IN THE SUPREME COURT OF THE STATE OF NEVADA

RUSSELL STEWART KEITHLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48099

FILED

NOV 0 8 2007

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; Michelle Leavitt, Judge.

On August 30, 2005, the district court convicted appellant, pursuant to a guilty plea, of one count of attempted lewdness with a child under fourteen years of age. The district court sentenced appellant to serve a term of 36 to 120 months in the Nevada State Prison. Appellant did not file a direct appeal.

On May 11, 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. After conducting an evidentiary hearing, on September 8, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that his plea was involuntarily entered. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered

knowingly and intelligently.[1] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[2] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[3]

First, appellant claimed that his plea was involuntarily entered because his counsel required an unobtainable fee to proceed to trial and his counsel only offered him a guilty plea. Appellant failed to demonstrate that his plea was not entered knowingly and intelligently. In the written guilty plea agreement and at the plea canvass, appellant stated that he was entering the plea freely and voluntarily and was not acting under duress or coercion. Further, appellant failed to demonstrate that the requirement of additional payment by his counsel to proceed to trial coerced him into entering a guilty plea. The record reveals that, prior to hiring counsel to represent him, appellant represented himself and the district court made several offers to appoint counsel to represent appellant. Appellant failed to demonstrate that he could not have proceeded to trial with the assistance of appointed counsel. Therefore, we conclude the district court did not err in denying this claim.

Second, appellant claimed that his plea was involuntarily entered because neither the court nor his counsel informed him of the specific nature, elements and consequences of lifetime supervision.

---

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

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

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

Appellant failed to demonstrate that his plea was not entered knowingly and intelligently. In Palmer v. State,[4] this court concluded that lifetime supervision is a direct consequence of a guilty plea. Consequently, the totality of the circumstances must demonstrate that a defendant was aware of the consequence of lifetime supervision prior to the entry of a guilty plea; otherwise, the petitioner must be allowed to withdraw the plea.[5] The particular conditions of lifetime supervision are tailored to each individual case and, notably, are not determined until after a hearing is conducted just prior to the expiration of the sex offender's completion of a term of parole or probation, or release from custody.[6] Thus, all that is constitutionally required is that the totality of the circumstances demonstrate that a petitioner was aware that he would be subject to the consequence of lifetime supervision before entry of the plea and not the precise conditions of lifetime supervision.[7] Here, appellant was informed in the guilty plea agreement and at the plea canvass that he was subject to the special sentence of lifetime supervision. Therefore, we conclude the district court did not err in denying this claim.

---

[4]118 Nev. 823, 59 P.3d 1192 (2002).

[5]Id. at 831, 59 P.3d at 1197.

[6]See NRS 213.1243(1); NAC 213.290.

[7]Palmer, 118 Nev. at 831, 59 P.3d at 1197. In Palmer this court recognized that under Nevada's statutory scheme, a defendant is provided with written notice and an explanation of the specific conditions of lifetime supervision that apply to him "[b]efore the expiration of a term of imprisonment, parole or probation." Id. at 827, 59 P.3d at 1194-95 (emphasis added).

Appellant also claimed that his counsel was ineffective. 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.[8] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[9] A petitioner must demonstrate "the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence."[10] The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.[11]

First, appellant claimed that his counsel was ineffective for failing to investigate case facts, interview key witnesses or advise appellant of a defense theory. Appellant failed to articulate what investigation his counsel should have conducted or what advice he should have been given, such that he would not have pleaded guilty and would

---

[8]Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

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

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

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

have insisted on going to trial.[12] Therefore, we conclude the district court did not err in denying this claim.

Second, appellant claimed that his counsel was ineffective for failing to advise him of the precise conditions of lifetime supervision. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced by his counsel's actions. Because the conditions of lifetime supervision are not determined until after a hearing is conducted just prior to the sex offender's completion of a term of parole or probation, or release from custody,[13] appellant's counsel could not have advised him of the conditions of lifetime supervision that would apply to appellant. Therefore, we conclude the district court did not err in denying this claim.

Third, appellant claimed that his counsel was ineffective for failing to file an appeal after being requested to do so. The district court held a limited evidentiary hearing on this claim. Appellant's trial counsel testified that, on the day of appellant's sentencing hearing, appellant informed his counsel that he wanted to pursue a federal appeal. Counsel further testified that he informed appellant that he did not see a basis for an appeal, but he would refer appellant to someone who could handle an appeal, "but nonetheless, [appellant] was on [his] own from that point forward." Additionally, counsel testified that appellant failed to fulfill the payment terms of his contract for representation. The State argued that because appellant did not specifically request his counsel to file a notice of appeal to the Nevada Supreme Court and because appellant did not

---

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

[13]See NRS 213.1243(1); NAC 213.290.

identify any non-frivolous issues he would have raised on direct appeal the district court should deny this claim. The district court determined that appellant failed to demonstrate that his counsel was ineffective for failing to file a direct appeal and denied appellant's claim.

"'[A]n attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction.'"[14] "[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable."[15] Prejudice is presumed where a defendant expresses a desire to appeal and counsel fails to file an appeal.[16] Here, it is clear from the record that appellant was dissatisfied with his conviction and sentence, and appellant timely asked his counsel to file an appeal. It is immaterial that appellant informed his counsel that he wished to file a federal appeal rather than a state 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.[17] Prejudice is presumed under the facts presented in this

---

[14]Davis v. State, 115 Nev. 17, 20, 74 P.2d 658, 660 (1999) (quoting Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994)).

[15]Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000).

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

[17]Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003); Davis, 115 Nev. at 20, 974 P.2d at 660; Lozada, 110 Nev. at 354, 871 P.2d at 947. We note that contrary to the State's argument below, in a case such as this, where appellant clearly requested his counsel to file an appeal, inquiry into whether appellant had any non-frivolous issues to

*continued on next page . . .*

case.[18] 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. Therefore, we conclude that the district court erred in denying this claim, and we reverse the denial of this claim and remand this appeal for the appointment of counsel to assist appellant in the filing of a post-conviction petition raising direct appeal issues pursuant to the remedy set forth in Lozada.[19]

Finally, appellant claimed that lifetime supervision is unconstitutional because it violates the First, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, is unconstitutionally vague, ambiguous and overbroad, and is a prohibited bill of attainder. These claims 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.[20] Therefore, we conclude the district court did not err in denying these claims.

---

*. . . continued*

raise on direct appeal is not a component of deciding the appeal deprivation claim. See Roe, 528 U.S. at 477. Further, 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).

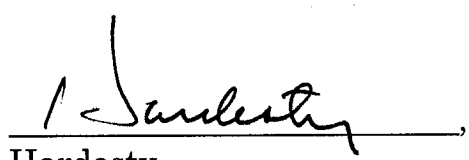
[18]Hathaway, 119 Nev. at 254, 71 P.3d at 507.

[19]Lozada, 110 Nev. 349, 871 P.2d 944.

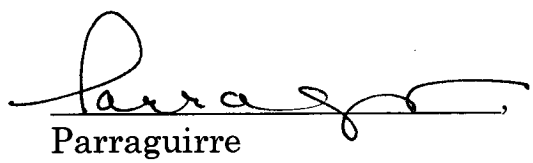
[20]See NRS 34.810(1)(a).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is only entitled to the relief granted and that briefing and oral argument are unwarranted.[21] Accordingly, we

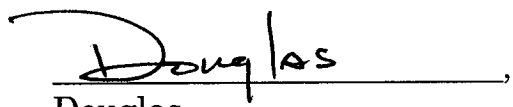
ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[22]



_____, J.
Hardesty



_____, J.
Parraguirre



_____, J.
Douglas

cc: Hon. Michelle Leavitt, District Judge
Russell Stewart Keithley
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

---

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

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