IN THE SUPREME COURT OF THE STATE OF NEVADA

LORANZO RAY ARRINGTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49807

FILED

JUL 10 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

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; Jennifer Togliatti, Judge.

On March 10, 2006, the district court convicted appellant, pursuant to an Alford[1] plea, of child abuse with substantial harm. The district court sentenced appellant to serve a term of 3 to 10 years and then suspended execution of the sentence, placing appellant on probation for a time period not to exceed 3 years. Appellant did not file a direct appeal. On August 17, 2006, the district court entered an order revoking

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

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appellant's probation and executing the original sentence. No direct appeal was taken from the order revoking probation.

On May 8, 2007, 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 July 3, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant first claimed that his trial counsel was ineffective for failing to advise him that his conviction was barred by the statute of limitations, failing to prevent appellant from being placed on sex-offender probation, and failing to present mitigating evidence at his sentencing hearing.

Appellant filed the petition raising claims challenging the validity of the judgment of conviction more than one year after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.[2] Appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice.[3] A petitioner may be entitled to a

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[2]See NRS 34.726(1).

[3]See id. Because these claims did not challenge the order revoking probation, the order revoking probation does not provide good cause for the delay in raising claims challenging the validity of the judgment of conviction and sentence. Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004).

review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice,[4] i.e., when a constitutional violation has probably resulted in the conviction of someone who is actually innocent.[5] This requires a petitioner to show that "'it is more likely than not that no reasonable juror would have convicted him.'"[6] "'[A]ctual innocence' means factual innocence, not mere legal insufficiency."[7]

In an attempt to overcome his procedural defects, appellant claimed that he was actually innocent of the crimes. Specifically, he asserted that he had been incarcerated during the time that he was accused to have abused the victims. Preliminarily, we note that a claim of actual innocence by a defendant who pleaded guilty pursuant to Alford is "essentially academic."[8] Further, appellant failed to meet his burden of demonstrating a fundamental miscarriage of justice based upon his claims of actual innocence because he failed to demonstrate that he was actually innocent of the crime. During the plea canvass, appellant acknowledged that the State would have been able to prove that he abused the children

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[4]Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

[5]See Bousley v. United States, 523 U.S. 614, 623 (1998); Mazzan, 112 Nev. at 842, 921 P.2d at 922.

[6]Bousley, 523 U.S. at 623 (quoting Schlup v. Delo, 513 U.S. 298, 327-28 (1995)).

[7]Id. at 623-24 (citing Sawyer v. Whitley, 505 U.S. 333, 339 (1992)).

[8]Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 226 (1984).

between November 1, 1999, and November 1, 2000, had the case proceeded to trial. Moreover, all three children testified before the grand jury that appellant molested them between November 1, 1999, and November 1, 2000. The district court incorporated this testimony into its factual basis for appellant's Alford plea. Appellant did not support his claim with any documentation showing that he was incarcerated during the entire period of time specified in the indictment.

To the extent that appellant asserted that he was actually innocent because the prosecution for the crime of child abuse with substantial harm was barred by the statute of limitations, appellant failed to demonstrate actual innocence.[9] Moreover, appellant did not assert that the 22 counts of lewdness with a minor under the age of 14, which had been foregone in the plea bargaining process, were also barred by the statute of limitations.[10] Therefore, we conclude that the district court did not err in determining that appellant's claims addressing his original judgment of conviction were procedurally barred.

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[9]See Dozier v. State, 124 Nev. ___, ___, 178 P.3d 149, 153 (2008) (recognizing that the assertion that a "prosecution is barred by the statute of limitations does not involve an element of the offense implicating the defendant's guilt or innocence").

[10]See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan, 112 Nev. at 842, 921 P.2d at 922; see also Bousley, 523 U.S. at 624 (recognizing that actual innocence in a case involving a guilty plea requires that the petitioner demonstrate that he is actually innocent of more serious charges foregone by the State in the course of plea bargaining).

Appellant also contended that he received ineffective assistance of counsel at his probation revocation hearing. 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.[11] Here, the district court conceded that appellant was entitled to the effective assistance of counsel because the district court reviewed appellant's claims without any reference as to whether he was entitled to the effective assistance of counsel in his probation revocation proceeding.[12] Moreover, because appellant raised claims challenging the order revoking probation, the order revoking probation provides good cause for raising claims challenging the revocation of probation.[13]

To state a claim of ineffective assistance of counsel sufficient to invalidate an order revoking probation, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were

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[11]See McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996).

[12]See Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973); Fairchild v. Warden, 89 Nev. 524, 525, 516 P.2d 106, 107 (1973).

[13]Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004).

so severe that they rendered the result of the proceeding unreliable.[14] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[15]

First, appellant claimed that his counsel failed to object to the amended judgment of conviction on the grounds that appellant was actually innocent of his original offense and the original prosecution was barred by the statute of limitations. These claims relate to the original judgment of conviction and are procedurally barred for the reasons set forth above. Therefore, the district court did not err in denying these claims.

Second, appellant claimed that his counsel was ineffective for failing to present mitigating evidence at appellant's probation revocation hearing. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant did not identify what evidence his counsel failed to present or how it would have had a reasonable probability of altering the outcome.[16] Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his counsel failed to file an appeal from the probation revocation order despite his request to do so.

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[14]Strickland v. Washington, 466 U.S. 668, 686 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984).

[15]Strickland, 466 U.S. at 697.

[16]See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

"[A]n attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction."[17] "The burden is on the client to indicate to his attorney that he wishes to pursue an appeal."[18] A petitioner is entitled to an evidentiary hearing on claims supported by specific facts, which if true, would entitle the petitioner to relief.[19]

It appears from this court's review of the record on appeal that the district court erred in denying this claim without first conducting an evidentiary hearing. Appellant's appeal deprivation claim was supported by specific facts and was not belied by the record on appeal, and if true, would have entitled him to relief. Therefore, we reverse the district court's order to the extent that it denied appellant's appeal deprivation claim relating to the probation revocation hearing, and we remand this matter to the district court to conduct an evidentiary hearing on appellant's appeal deprivation claim. The district court may exercise its discretion to appoint post-conviction counsel to represent appellant at the evidentiary hearing. If the district court determines that appellant was not deprived of a direct appeal without his consent, the district court shall enter a final written order to that effect. We affirm the remainder of the

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[17]Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994); see Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999).

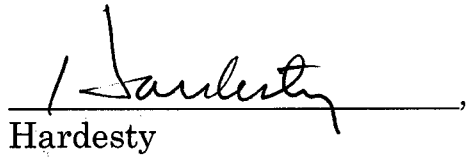
[18]Davis, 115 Nev. at 20, 974 P.2d at 660.

[19]See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

district court's order denying appellant's petition for the reasons set forth above.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.[20] 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.[21]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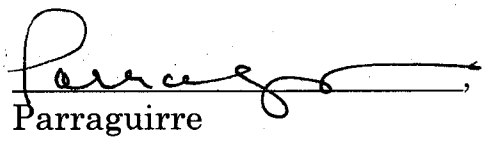
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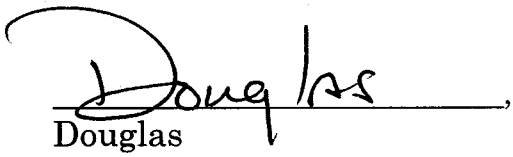
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[20]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[21]We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

cc: Hon. Jennifer Togliatti, District Judge
Loranzo Ray Arrington
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk