

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KEITH LASSETTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49024

FILED

NOV 20 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY S. Young
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; Sally L. Loehrer, Judge.

On November 14, 2005, the district court convicted appellant, pursuant to an Alford¹ plea, of one count of attempted lewdness with a child under the age of fourteen. The district court sentenced appellant to serve a term of 48 to 144 months in the Nevada State Prison. The district court suspended the sentence and placed appellant on probation for a fixed term of five years. No direct appeal was taken. On April 11, 2006, the district court entered an order that revoked appellant's probation, executed the original sentence, and granted appellant 147 days of credit for time served. No appeal was taken.

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

On October 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. The district court denied appellant's petition on February 9, 2007, after conducting an evidentiary hearing. 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 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 of a different result in the proceedings. To demonstrate prejudice sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.² The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.³ "[A] habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a

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

³Strickland v. Washington, 466 U.S. 668, 697 (1984).

preponderance of the evidence."⁴ Factual findings of the district court that are supported by substantial evidence and are not clearly wrong are entitled to deference when reviewed on appeal.⁵

First, appellant claimed that his counsel was ineffective for failing to obtain medical exam and swab test results. Appellant failed to demonstrate that his counsel was ineffective. Appellant failed to demonstrate that any medical exam and swab tests were conducted, or that any results from such tests were available before he entered his Alford plea. Further, appellant failed to demonstrate that had the tests been conducted and results been available that he would not have entered his plea and would have insisted on proceeding to trial. Therefore, we conclude the district court did not err by denying this claim.

Second, appellant claimed that his counsel was ineffective for failing to file a notice of appeal after appellant requested him to do so. The district court conducted an evidentiary hearing on this issue. At the evidentiary hearing, appellant's counsel testified he did not recall appellant asking him to file an appeal after sentencing or after the probation revocation hearing, but counsel would have filed an appeal if appellant had requested him to do so. The district court found that appellant did not request a direct appeal either after sentencing or after

⁴Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

⁵Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

the probation revocation hearing, and thus his counsel was not ineffective for failing to file a notice of appeal. The district court's determination was supported by substantial evidence and was not clearly wrong. Therefore, we affirm the district court's denial of this claim.

Third, appellant claimed that his probation revocation counsel was ineffective for failing to obtain and provide him with discovery relating to his probation violation in violation of Brady v. Maryland.⁶

Preliminarily, we note that this court has recognized that an ineffective assistance of counsel claim will lie only where the defendant has a constitutional or statutory right to the appointment of counsel.⁷ In the context of probation revocation proceedings, counsel is constitutionally required if the probationer requests counsel and makes a colorable claim that (1) he did not commit the alleged violations; or (2) that there are justifying or mitigating circumstances which make revocation inappropriate and these circumstances are difficult or complex to present.⁸ It appears that the district court conceded that appellant was entitled to the effective assistance of counsel because the district court reviewed

⁶373 U.S. 83 (1963) (holding that the prosecution must disclose material evidence favorable to the defense).

⁷McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996).

⁸Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973); Fairchild v. Warden, 89 Nev. 524, 516 P.2d 106 (1973) (adopting the approach set forth in Gagnon v. Scarpelli).

appellant's claims of ineffective assistance of counsel without any reference as to whether appellant was entitled to the effective assistance of counsel in the probation revocation proceedings. Therefore, appellant's ineffective assistance of counsel claims will be reviewed on the merits.

Appellant failed to demonstrate that he was prejudiced. Even assuming, without deciding, that appellant's counsel failed to review or provide appellant with the discovery in his probation revocation case, appellant failed to demonstrate that the discovery contained evidence favorable to his defense and his probation would not have been revoked had he been provided the discovery. The record demonstrates that the district court revoked appellant's probation because appellant accessed the internet and contacted the victim, her mother, and siblings in violation of the terms of his probation. At the probation revocation hearing, appellant admitted that he had contacted the victim's mother and her siblings. Further the State offered proof that appellant had accessed the internet on several occasions and had e-mailed the victim's family. Therefore, we conclude the district court did not err by denying this claim.

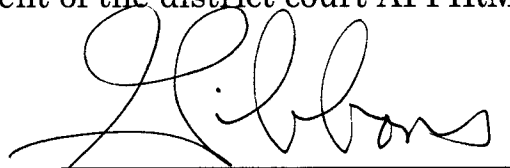
Appellant also claimed that his due process rights were violated because the State failed to provide him with Brady⁹ material, specifically, documents relating to his probation violation. This claim should have been raised in a direct appeal from appellant's probation

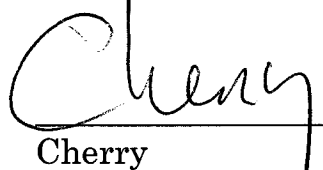
⁹Id.


revocation, and appellant failed to demonstrate good cause for his failure to do so.¹⁰ Therefore, we conclude the district court did not err by 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.¹¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹²


_____, J.
Gibbons


_____, J.
Cherry


_____, J.
Saitta

¹⁰See NRS 34.810(1)(b).

¹¹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹²We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted.

cc: Hon. Sally L. Loehrer, District Judge
Brian Keith Lassetter
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk