

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRED D. GEORGE A/K/A FRED D.  
GEORGE, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 48913

**FILED**

FEB 26 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

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; Valorie Vega, Judge.

On January 31, 2005, the district court convicted appellant, pursuant to a guilty plea, of one count of attempted robbery, victim sixty-five years of age or older. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after ten years. This court dismissed appellant's untimely direct appeal for lack of jurisdiction.<sup>1</sup>

On January 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 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On April 18, 2006, the district court denied appellant's petition. On appeal, this court affirmed the district

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<sup>1</sup>George, Jr. v. State, Docket No. 45784 (Order Dismissing Appeal, September 14, 2005).

court's order in part, but reversed the district court's decision to deny appellant's appeal deprivation claim and remanded the matter for an evidentiary hearing on this claim.<sup>2</sup> This court further declined to consider several direct appeal claims that fell outside the scope of a habeas corpus petition. On remand, the district court conducted an evidentiary hearing and denied the petition at the conclusion of the hearing. This appeal followed.

In his petition, appellant claimed, among other things, that his trial counsel was ineffective for failing to file an appeal after being requested to do so. At the evidentiary hearing, appellant's trial counsel that represented him before the sentencing hearing and at the sentencing hearing, Mr. David A. Grauman and Mr. Joel Hastings respectively, testified that appellant did not ask for an appeal in this case. Mr. Grauman further testified that he did not know of any non-frivolous issues that would have been successful on direct appeal in this case. Appellant declined the offer to testify and did not present any witnesses.

This court has held that if a defendant expresses a desire to appeal, counsel is obligated to file a notice of appeal on the defendant's behalf.<sup>3</sup> Prejudice is presumed where a defendant expresses a desire to appeal and counsel fails to do so.<sup>4</sup> Additionally, trial counsel is obligated

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<sup>2</sup>George, Jr. v. State, Docket No. 47308 (Order Affirming in Part, Reversing in Part and Remanding, November 7, 2006).

<sup>3</sup>See Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003); Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999); see also Roe v. Flores-Ortega, 528 U.S. 470 (2000).

<sup>4</sup>Mann v. State, 118 Nev. 351, 353-54, 46 P.3d 1228, 1229-30 (2002).

to consult with a defendant about the right to appeal when a defendant inquires about an appeal or there exists a direct appeal claim that has a reasonable likelihood of success.<sup>5</sup> A petitioner must prove the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.<sup>6</sup> A district court's factual finding regarding a claim of ineffective assistance of counsel is entitled to deference so long as it is supported by substantial evidence and is not clearly wrong.<sup>7</sup>

The district court found that based upon the testimony of trial counsel that appellant had failed to demonstrate that he asked for an appeal and failed to demonstrate that there were non-frivolous issues that could have been appealed. We conclude that the district court's findings were based upon substantial evidence and not clearly wrong. Appellant failed to demonstrate by a preponderance of the evidence the factual basis for his appeal deprivation claim. Additionally, those claims that were not previously considered were properly denied as 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.<sup>8</sup>

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<sup>5</sup>See Thomas, 115 Nev. at 150, 979 P.2d at 223; see also Flores-Ortega, 528 U.S. 470; Davis, 115 Nev. at 20, 974 P.2d at 660.

<sup>6</sup>Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

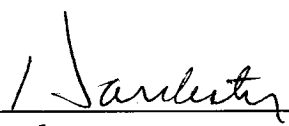
<sup>7</sup>Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

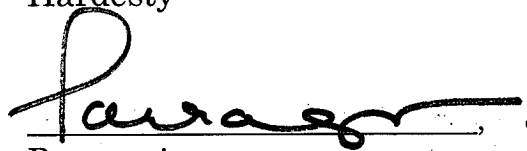
<sup>8</sup>See NRS 34.810(1)(a). Those claims include: (1) the State relied on false documents, and the district court considered the false documents when adjudicating appellant a habitual criminal; (2) appellant was not provided adequate notice that the State was seeking habitual criminal treatment; (3) appellant's habitual criminal adjudication was not  
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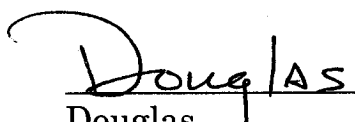
Therefore, we affirm the order of the district court denying appellant's petition.

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>9</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

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determined by a jury; (4) the district court allowed appellant to stipulate to habitual criminal status and did not exercise discretion when adjudicating him a habitual criminal; (5) the district court did not give appellant an opportunity to speak at the sentencing hearing; and (6) appellant did not admit to facts supporting his conviction at the sentencing hearing.

<sup>9</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Valorie Vega, District Judge  
Fred D. George  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk