


IN THE SUPREME COURT OF THE STATE OF NEVADA

VORNELIUS JAMAL PHILLIPS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48602

FILED

APR 14 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from an order of the district court denying appellant Vornelius Phillips' post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On April 27, 2004, the district court convicted Phillips, pursuant to a guilty plea, of first-degree murder with the use of a deadly weapon, robbery with the use of a deadly weapon, first-degree kidnapping causing substantial bodily harm, first-degree kidnapping, robbery, assault with a deadly weapon, two counts of battery with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and stop required on signal of a police officer. The district court sentenced Phillips to serve multiple concurrent and consecutive terms in the Nevada State Prison totaling two consecutive terms of life without the possibility of parole, plus two consecutive terms of 96 to 240 months. Phillips did not file a direct appeal.

Phillips filed a timely proper person post-conviction petition for a writ of habeas corpus. Counsel filed a supplement to the petition or, in the alternative, a motion to withdraw the guilty plea. The State

opposed the petition and supplement. The district court denied the petition, and this appeal followed.

Phillips argues that the district court erred by failing to grant him an evidentiary hearing and denying the petition. He argues that an evidentiary hearing was necessary to resolve his claims that counsel were ineffective for advising him to enter a guilty plea to all charges when there was no benefit to him and counsels' improper advice rendered his plea invalid. We agree.

An evidentiary hearing is warranted if the petitioner raises claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief.¹ To establish ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that 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.² A petitioner carries the burden of establishing that a guilty plea was not entered knowingly and intelligently.³

In his petition below, Phillips argued that his counsel were ineffective for advising him to plead guilty to all charges when there was

¹See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

²Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

³Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994).

no benefit to him to do so. He asserted that counsel advised him to plead guilty in order to avoid the death penalty. However, the district court had determined that he was mentally retarded and the State was precluded from seeking the death penalty against him. Phillips argued that due to counsels' improper advice his guilty plea was not knowingly, intelligently and voluntarily entered. He appears to have asserted that had counsel not advised him to plead guilty to avoid the death penalty, he would have proceeded to trial.

The State opposed the petition, arguing that the totality of the circumstances demonstrated that Phillips understood the charges to which he pleaded guilty and the possible sentences he was facing and he entered the plea voluntarily.⁴ The State further argued that counsel were not ineffective for advising Phillips to plead guilty. Specifically, the State asserted that Phillips' counsel made a tactical decision to plead guilty to all of the charges rather than risk having the State appeal the ruling that Phillips was mentally retarded. The State further asserted that Phillips received a benefit from the guilty plea because it circumvented a possible death sentence in the event the State succeeded on appeal from the determination that Phillips was mentally retarded.

The district court determined that an evidentiary hearing was not necessary to resolve the petition due to the extensive documentation in the record. The district court denied the petition on the bases that Phillips' claim of ineffective assistance of counsel lacked merit and Phillips knew and understood the nature and consequences of his guilty plea. The

⁴See State v. Freese, 116 Nev. 1097, 1106, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. at 272, 721 P.2d at 368.

court specifically found that Phillips understood the nature and consequences of his guilty plea, he previously indicated that he entered the plea to avoid proceeding to trial and facing more serious consequences, and counsel made a tactical decision that it was in Phillips' best interest to plead guilty rather than expose him to a possible re-filing of the notice of intent to seek the death penalty.

We conclude that the district erred by denying Phillips' petition without first conducting an evidentiary hearing to determine whether counsels' advice to plead guilty to all charges was reasonable. All parties and the court agree that Phillips' counsel advised him to plead guilty in order to avoid the death penalty. Phillips indicates that he would have proceeded to trial on all of the charges but for counsels' advice. If avoiding the death penalty was counsels' sole reason for advising Phillips to plead guilty, this advice could have constituted ineffective assistance of counsel. Specifically, if the advice was unreasonably given, then it appears that Phillips would have been prejudiced by his reliance on the advice because the advice prevented him from proceeding to trial and would have rendered the plea unknowing and unintelligent.

The record reveals that on June 24, 2003, the district court entered an order in which it found that Phillips was mentally retarded and granted his motion to vacate the notice of intent to seek the death penalty. When counsel advised Phillips to enter the guilty plea, the State had not filed an extraordinary writ challenging the district court's order⁵

⁵Although NRS 177.015(1)(c) provides for an appeal from an order determining whether a defendant is mentally retarded, this subsection was not effective until October 1, 2003. See NRS 218.530. Therefore, in
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and Phillips was not facing the death penalty. Therefore, in order to be reasonable, any advice that Phillips should plead guilty to all charges had to be based on more than counsels' mere speculation that the State might successfully challenge the determination of mental retardation by way of an extraordinary writ. If, however, there was evidence the State was going to file an extraordinary writ challenging the determination that Phillips was mentally retarded and counsel had a valid reason for believing that the State's writ would have been successful, then counsels' advice may have been reasonable.

Because the record alone does not contain sufficient facts to determine whether counsels' advice to plead guilty to all charges was reasonable, we conclude that an evidentiary hearing was necessary to resolve this matter. Because no evidentiary hearing was held, we reverse the district court's denial of the petition and remand this matter for an evidentiary hearing. At the evidentiary hearing, the district court shall have Phillips' counsel explain the bases upon which they advised Phillips to enter a guilty plea to all charges. If counsel testifies that they believed the State could have successfully challenged the district court's determination that Phillips was mentally retarded, counsel shall explain the bases of their decision. In so doing, counsel shall specifically address whether the doctrine of laches could have precluded the State from


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order to challenge the district court's determination, the State would have had to seek relief by way of an extraordinary writ.

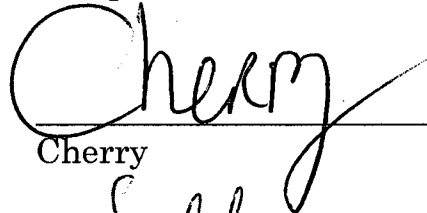
successfully challenging the mental retardation determination⁶ and if the State could have demonstrated that the district court acted in excess of its jurisdiction, or manifestly abused or capriciously exercised its discretion when determining Phillips was mentally retarded.⁷ In the event the district court determines that counsels' advice constituted ineffective assistance of counsel and rendered the plea invalid, the district court shall provide Phillips an opportunity to withdraw his plea.

For the preceding reasons, we

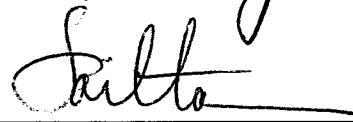
ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.⁸


_____, J.

Maupin


_____, J.

Cherry


_____, J.

Saitta

⁶See Widdis v. Dist. Ct., 114 Nev. 1224, 1228, 968 P.2d 1165, 1167 (1998).

⁷See NRS 34.160; NRS 34.320; see also State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005).

⁸This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

cc: Hon. Lee A. Gates, District Judge
Christopher R. Oram
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk