

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH PATRICK HIBBLER, AKA
KENNETH P. HIBBLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47899

FILED

JUL 26 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

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; David Wall, Judge.

On August 3, 2005, the district court convicted appellant, pursuant to an Alford¹ plea, of one count of child abuse and neglect with substantial bodily harm. The district court sentenced appellant to serve a term of 60 to 180 months in the Nevada State Prison. Appellant did not file a direct appeal.

On May 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. Appellant filed a reply. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On August 15, 2006, the district court denied appellant's petition. This appeal followed.

¹North Carolina v. Alford, 400 U.S. 25 (1970).

In his petition, appellant contended that defense counsel was ineffective.² 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 resulted in 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.³ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁴

First, appellant claimed that defense counsel was ineffective for failing to investigate appellant's mental health history. Specifically, appellant maintained that counsel failed to discover that, before the crime occurred, appellant had been diagnosed with severe depression and had been prescribed Ativan, which allegedly caused him to suffer a psychotic break. Appellant failed to demonstrate that counsel's investigation of his mental health history was deficient. The record on appeal indicates that counsel investigated appellant's contention that he suffered a psychotic reaction which resulted in his criminal actions. The record indicates that defense counsel noticed an expert witness, a neuropsychologist, who

²To the extent that appellant raised any of the underlying issues independently from his ineffective assistance of counsel claims, we conclude that they fell outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea. NRS 34.810(1)(a).

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

⁴Strickland v. Washington, 466 U.S. 668, 697 (1984).

evaluated appellant's medical records and was expected to testify that appellant was "under a neurological impairment at the time of the offense." Further, counsel stated in the sentencing memorandum that he intended on presenting expert testimony at trial that Ativan could have possibly produced a "hostile reaction" in appellant's case. Thus, the district court did not err in denying this claim.

Second, appellant claimed that defense counsel was ineffective for failing to object to the justice court's decision to order a competency evaluation. Appellant failed to demonstrate that defense counsel's performance was deficient or that he was prejudiced. Pursuant to NRS 178.415(2), a justice court is allowed to order a competency evaluation of a criminal defendant. Appellant failed to demonstrate that his competency evaluation would have been different if ordered in the district court. Further, defense counsel made a tactical decision to request a competency evaluation, and the justice court merely granted the defense's motion.⁵ Thus, the district court did not err in denying this claim.

Third, appellant claimed that defense counsel was ineffective for failing to have him properly evaluated pursuant to NRS 178.415(1),⁶ and ensure that he was competent at the time he entered his guilty plea. Additionally, appellant claimed that his guilty plea was invalid because he was under the influence of anti-psychotic medications at the entry of his

⁵See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (holding that counsel's "[t]actical decisions are virtually unchallengeable absent extraordinary circumstances").

⁶NRS 178.415(1) specifies that a "court shall appoint two psychiatrists, two psychologists, or one psychiatrist and one psychologist, to examine the defendant."

plea. Appellant failed to demonstrate that defense counsel's performance was deficient or that he was prejudiced. Appellant also failed to show that his guilty plea was involuntary. There is no evidence in the record indicating that defense counsel or the district court had reason to doubt appellant's competency when he entered his plea.⁷ The transcript of the plea canvass indicates that appellant appropriately responded to the district court's questions and requested clarification when he did not understand the proceedings. Further, appellant acknowledged in the written plea agreement that he was not under the influence of any drug which would impair his ability to understand the proceedings surrounding his entry of plea. The totality of the circumstances indicates that appellant entered his plea knowingly and voluntarily. Thus, the district court did not err in denying these claims.

Fourth, appellant claimed that defense counsel was ineffective for failing to insure that he received a mandatory psychosexual evaluation prior to sentencing. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. NRS 176A.110 requires a defendant be certified as not a high risk to reoffend if he is convicted of an enumerated crime, including abuse and neglect of a child, before the district court grants probation. Appellant did not request probation but instead stipulated to a term of imprisonment of five to fifteen years. The district court sentenced appellant according to the stipulation. Thus, the district court did not err in denying this claim.

⁷See NRS 178.405; Calvin v. State, 122 Nev. ___, ___, 147 P.3d 1097, 1100 (2006).

Fifth, appellant claimed that defense counsel was ineffective for failing to ensure that appellant signed the plea agreement. This claim is belied by the record.⁸ The record on appeal contains a guilty plea agreement with appellant's signature, and appellant admitted during the plea canvass that he signed the plea agreement. Thus, the district court did not err in denying this claim.

Sixth, appellant claimed that defense counsel was ineffective for failing to file a presentence motion to withdraw appellant's guilty plea. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Prior to sentencing, defense counsel informed the district court that appellant wanted to withdraw his guilty plea. Because the motion was to be based on ineffective advice of counsel, the district court allowed counsel to withdraw and appointed substitute counsel. After discussing his options with his new counsel, appellant decided not to withdraw his guilty plea. Further, appellant failed to demonstrate that such a motion would have been successful because, as previously discussed, the record indicates that the guilty plea was knowing, voluntary and intelligent.⁹ Thus, the district court did not err in denying this claim.

Seventh, appellant claimed that defense counsel was ineffective for misadvising him that there were no insanity or diminished capacity defenses in Nevada. Appellant has failed to show that defense counsel was deficient or that he was prejudiced. Defense counsel correctly

⁸Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

⁹State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

advised appellant that there is no diminished capacity defense in Nevada.¹⁰ Moreover, appellant's claim that defense counsel misadvised him about an insanity defense is belied by the record. The record indicates that defense counsel intended to present expert testimony at trial that appellant was "under a neurological impairment at the time of the offense." Defense counsel stated in the sentencing memorandum that, at trial, he intended to present expert testimony from a neuropsychologist and an assistant professor of pharmacology who would testify that Ativan could have possibly produced a "hostile reaction" in appellant's case. And even assuming counsel misadvised appellant about an insanity defense, appellant failed to demonstrate that he would not have pleaded guilty and would have instead insisted on proceeding to trial. Appellant substantially benefited by entering into the plea agreement by avoiding more serious charges,¹¹ and there is no indication in the record that an insanity defense would have been successful at trial.¹² Thus, the district court did not err in denying this claim.

Eighth, appellant claimed that his counsel was ineffective for failing to inform him of his right to file a direct appeal. Appellant failed to

¹⁰Crawford v. State, 121 Nev. 744, 757, 121 P.3d 582, 591 (2005); Ogden v. State, 96 Nev. 258, 262, 607 P.2d 576, 578 (1980); see also Fox v. State, 73 Nev. 241, 244-45, 316 P.2d 924, 926 (1957).

¹¹Appellant was initially charged with first-degree kidnapping with the use of a deadly weapon (NRS 200.310, NRS 193.165); attempted murder with the use of a deadly weapon (NRS 200.010, NRS 200.030, NRS 193.330, NRS 193.165); and battery with the use of a deadly weapon resulting in substantial bodily harm (NRS 200.481(2)(e)(2)).

¹²See Finger v. State, 117 Nev. 548, 576, 27 P.3d 66, 84-85 (2001) (discussing the M'Naughten standard for legal insanity).

demonstrate that his counsel's performance was deficient. "[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 a direct appeal or there exists a direct appeal claim that has a reasonable likelihood of success.¹³ In Lozada v. State, this court recognized that "an attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction."¹⁴ The burden is on the defendant to indicate to his attorney that he wishes to pursue an appeal.¹⁵ Appellant did not allege that he informed counsel that he wished to pursue a direct appeal or was dissatisfied with his stipulated sentence. Further, appellant was informed in the written plea agreement of his limited right to appeal. Thus, the district court did not err in denying this claim.

Last, appellant claimed that defense counsel was ineffective for failing to assist him in asserting his right to self-representation pursuant to Faretta v. California.¹⁶ This court has held that criminal defendants have an "unqualified right" to self-representation, so long as there is a voluntary and intelligent waiver of the right to counsel.¹⁷ A trial

¹³See Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999).

¹⁴110 Nev. 349, 356, 871 P.2d 944, 948 (1994).

¹⁵Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999).


¹⁶422 U.S. 806 (1975).


¹⁷Baker v. State, 97 Nev. 634, 636, 637 P.2d 1217, 1218 (1981) (citing Faretta v. California, 422 U.S. 806 (1975)) (overruled by Lyons v. State, 106 Nev. 438, 796 P.2d 210 (1990)).

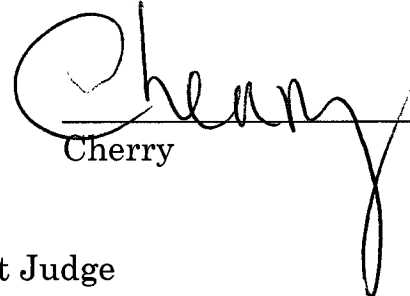
court may deny a request for self-representation that is untimely, equivocal, made solely for purpose of delay, or if the defendant abuses the right by disrupting the judicial process.¹⁸ The record indicates that appellant did not equivocally request self-representation, and in fact, withdrew his motion for self-representation. Thus, the district court did not err in denying this claim.

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.¹⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

cc: Hon. David Wall, District Judge
Kenneth Patrick Hibbler
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁸Tanksley v. State, 113 Nev. 997, 1001, 946 P.2d 148, 150 (1997).

¹⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).