IN THE SUPREME COURT OF THE STATE OF NEVADA

J.B. MIKELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47607

FILED

NOV 27 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
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 a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On August 22, 2005, the district court convicted appellant, pursuant to a guilty plea, of one count of child endangerment (gross misdemeanor) and one count of assault on an officer (gross misdemeanor). The district court sentenced appellant to serve two consecutive terms of one year in the Clark County Detention Center. This court dismissed appellant's untimely direct appeal for lack of jurisdiction.[1]

On February 15, 2006, 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, the district court declined to appoint counsel to represent appellant. On July 12, 2006, after conducting an evidentiary hearing, the district court denied appellant's petition. This appeal followed.

---

[1]Mikell v. State, Docket No. 46050 (Order Dismissing Appeal, December 23, 2005).

In his petition, appellant contended that his guilty plea was not entered knowingly and voluntarily. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.[2] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[3] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[4]

Appellant claimed that his guilty plea was the product of deception. Specifically, appellant claimed that his trial counsel assured him that he would get probation in the instant case.

Based upon our review of the record on appeal, we conclude that appellant failed to carry his burden of demonstrating that his guilty plea was entered unknowingly and involuntarily. Appellant's trial counsel testified at the evidentiary hearing that he did not promise appellant that he would get probation. Appellant was informed in the written guilty plea agreement, which he acknowledged reading, signing and understanding, that he faced terms of incarceration and that probation was in the discretion of the sentencing judge. The district court personally canvassed appellant about his understanding that matters of sentencing were in the discretion of the district court judge. Appellant further acknowledged in his written guilty plea agreement that he was not promised a particular

---

[2]Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

[3]Hubbard, 110 Nev. at 675, 877 P.2d at 521.

[4]State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

sentence by anyone. Appellant's mere subjective belief as to a potential sentence is insufficient to invalidate his guilty plea as involuntary and unknowing.[5] Therefore, the district court did not err in denying this claim.

Next, 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, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that there is a reasonable probability of a different outcome in the proceedings.[6] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[7] A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel by a preponderance of the evidence.[8]

First, appellant claimed that his counsel was ineffective for failing to file a response to an order to show cause in his direct appeal. Appellant failed to demonstrate that he was prejudiced. Appellant's notice of appeal was untimely filed, and there is no good cause exception for a late notice of appeal.[9] Appellant failed to demonstrate that any argument from counsel would have made a difference to the outcome of the appeal.

---

[5]See Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975).

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

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

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

[9]See NRAP 4(b).

Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to file a post-sentence motion to withdraw the guilty plea. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that trial counsel had any obligation to file such a motion in the instant case. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to request a direct appeal after being requested to do so by appellant. Appellant asserted that he informed counsel of his desire to pursue a direct appeal.

This court has held that "[t]rial counsel is ineffective if he or she fails to file a direct appeal after a defendant has requested or expressed a desire for a direct appeal; counsel's performance is deficient and prejudiced is presumed under these facts."[10] As stated earlier, a petitioner must prove the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.[11]

Appellant's trial counsel testified that he was asked to file an appeal, but that the issue appellant wanted to raise on appeal was not

---

[10]Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003).

[11]Means, 120 Nev. at 1012, 103 P.3d at 33.

appropriate for direct appeal.[12] Instead, appellant's trial counsel testified that he informed appellant to raise the issue in a post-conviction petition, and trial counsel withdrew from the case and sent appellant the case file to facilitate the filing of a post-conviction petition.

Having reviewed the documents before this court, we conclude that appellant demonstrated that his trial counsel was ineffective. The record on appeal establishes that after sentencing appellant expressed dissatisfaction with his conviction and that appellant wanted to challenge his conviction on appeal. Appellant's trial counsel's own testimony indicates that trial counsel knew that appellant wanted to pursue a direct appeal. Although appellant's trial counsel may have believed that there were not any non-frivolous issues to argue in a direct appeal, appellant's trial counsel had an obligation to file an appeal because appellant had expressed a desire for an appeal.[13] Prejudice is presumed under the facts presented in this case.[14] It is unnecessary to remand this matter for further evidentiary proceedings as the record before this court establishes that appellant demonstrated the factual allegation underlying his claim of ineffective assistance of counsel by a preponderance of the evidence.

---

[12]It appears that appellant informed counsel that he wanted to challenge the validity of his guilty plea based upon the alleged promise of probation.

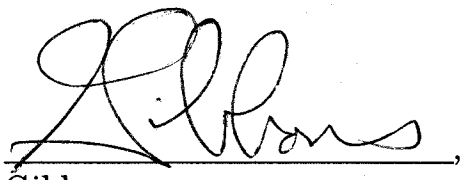
[13]Hathaway, 119 Nev. at 254, 71 P.3d at 507; Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999); Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994). We note that this court has held that there is an exception to counsel's ethical obligation not to raise frivolous issues where counsel must pursue an appeal considered frivolous by counsel. See Ramos v. State, 113 Nev. 1081, 944 P.2d 856 (1997).

[14]Hathaway, 119 Nev. at 254, 71 P.3d at 507.

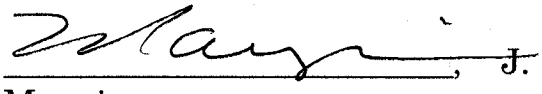
Therefore, we reverse the district court's order in part, and we remand this matter to the district court for the appointment of counsel. Appellant may raise any claims appropriate for a direct appeal in a petition for a writ of habeas corpus filed in the district court pursuant to the remedy set forth in Lozada.[15]

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that briefing and oral argument are unwarranted.[16] Accordingly, we

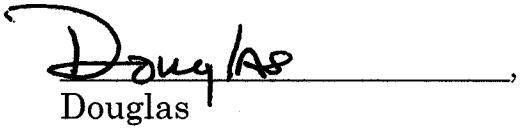
ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[17]



_____, J.
Gibbons



_____, J.
Maupin



_____, J.
Douglas

---

[15]Lozada, 110 Nev. at 359, 871 P.2d at 950.

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

[17]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.