalled appellant requesting counsel to file an appeal or recalled William Morrison, an attorney from North Carolina, calling and requesting counsel to file an appeal on appellant's behalf.[11] Appellant's counsel testified that he did not recall appellant asking him to file an appeal. Additionally, appellant's counsel testified that he did not recall William Morrison requesting an appeal, but it "[v]ery definitely

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

[10]Mann v. State, 118 Nev. 351, 353-54, 46 P.3d 1228, 1229-30 (2002).

[11]We note that there are some discrepancies between appellant's questions at the evidentiary hearing and the affidavit submitted by appellant. Specifically, although appellant asserted that he had attorney William Morrison request his counsel to file an appeal, the affidavit was signed by a William Morris and the affidavit in no way indicates that Morris is an attorney in North Carolina.

could've happened." Appellant's counsel further testified that because appellant had not paid him to proceed through an appeal, if appellant had requested him to file an appeal, counsel would have done so and filed a motion to withdraw as counsel after the appeal had been perfected. Counsel testified that he took no such action in this case. Appellant did not testify at the evidentiary hearing. The district court determined that counsel's testimony was credible and found that appellant failed to demonstrate that his counsel was ineffective by a preponderance of the evidence.

It appears that the letter and affidavits were properly before the district court for consideration when resolving appellant's appeal deprivation claim.[12] We therefore conclude that, although there may be issues regarding the authenticity of these documents, the district court should have considered these documents when resolving appellant's appeal deprivation claim, and the district court's failure to consider the documents based on the State's hearsay objection was not appropriate. The record before this court does not indicate whether the district court's factual determination that appellant did not request his counsel to file an appeal on his behalf would be established by a preponderance of the evidence had the district court considered the letter and affidavits when making its decision. Accordingly, we reverse the district court's denial of

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[12]See NRS 34.790. Although it is not clear from the record whether the district court ordered the submission of additional material pursuant to this section, the documents submitted were of the type permitted and they were submitted after the district court ordered an evidentiary hearing on appellant's appeal deprivation claim.

appellant's appeal deprivation claim and remand this appeal for an additional evidentiary hearing on this claim.[13]

We remind the State that because appellant's appeal deprivation claim and the statements contained in the affidavits and letter supplied by appellant in support of that claim are not belied by the record, they appear to amount to a preponderance of the evidence on their face, and thus the burden is on the State to refute the factual allegations in those documents. This burden requires an investigation into the allegations contained in the affidavits, an investigation into the authenticity of the affidavits and, if necessary, testimony from those individuals at the evidentiary hearing.

In reviewing this appeal, we note that the documents submitted by appellant implicate some troubling authenticity issues.[14] For example, the discrepancies in appellant's testimony regarding William Morrison and the affidavit by William Morris as stated above. Additional discrepancies also appear between Morris' affidavit and a May 19, 2006, letter from Morris that appellant submitted to this court in support of this

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[13]Appellant also claimed that his Fourteenth Amendment rights were violated because he was arrested on a stale warrant. In light of this order, we decline to consider this issue at this time. If appellant demonstrates that he was deprived of a direct appeal, appellant may raise this claim in a petition filed pursuant to Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994). See also NRS 177.015(4).

[14]Copies of the documents submitted by appellant are attached to this order. The last document attached to this order is a copy of a May 19, 2006, letter purportedly sent by Morris to appellant that was submitted to this court by appellant in support of this appeal. This letter is not included in the record on appeal from the district court.

appeal. Specifically, the letter submitted to this court indicates that Morris is an attorney in Nebraska, not North Carolina. Accordingly, any investigation into the Morris affidavit and the letter submitted to this court that was purportedly written by Morris should include an inquiry into: (1) whether Morris executed the affidavit and letter; (2) whether William J. Morris is an attorney in North Carolina and/or an attorney in Nebraska; (3) whether Morris works for American Legal Services Group as indicated in the letter; and (4) whether Morris lives in North Carolina as indicated in the affidavit or in Nebraska as indicated in the letter.

Further, in taking judicial notice of other documents filed before this court, we note that appellant's purported letter to his counsel requesting an appeal that was submitted in support of his appeal deprivation claim is substantially similar to letters submitted by several other inmates who have filed original petitions with this court seeking relief. All of these letters appear to be submitted primarily by inmates who have been convicted of a sexual offense, are purportedly sent by the inmates from county jails and institutions from around the state, and the inmates are now solely housed in the Lovelock Correctional Center when the petition raising the appeal deprivation claim is filed.[15] Because

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[15]See Burbank v. District Court, Docket No. 45542 (Order Denying Petition, August 24, 2005); Dustman v. State, Docket No. 45418 (Order Denying Petition, August 24, 2005); Johnson v. District Court, Docket No. 45256 (Order Denying Petition, August 24, 2005); Ballard v. District Court, Docket No. 45649 (Order Denying Petition, August 17, 2005); Johnson v. State, Docket No. 45509 (Order Denying Petition, August 17, 2005); Paschall v. District Court, Docket No. 45007 (Order Denying Petition, April 21, 2005); Bruinsma v. State, Docket No. 44950 (Order Denying Petition, April 6, 2005); Garcia v. State, Docket No. 44948 (Order

continued on next page . . .

appellant has submitted an affidavit from Licon stating that Licon witnessed appellant execute the letter requesting an appeal and mail it to his counsel, any investigation into Licon's affidavit should include an inquiry into: (1) whether Licon executed the affidavit; (2) whether Licon was housed at the High Desert State Prison on the date the letter was signed by appellant and witnessed by Licon; (3) whether Licon was appellant's cellmate at the time the letter was sent by appellant; (4) whether appellant used any legal mail logs, other mail logs or had any brass slips issued to him that would demonstrate appellant mailed the letter requesting an appeal to his counsel; and (5) whether Licon was housed at the Lovelock Correctional Center when Licon's affidavit was executed as is indicated on the face of the affidavit.

. . . continued

Denying Petition, April 6, 2005); McCreary v. State, Docket No. 44810 (Order Denying Petition, April 5, 2005); Magalotti v. State, Docket No. 44861 (Order Denying Petition, April 1, 2005); Concepcion v. State, Docket No. 44811 (Order Denying Petition, April 1, 2005); Johnson v. State, Docket No. 44756 (Order Denying Petition, March 29, 2005); Kyriacou v. State, Docket No. 44678 (Order Denying Petition, March 4, 2005); Boswell v. State, Docket No. 44654 (Order Denying Petition, February 24, 2005); Lanoue v. State, Docket No. 44641 (Order Denying Petition, February 17, 2005); Cooper v. State, Docket Nos. 44498 and 44499 (Order Denying Petitions, February 3, 2005); Esquibel, III v. State, Docket No. 44489 (Order Denying Petition, February 3, 2005); Peterson v. State, Docket No. 44392 (Order Denying Petition, January 13, 2005). We stress that this court has only observed these letters attached to petitions filed by inmates housed at the Lovelock Correctional Center when the petition is filed, even though the letters were purportedly sent by the inmates from locations around the State.

When investigating the authenticity of the documents submitted by appellant, if it appears that appellant has submitted false documents to the court, the State may choose to pursue charges against appellant for offering false documents into evidence.[16]

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is only entitled to relief granted and that briefing and oral argument are unwarranted.[17] 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.[18]

Becker, J.
Becker

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

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[16]See NRS 199.210; NRS 209.451(1)(d).

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

[18]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.

cc: Hon. Jackie Glass, District Judge
Curtis Charles Brown
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

CURTIS CHARLES BROWN, Petitioner, vs. DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS, and THE STATE OF NEVADA, Respondents.	)	CASE NO. C209533 DEPT NO. V

WITNESS FFIDAVIT OF WILLIAM J. MORRIS

NORTH CAROLINA)
) ss.
ALAMANCE COUNTY)

WILLIAM J. MORRIS, being first duly sworn upon Oath, deposes and says:

That I am the affiant herein and make this affidavit from personal knowledge, being competent to testify to the facts herein;

That Mr. Curtis C. Brown was continuously residing at my residence from June 6, 1994, a Monday, through to March 22, 1995, a Wednesday, and was never away from my residence any longer than my 6 hour work shift on weekdays, and at my residence all days and nights during the weekends, or with me personally. When he was arrested in Las Vegas, I telephoned his attorney, Mr. Buchanan, and informed him that Curtis could not possibly have committed the offense they claimed he had committed in December, 1994, as he was residing with me. Mr. Buchanan stated that he had a "deal" going, but thanked me for my interest. After the sentencing, I also relayed a message to Mr. Buchanan for Curtis to please file an appeal of the ease, and Mr. Buchanan said he would do so.

William J. Morris, Affiant

x William J. Morris

P.O. Box 430
Graham, N.C. 27253

SUBSCRIBED A.D SWORN before me this 3rd of April, 2006:

Angela Dawn
NOTARY PUBLIC
My Comm. Exp's: 6-12-10

OFFICIAL SEAL
NOTARY PUBLIC - North Carolina
ANGELA DAWN

RECEIVED
MAY - 5 2006
COUNTY CLERK

SIT

Copy

Curtis C. Brown #86397
High Desert State Prison
P.O. Box 650
Indian Springs, Nevada
89018

Mr. James L. Buchanan, II
Attorney at Law
300 South Maryland Parkway
Las Vegas, Nevada 89101

June 20, 2005

Dear Mr. Buchanan;

After sentencing I asked you to appeal and I haven't heard anything from you on that. Since I just found out that I only have 30 days to file an appeal and don't know how to do so, I am again asking please file an appeal as there are several issues that need to be reviewed by the Supreme Court on my case.

Thank you for your assistance.

Sincerely,

Curtis Brown

Curtis C. Brown

I witnessed Curtis Brown send this letter as addressed on this 20th day of June, 2005:

Eduardo Licon

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DISTRICT COURT

CLARK COUNTY, NEVADA

Shirley B. Parraguirre
CLERK

CURTIS CHARLES BROWN, Petitioner, vs. DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS, and THE STATE OF NEVADA, Respondents.	CASE NO. C209533 DEPT NO. V Hearing Date: April 11, 2006 Hearing Time: 8:30 A.M.

WITNESS AFFIDAVIT OF EDUARDO LICON
FOR PETITIONER'S HABEAS CORPUS PROCEEDINGS

STATE OF NEVADA)
) ss.
PERSHING COUNTY)

EDUARDO LICON, being first duly sworn upon oath, deposes and says:

That I am the affiant herein and make this affidavit from personal knowledge being competent to testify to the facts herein.

On June 20, 2005, I executed the attached letter as a witness for Curtis Brown and watched when he mailed it from High Desert State Prison where we were both housed at the time.

SWORN under penalty of perjury, NRS 208.165/ 28 USC § 1746.

Dated: March 6, 2006

EDUARDO LICON, Affiant

Lovelock Correctional Center
P.O. Box 359
Lovelock, Nevada 89419-0359

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RECEIVED
APR 24 2006
COUNTY CLERK

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AMERICAN LEGAL SERVICES GROUP
47 Lemmick Circle
Omaha, Nebraska 68119
(800) 527-2431

May 19, 2006

Midwestern Regional Division Offices

Hon. Jackie Glass
District Judge, Department V
EIGHT JUDICIAL DISTRICT COURT
200 Lewis Street
Las Vegas, Nevada 89155

Re: Curtis Charles Brown, Case No. C209533

Dear Judge Glass:

This is to further confirm my affidavit filed in Mr. Brown's habeas corpus proceedings, that he was never away from my residence in North Carolina on the dates show and could not have committed the alleged offense unless it occurred before that date, which puts the charges past the statute of limitations.

If you have already ruled on this matter I am requesting that you re-examine it on the Court's own motion as the prosecution was effectively barred from bringing the charges due to the foregoing facts.

Sincerely,

William J. Morris

WJM/dgf