IN THE SUPREME COURT OF THE STATE OF NEVADA

ELVIN HUMBERTO CRUZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49210

FILED

JUN 10 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

On February 9, 2006, the district court convicted appellant Elvin Humberto Cruz, pursuant to a guilty plea, of one count each of lewdness with a minor under the age of 14 years and attempted lewdness with a child under the age of 14 years. The district court sentenced Cruz to serve concurrent terms of life in prison with the possibility of parole after 10 years for the lewdness count and 96 to 240 months for the attempted lewdness count. Cruz did not file a direct appeal.

On August 31, 2006, Cruz filed a proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel and conducted an evidentiary hearing. Thereafter, the district court denied the petition. This appeal followed.

On appeal, Cruz argues that the district court erred in rejecting his claim that he was deprived of the right to a direct appeal due to ineffective assistance of counsel. In particular, Cruz argues that testimony and evidence presented at the post-conviction evidentiary hearing demonstrate that he asked his trial counsel, John Momot, to file

an appeal but that Momot failed to do so. Based on this evidence, Cruz argues that the district court should have granted his petition and afforded him the remedy provided in Lozada v. State.[1] We conclude that this argument lacks merit.

A claim of ineffective assistance of counsel presents a mixed question of law and fact and thus is subject to our independent review, but we give deference to a district court's purely factual findings with respect to such a claim.[2] As a general rule, to state an ineffective-assistance claim, a petitioner must demonstrate that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense.[3] When an ineffective-assistance claim is based on counsel's failure to file a direct appeal, this court has recognized that trial counsel's performance is deficient if he or she fails to file a direct appeal after a defendant has requested or expressed a desire for a direct appeal[4] and that prejudice is presumed in such cases.[5] The petitioner, however, bears the burden of proving the "disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence."[6]

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[1]110 Nev. 349, 871 P.2d 944 (1994).

[2]State v. Powell, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006).

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

[4]Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003); accord Roe v. Flores-Ortega, 528 U.S. 470, 477-78, 483-85 (2000).

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

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

Here, Cruz claimed that trial counsel, John Momot, was ineffective because he failed to file a direct appeal after Cruz asked to do so. In an attempt to meet his burden of proof at the post-conviction evidentiary hearing, Cruz presented testimony and documentary evidence. Cruz testified that at his sentencing hearing he asked Momot to file a direct appeal, and Cruz's wife testified that she overheard the conversation and that outside of the courtroom after the sentencing hearing, she asked Momot to file a direct appeal. Cruz also testified that four days after the sentencing hearing, on January 30, 2006, he sent a letter to Momot repeating his request that Momot file a direct appeal. Cruz also presented a copy of the letter. On appeal, Cruz focuses on this evidence and argues that he met his burden of proof. We disagree.

The district court heard testimony that undermined the credibility of Cruz and his wife and led the court to conclude that Cruz had not demonstrated that he was deprived of his right to a direct appeal due to ineffective assistance of counsel. In particular, Momot testified that he would have filed a direct appeal had Cruz requested one and that he had no recollection of any conversations with Cruz or any of his family members regarding an appeal. According to Momot, when he met with Cruz almost a week after the sentencing hearing, Cruz did not mention an appeal or the letter that he allegedly sent to Momot just a few days before the meeting. Momot further testified that his case file did not include any notes about a request to file a direct appeal or the letter that Cruz claimed to have sent him regarding an appeal. Additionally, Cruz's testimony indicated that the alleged letter to Momot had been forged to support the habeas petition. In particular, Cruz admitted that when he spoke to Momot a few days after allegedly sending the letter, it "slipped [his] mind"

to mention the letter. And the record suggests that the inmate law clerk who helped prepare Cruz's petition may have been involved in preparing petitions for other inmates containing similar letters to counsel, thus suggesting that the letter had been prepared solely to support the petition. Based on this evidence and the deference that we must give to the district court's credibility determinations,[7] we conclude that the district court did not err in finding that Cruz never asked trial counsel to file a direct appeal and therefore concluding that trial counsel was not deficient in failing to file a direct appeal.

Having considered Cruz's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Maupin

_____, J.
Cherry

_____, J.
Saitta

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

[7]See Little v. Warden, 117 Nev. 845, 854, 34 P.3d 540, 546 (2001); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).