IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL R. DULIN-EVANS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49605

FILED

MAR 24 2008

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

ORDER OF REVERSAL AND REMAND

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus and motion to withdraw the guilty plea. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On July 27, 2005, the district court convicted appellant, pursuant to a guilty plea, of one count of possession of a controlled substance. The district court sentenced appellant to serve a term of twelve to forty-eight months in the Nevada State Prison. This court affirmed the judgment of conviction and sentence on direct appeal.[1] The remittitur issued on January 18, 2006.

On December 2, 2005, 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, and on February 14, 2006, the district

[1]Dulin-Evans v. State, Docket No. 45686 (Order of Affirmance, November 16, 2005).

court denied appellant's petition. Appellant's appeal from that order was docketed in this court as Docket No. 46817.

On December 15, 2005, appellant filed a proper person motion to withdraw the guilty plea in the district court. The State opposed the motion. On March 16, 2006, the district court denied the motion. Appellant's appeal from that order was docketed in this court as Docket No. 46695.

In those appeals, this court affirmed the district court's denial of the majority of the claims raised in the petition and motion, but reversed and remanded for an evidentiary hearing on one claim—whether trial counsel were ineffective for advising appellant to enter a guilty plea in the instant case because the arrest and subsequent search were allegedly illegal.[2] This court further ordered that due to the complexities of the issue, post-conviction counsel should be appointed to assist appellant. The district court appointed counsel and conducted an evidentiary hearing, in which appellant's former trial counsel and appellant testified. On June 13, 2007, the district court denied the final remaining claim in the petition and motion. This appeal followed.[3]

In his petition and his motion, appellant claimed that his trial counsel were ineffective for advising him to enter a guilty plea in the instant case because his arrest and subsequent search were allegedly illegal and that trial counsels' advice induced him to enter the guilty plea. Although trial counsel filed a motion to suppress the evidence, appellant

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[2]Dulin-Evans v. State, Docket Nos. 46695 and 46817 (Order Affirming in Part, Reversing in Part and Remanding, July 12, 2006).

[3]The American Civil Liberties Union of Nevada sought and was granted permission to file a brief of amicus curiae and appendix.

alleged that trial counsel advised him to enter a guilty plea rather than prosecute the motion to suppress because the motion to suppress would be denied by the district court. Finally, he claimed that his guilty plea was invalid because of the illegal arrest and search.

Underlying facts

Appellant violated NRS 484.325(4)(b) when he crossed the street against the traffic signal. A violation of NRS 484.325(4)(b) is a misdemeanor offense.[4] Rather than citing appellant, the police officer arrested appellant for the misdemeanor offense and conducted a search of appellant's person incident to the arrest. The police officer testified at the preliminary hearing that he arrested appellant, rather than citing him, pursuant to the Downtown Area of Command Strategic Initiative (Downtown Initiative). The police officer testified that pursuant to the Downtown Initiative an individual with a criminal record for crimes that occur in the downtown area would be arrested rather than cited.[5] The subsequent search incident to the arrest revealed that appellant was in possession of controlled substances, several baggies, two hypodermic needles, and money. Appellant was charged with possession of a controlled substance with the intent to sell, and the State filed a notice of intent to seek habitual criminal adjudication.

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[4]NRS 484.999(1).

[5]The police officer testified, "We disproportionately arrest people in a specific area because of the high crime area." The police officer further testified that a prior failure to appear would factor into the decision to arrest an individual rather than cite the individual. However, the police officer testified that he could not remember if he was told about a failure to appear in appellant's record. The police report further does not set forth any information about a prior failure to appear.

First post-conviction appeal

In reviewing the first post-conviction appeal, this court determined that the district court erroneously denied appellant's ineffective assistance of counsel and involuntary guilty plea claim without first conducting an evidentiary hearing. Notably, it appeared that the police officer's stated reasons for arresting and searching appellant, the Downtown Initiative, violated Nevada statutory law and was in excess of the police officer's authority in the instant case.[6] However, complicating the issue of the arrest, search, and seizure was the fact that appellant was on parole at the time. It was unclear from the documents before this court in the first post-conviction appeal what effect appellant's parole status had on the arrest, search, and seizure. In Nevada, a parolee may be searched without a warrant if a parole officer has reasonable grounds to believe that a violation of the parole agreement has occurred.[7] No testimony was presented at the preliminary hearing that the police officer knew appellant was on parole or was conducting a search pursuant to a suspected violation of a condition of parole. If the police officer did not know at the time he arrested and searched appellant that he was on parole, later knowledge that appellant was on parole may not retroactively

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[6]See NRS 484.795; State v. Bayard, 119 Nev. 241, 247, 71 P.3d 498, 502 (2003).

[7]Allan v. State, 103 Nev. 512, 514, 746 P.2d 138, 140 (1987) (citing Seim v. State, 95 Nev. 89, 590 P.2d 1152 (1979)). This court noted in the prior order that the United States Supreme Court had decided that a suspicionless search of a parolee pursuant to California law and the parolee's specific parole conditions would not violate the Fourth Amendment. See Samson v. California, 547 U.S. 843 (2006). However, it appeared that Samson was distinguishable as Nevada does not have a similar statute requiring a parolee to submit to a suspicionless search.

justify the arrest or search.[8] Notably, a copy of appellant's parole agreement setting forth the specific conditions of parole was not in the record on appeal, and thus, it was not clear if appellant agreed to be searched as a condition of parole or the extent of any search clause. Therefore, this court reversed the district court's denial of the claim and remanded the matter for an evidentiary hearing.

Proceedings upon remand

Upon remand, the district court appointed post-conviction counsel and conducted an evidentiary hearing in this matter. Appellant's trial counsel, Ms. Marisa Border, testified that she had filed a motion to suppress the evidence and discussed with appellant the possible outcomes of the motion and trial. Ms. Border testified that the motion was not heard because appellant had accepted the plea negotiations. Ms. Border further testified that the decision to accept the guilty plea was appellant's decision and that she felt that the motion to suppress "could go either way . . . there was no guarantee and I informed [appellant] . . . if it was granted that would essentially end the prosecution. However, if it wasn't then everything would come in and that would make the case obviously harder." Ms. Border noted that in exchange for his guilty plea, appellant avoided the possibility of habitual criminal adjudication.

Appellant testified that when the police officer stopped him for jaywalking, he walked up to the police officer, gave the police officer his driver's license, and told him that he was on parole. The police officer then asked, "You know you [jaywalked]," to which appellant affirmatively responded. The police officer then placed appellant under arrest. Appellant testified that he researched the legality of his search and asked

[8]See Moreno v. Baca, 431 F.3d 633, 638-41 (9th Cir. 2005).

Ms. Border to file a motion to suppress based upon NRS 484.795, the statutory provision relating to citations and arrests for traffic offenses. Appellant stated that Ms. Border approached him with a plea offer, and Mr. Scott Coffee, Ms. Border's "supervisor" or co-counsel in the instant case, discussed the plea negotiations and told him the only thing that he could do was enter a guilty plea. Appellant also testified that Mr. Coffee told him that he had no rights because he was on parole. Appellant also testified that he believed that he would still be able to challenge the arrest under the plea agreement. Appellant further testified that Mr. Coffee "did all the talking" and that Ms. Border either misrepresented or did not correctly remember what transpired in the discussions.

Mr. Coffee testified that he did not specifically remember this case, but he remembered working on a case with suppression issues on a low-level drug amount. Although he did not specifically remember this case, Mr. Coffee stated that he would have explained to someone in appellant's position that a parolee signs a "right to search and seizure . . . a waiver that allows people to search you, parole officers, for example." Mr. Coffee testified that in his opinion such a condition would allow the search of a parolee in appellant's situation. Mr. Coffee also testified that he would not have told appellant that he could enter a guilty plea and later challenge the legality of the arrest, search, and seizure. Mr. Coffee emphasized that the decision to enter a guilty plea was always appellant's decision.

The State indicated that the police officer involved in the arrest, search, and seizure had been subpoenaed and was prepared to testify about other reasons for arresting appellant. The State indicated that the testimony would be relevant to the underlying merits of the motion to suppress and the prejudice prong of an ineffective assistance of counsel claim. Significantly, despite the fact that the district court had

admitted that it had not read this court's prior order, the district court limited the scope of the evidentiary hearing and would not allow either side to present testimony or evidence relating to the legality of the arrest, search, and seizure. Rather, the district court determined that the proper scope of inquiry was whether appellant's decision to enter a guilty plea was voluntary and the district court found that appellant had the issues and potential outcomes fully communicated to him. The district court determined that it was unreasonable to expect trial counsel to be clairvoyant about the likely merits of the motion to suppress, and thus, the district court determined that in the instant case appellant failed to demonstrate that the performance of trial counsel was deficient, that he was prejudiced by the performance of trial counsel, or that his guilty plea was invalid.

Appellant and amicus curiae argue that the district court erred in limiting the scope of the evidentiary hearing and not permitting testimony regarding the lawfulness of appellant's arrest, search, and seizure. Amicus curiae note that the district court heard testimony regarding the conversations between appellant and his counsel and the voluntariness of the plea, but failed to allow testimony on the key issue of the lawfulness of the arrest, search, and seizure—in particular the lawfulness of the Downtown Initiative. Amicus curiae argue that misinformation about or failure to explore the lawfulness of the arrest, search, and seizure should not provide the basis for a conclusion that the decision to enter a guilty plea was knowingly and voluntarily entered. Amicus curiae further argue that the record establishes that appellant's arrest pursuant to the Downtown Initiative violated Nevada law.

The State argues that appellant waived the right to challenge the lawfulness of the arrest, search, and seizure and the Downtown Initiative by entry of his guilty plea because a defendant who enters a

guilty plea may not thereafter challenge constitutional deprivations that occurred prior to entry of the guilty plea.[9] The State further argues that the district court did not err in concluding that appellant failed to demonstrate that his trial counsel was ineffective because by entry of the guilty plea appellant was spared from a potential habitual criminal sentence and because trial counsel believed that the motion to suppress could have been decided against appellant. The State notes that the testimony at the evidentiary hearing established that appellant made the decision to enter the guilty plea and not to pursue the motion to suppress after being informed of the potential outcomes. Finally, the State argues that trial counsel did not have the luxury of hindsight to know that this court would be troubled by the legality of the Downtown Initiative and that this is not the appropriate case to reach the challenge to the Downtown Initiative.

Based upon our review of the arguments and documents presented to this court, we conclude that the district court improperly limited the scope of the evidentiary hearing. We further conclude from the arguments and documents presented to this court that the district court erred in denying appellant's claim that his trial counsel were ineffective in the advice given regarding entry of the plea and the legality of the search. Although the State is correct that appellant may not directly challenge the lawfulness of his arrest, search, and seizure because of his guilty plea, the merits of the arrest, search, and seizure claim are critical in evaluating appellant's claim of ineffective assistance of counsel and the validity of his decision to enter a guilty plea.

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[9]See Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975).

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, 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 that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.[10] In examining an ineffective assistance claim relating to trial counsel's failure to file, or in this case, to pursue a motion to suppress, appellant must demonstrate that the illegal arrest and search claim was meritorious and that there was a reasonable likelihood that the exclusion of the evidence would have changed the results of a trial.[11] Although clairvoyance is not required, trial counsel's performance must be evaluated against the backdrop of the likelihood of success of the motion and the likely outcome on a trial. Further, advice regarding entry of a guilty plea must likewise be evaluated against the backdrop of the likelihood of success of the motion and the likely outcome on trial. Trial counsel would be ineffective for advising appellant to enter a guilty plea if the arrest and subsequent search and seizure were unlawful in the instant case because the only evidence of the crime—the drugs—would have been excluded at trial.

This conclusion does not discount the fact that appellant made the decision to enter a guilty plea after discussing the possible outcomes of the motion to suppress with his counsel, but trial counsels' advisements

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

[11]See Kirksey, 112 Nev. at 990, 923 P.2d at 1109 (citing Kimmelman v. Morrison, 477 U.S. 365, 375 (1986)).

must reasonably inform appellant of the potential merits of the motion to suppress. The arguments set forth in the motion to suppress relating to NRS 484.795 correctly identified the highly questionable nature of the arrest pursuant to the Downtown Initiative and the subsequent search and seizure. Mr. Coffee correctly pointed out in his evidentiary hearing testimony that appellant's parole status complicated the issue of the arrest, search, and seizure. However, Mr. Coffee's testimony regarding the effect of parole upon the lawfulness of the arrest, search, and seizure was an inaccurate representation of Nevada law, which requires a parole officer have reasonable grounds to believe that a violation of the parole agreement has occurred before conducting a warrantless search of a parolee. No testimony has ever been presented that the police officer searched appellant believing that a violation of the parole agreement had occurred.[12] Further, no argument has been made and no evidence has ever been presented that appellant was subject to a search condition through his parole agreement, that the police officer knew of the search condition, or that appellant was subject to a search by a police officer rather than a parole officer.[13]

Under these facts, we conclude that appellant demonstrated that his trial counsel were ineffective in the advice provided to appellant before he entered his plea and that his guilty plea was not knowingly entered. Therefore, we reverse the decision of the district court denying

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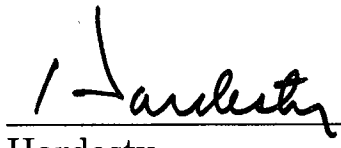
[12]We note, however, that appellant's testimony at the evidentiary hearing and the police report presented by amicus curiae in their appendix indicate that the police officer knew appellant was on parole at the time of the arrest, search, and seizure.

[13]See Moreno, 431 F.3d at 638-41.

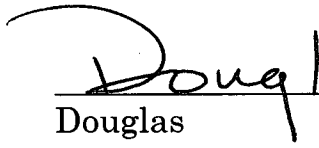
appellant's claim and remand the matter to allow appellant an opportunity to withdraw his guilty plea. We are troubled that the district court indicated during the evidentiary hearing that the district court had not personally read this court's order of remand, which apparently led the district court to improperly limit the scope of the evidentiary hearing. Under these circumstances and due to the protracted nature of the proceedings, we direct that this matter be assigned to a different district court judge for new trial proceedings.[14] Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[15]



_____, J.
Hardesty

_____, J.
Parraguirre



_____, J.
Douglas

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[14]We note that this appeal resolves the issue of the ineffective assistance of counsel and the voluntariness of the plea based upon the advice given and the documents before this court in this appeal. This appeal does not resolve the motion to suppress.

[15]On October 9, 2007, this court received a proper person notice to the court. Appellant has not been granted permission to file documents in this court in this matter in proper person and this court declines to consider such documents. See NRAP 46(b).

cc: Hon. Kathy Hardcastle, Chief District Judge
Hon. Donald M. Mosley, District Judge
Lizzie R. Hatcher
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Allen Lichtenstein
Lee B. Rowland
Eighth District Court Clerk