

IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRY LYNN DAVIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49621

FILED

MAR 28 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY J. Alvarado
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus. Third Judicial District Court, Lyon County; Robert E. Estes, Judge.

On April 13, 2006, in two separate district court cases, appellant Jerry Lynn Davis was convicted, pursuant to guilty pleas, of one count of unlawful use of a controlled substance and one count of being an ex-felon in possession of a firearm. The district court sentenced Davis to serve a prison term of 16 to 48 months for the unlawful use of a controlled substance count and a consecutive prison term of 24 to 72 months for the ex-felon in possession of a firearm count. Davis did not file direct appeals.

On January 29, 2007, Davis filed a proper person petition for a writ of habeas corpus in both cases. The State filed a partial motion to dismiss and an opposition to the petition. The district court appointed counsel to represent Davis, and counsel filed a supplement to the petition. Without conducting an evidentiary hearing, the district court denied the petition. Davis filed this timely appeal.

Davis contends that the district court erred in denying without an evidentiary hearing his claims of ineffective assistance of counsel. In order to state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness.¹ A petitioner must also demonstrate a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.² A petitioner is not entitled to an evidentiary hearing on claims that fail for lack of specificity or are belied by the record.³

Davis first contends that defense counsel was ineffective for failing to advise him to proceed to trial on the firearm charge and present a complete necessity defense. We decline to consider Davis' contention regarding a complete necessity defense because the claim was not specifically pleaded in the original or supplemental petitions filed below and it was never considered by the district court.⁴ In the petitions below, Davis raised a general allegation that defense counsel was ineffective for failing to investigate the case and discuss defenses. The district court rejected Davis' claim, finding that it was belied by the record. The district

¹Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996); accord Hill v. Lockhart, 474 U.S. 52 (1985).

²Hill, 474 U.S. at 59.

³Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

⁴See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004).

court's finding is supported by substantial evidence.⁵ In particular, Davis acknowledged, at the plea canvass and in the signed plea agreements, that he had discussed possible defenses with his counsel and was satisfied with the representation provided by his attorney. Accordingly, the district court did not err in rejecting his claim.

Davis next contends that counsel was ineffective at sentencing by waiving the second presentence investigation report (PSI) without appellant's consent. The district court found that Davis failed to show that he was prejudiced by counsel's decision to waive the second PSI. The district court's finding is supported by substantial evidence.⁶ In particular, the first PSI used at the sentencing hearing was only two months old, and the district court found that the sentence imposed was not affected by the fact that there was only one PSI. Further, Davis has failed to articulate with specificity any additional, exculpatory information that would have been presented to the district court in the second PSI.⁷ Accordingly, the district court did not err in rejecting his claim.

Finally, Davis contends that he is entitled to an evidentiary hearing on his claim that defense counsel was ineffective for failing to file a direct appeal pursuant to Davis' request. We agree.

In Lozada v. State, this court recognized that "an attorney has a duty to perfect an appeal when a convicted defendant expresses a desire

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

⁶See id.

⁷See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

to appeal or indicates dissatisfaction with a conviction.”⁸ If counsel fails to file an appeal after a convicted defendant makes a timely request that counsel do so, the defendant is entitled to the Lozada remedy, namely, to file a post-conviction habeas petition, with the assistance of counsel, raising direct appeal issues for appellate consideration.⁹ Notably, in order to be afforded the Lozada remedy, a petitioner is not required to present any direct appeal claims or to demonstrate that he would have succeeded on appeal but for counsel’s conduct; rather, a petitioner must only show that he was deprived of his right to a direct appeal without his consent.¹⁰

In this case, the district court’s refusal to conduct an evidentiary hearing on this claim was primarily based upon the district court’s finding that Davis failed to demonstrate prejudice. Specifically, the district court found that Davis failed to “identify any issue that should have been raised on appeal” and failed to “show that an omitted issue would have had a reasonable probability of success on appeal.” As discussed above, however, a petitioner need not show that a direct appeal would have succeeded to be afforded the remedy described in Lozada. Because Davis has alleged that he requested a direct appeal from counsel, the district court should have conducted an evidentiary hearing to determine whether Davis timely requested an appeal from counsel.

Accordingly, we reverse the district court order in part and remand this matter to the district court for an evidentiary hearing. If the

⁸Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994).

⁹Id.

¹⁰See id. at 357, 871 P.2d at 949.

district court finds that Davis timely requested an appeal from defense counsel, Davis should be afforded the Lozada remedy without consideration of whether he suffered any prejudice by counsel's deficient conduct.¹¹ Accordingly, we

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

1 J. Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

cc: Hon. Robert E. Estes, District Judge
Kay Ellen Armstrong
Attorney General Catherine Cortez Masto/Carson City
Lyon County District Attorney
Lyon County Clerk

¹¹See id. ("prejudice may be presumed for purposes of establishing the ineffective assistance of counsel when counsel's conduct completely denies a convicted defendant an appeal"). Pursuant to Lozada, a defendant with the assistance of counsel is allowed to file a post-conviction petition for a writ of habeas corpus raising direct appeal issues. The district court should then conduct a meaningful review of the claims raised in the Lozada petition, considering whether they were waived by the entry of the guilty pleas or would have succeeded on the merits. Id.