

IN THE SUPREME COURT OF THE STATE OF NEVADA

COURTNEY JAMES RENDELL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 48298

**FILED**

**JUN 08 2007**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. R. [Signature]*  
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; Jackie Glass, Judge.

On November 29, 2005, the district court convicted appellant, pursuant to a jury verdict, of one count of burglary and one count of grand larceny. The district court sentenced appellant to serve a term of eighteen to sixty months in the Nevada State Prison for burglary and a concurrent term of eighteen to forty-eight months for grand larceny. No direct appeal was taken.

On April 6, 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 November 30, 2006, after conducting an evidentiary hearing on the sole issue of whether trial counsel was ineffective for failing to file a notice of appeal, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended 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 counsel's errors were so severe that they rendered the jury's verdict unreliable.<sup>1</sup> The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.<sup>2</sup> A petitioner must prove the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence, and the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.<sup>3</sup>

First, appellant claimed that his trial counsel was ineffective for failing to file the witness list as directed by the district court. Appellant claimed that because trial counsel had failed to file the witness list as directed, the district court would not allow him to present testimony from his stepfather, Jerry Denning. In support of his claim, appellant attached an affidavit from Denning indicating that from the window of the home he shared with appellant's mother, Denning observed appellant sitting in his car in front of their home on the date that the victim's residence was burglarized.<sup>4</sup> Denning indicated that he observed appellant on several occasions and that appellant had left before appellant's mother

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<sup>1</sup>Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>2</sup>Strickland, 466 U.S. at 697.

<sup>3</sup>Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

<sup>4</sup>The victim's residence was on a street around the corner from Denning's.

had returned home. Appellant claimed that this demonstrated that he was not acting as a lookout for the burglary that occurred on the street around the corner.

Appellant failed to demonstrate that he was prejudiced by trial counsel's failure to file the witness list as directed by the district court because appellant failed to demonstrate that there was a reasonable probability of a different outcome had Denning testified. Denning's affidavit does not indicate the times that he saw appellant or the time that appellant had left the front of his mother's home. Thus, the information contained in the affidavit did not establish an alibi for the offense. More importantly, the evidence at trial established that appellant had admitted to Officer Merges that he was the lookout person for the burglary on the street around the corner. Evidence was further presented that appellant had gone to his mother's home before the commission of the burglary, and thus, Denning's potential testimony was cumulative to the testimony presented at trial regarding this point. 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 move for a mistrial when a State's witness referenced a statement about appellant's past. Specifically, appellant claimed that a mistrial should have been sought when Officer Merges testified that appellant told him that "he was scared because of his past."

Appellant failed to demonstrate that he was prejudiced by trial counsel's failure to move for a mistrial. Appellant failed to demonstrate that a motion for mistrial would have been successful. The comment was vague and the jury would not have reasonably inferred that

appellant had engaged in past criminal activity based on the statement.<sup>5</sup> Trial counsel did object to the reference to appellant's past and appeared to contemplate requesting a limiting jury instruction. However, after discussion with the district court about the nature of the comment and the danger of emphasizing the comment, appellant's trial counsel made a decision to not request a limited jury instruction. "Tactical decisions are virtually unchallengeable absent extraordinary circumstances," and such circumstances are not present here.<sup>6</sup> 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 file a motion for judgment of acquittal. Appellant claimed that a motion for judgment of acquittal would have been successful because the jury found him not guilty of the crime of conspiracy to commit grand larceny and because there was no physical or identification evidence that he committed the crimes of grand larceny and burglary. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that there was a reasonable probability that a motion for judgment of acquittal would have been granted in the instant case. The State proceeded under two theories of liability in the instant case—conspiracy and aiding and abetting. Despite the fact that the jury found appellant not guilty of the crime of conspiracy to commit grand larceny, the evidence at trial supported the

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<sup>5</sup>See Emmons v. State, 107 Nev. 53, 59, 807 P.2d 718, 722 (1991) (holding that if a jury could reasonably infer from evidence presented that the accused previously engaged in criminal activity, the reference to the accused's prior criminal history violates the accused's due process rights).

<sup>6</sup>See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).

jury's verdict regarding the remaining charges. The evidence adduced at trial indicated that appellant told the police that he had acted as a lookout during the offense. Within hours of the crime, a traffic stop was conducted on a car driven by the individual who entered the residence and took the victim's property while appellant acted as a lookout. Appellant was a passenger in the vehicle when it was stopped. The police officer who stopped the vehicle found a wallet with the victim's name on it in the area of the driver's seat. A later search of the impounded vehicle indicated that the victim's property was also found in the backseat in the area where appellant had been sitting before the traffic stop. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to file a direct appeal. Appellant indicated that he indicated to trial counsel that he wanted to appeal after the verdict and the sentencing hearing. In support of his contention, appellant attached a copy of a letter purportedly sent by appellant memorializing his request for an appeal.

This court has held that trial counsel's failure to obtain his client's consent not to pursue a direct appeal when the client expresses a desire to appeal or indicates dissatisfaction with the conviction is unreasonable conduct and prejudice is presumed.<sup>7</sup> As stated earlier, a petitioner must prove the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.<sup>8</sup>

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<sup>7</sup>Lozada v. State, 110 Nev. 349, 354-58, 871 P.2d 944 947-49 (1994); Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003).

<sup>8</sup>Means, 120 Nev. at 1012, 103 P.3d at 33.

At the evidentiary hearing, appellant's trial counsel testified that he had discussed an appeal with appellant, but that the two issues that appellant wanted to raise would not have been "viable." Appellant's trial counsel testified that he would not have allowed an appeal to go forward because of his ethical violation not to pursue a non-meritorious appeal. Trial counsel also appeared to suggest in his testimony that a notice of appeal had not been filed because appellant had not finished paying for the trial, and trial counsel did not engage in appellate work. Appellant's trial counsel testified that he was never asked to file the appeal after his discussion with appellant, and he did not receive any letter asking for an appeal.

At the evidentiary hearing, the district court denied this claim apparently on the belief that trial counsel did not have an obligation to file a notice of appeal despite the fact that appellant expressed dissatisfaction with the conviction because appellant had not retained trial counsel to file an appeal. The district court further appeared to indicate that trial counsel had no duty to file a notice of appeal because trial counsel testified that he did not perform appellate work and because appellant did not have any viable issues. The district court further determined that appellant had never asked for an appeal.

Having reviewed the documents before this court, we conclude that appellant demonstrated that his trial counsel was ineffective for failing to file a notice of appeal in the instant case. The record on appeal does not support the district court's determination that appellant did not request an appeal in the instant case. The record on appeal establishes that appellant expressed dissatisfaction with his conviction and indicated to his trial counsel that he wanted to appeal his conviction. 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 a notice of appeal because appellant had indicated a desire for an appeal and dissatisfaction with his conviction.<sup>9</sup> The fact that trial counsel was retained did not diminish this obligation in the instant case.<sup>10</sup> Prejudice is presumed under the facts presented in this case.<sup>11</sup> 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 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.<sup>12</sup>

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<sup>9</sup>Hathaway, 119 Nev. at 254, 71 P.3d at 507; Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999); Lozada, 110 Nev. at 354, 871 P.2d at 947. 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).

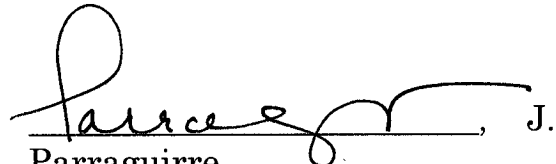
<sup>10</sup>See NRAP 3C(b) (providing that trial counsel is responsible for filing the notice of appeal, rough draft transcript request form and fast track statement and for consulting with appellate counsel for the case regarding the appellate issues that are raised and that trial counsel is required to arrange their calendars and adjust their public or private contracts for compensation to accommodate the additional duties imposed by the fast track appeal rules).

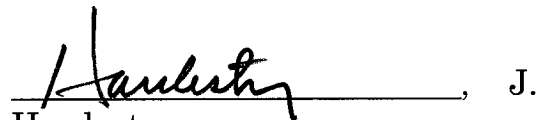
<sup>11</sup>Hathaway, 119 Nev. at 254, 71 P.3d at 507; Lozada, 110 Nev. at 354-58, 871 P.2d at 947-49.

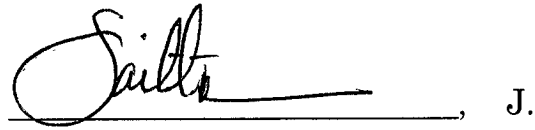
<sup>12</sup>Lozada, 110 Nev. at 359, 871 P.2d at 950. In his petition, appellant raised several claims that should have been raised on direct  
*continued on next page . . .*

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.<sup>13</sup> 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.<sup>14</sup>

  
Parraguirre, J.

  
Hardesty, J.

  
Saitta, J.

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*... continued*

appeal, including: (1) insufficient evidence in that the elements of the offenses were not proven and mere presence is insufficient to establish guilt, and (2) the district court erred in finding no racial discrimination in the State's use of a peremptory challenge. In light of this court's disposition of appellant's Lozada claim, we decline to consider these claims. Appellant may raise any direct appeal claims in the Lozada petition with the assistance of counsel.

<sup>13</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>14</sup>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  
Courtney James Rendell  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk