

IN THE SUPREME COURT OF THE STATE OF NEVADA

ADRIAN BORUNDA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49833

FILED

APR 10 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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; Jackie Glass, Judge.

On August 24, 2006, the district court convicted appellant, pursuant to a guilty plea, of conspiracy to commit robbery (Count 1), burglary while in possession of a firearm (Count 2), and robbery with the use of a deadly weapon (Count 3). The district court sentenced appellant to serve a total of two consecutive terms of 48 to 150 months in the Nevada State Prison. No direct appeal was taken.

On March 20, 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 June 28, 2007, the district court denied appellant's petition. 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 outcome in the proceedings.¹ To demonstrate prejudice sufficient to invalidate the decision to enter a guilty plea, a petitioner must demonstrate that he 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

First, appellant claimed that his trial counsel was ineffective for proceeding to his plea without seeking to adjudicate whether appellant was a juvenile or consulting appellant about the possibility of such an adjudication. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. According to an order filed May 19, 2006, the juvenile court, after having a certification hearing and conducting a full investigation, found probable cause to believe that the appellant committed the crimes and further found cause to certify appellant to adult status. Further, there is no indication that the juvenile court erred in determining that it did not have jurisdiction over appellant. Appellant was 16 years old at the time of the instant offense, was accused of an offense involving the use of a firearm, and had previously been

¹Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

²Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

³Strickland, 466 U.S. at 697.

adjudicated delinquent for numerous acts including burglary, conspiracy to commit burglary, and grand larceny.⁴ Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his counsel was ineffective for coercing him to plead guilty by telling him that the court would be “angry” and could possibly sentence him to life in the Nevada State Prison if appellant proceeded to trial. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant stated, in the plea agreement and during the plea canvass, that he was not pleading guilty as a result of threats or coercion. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his counsel was ineffective for inducing him to plead guilty by telling appellant that he would receive probation. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. In the plea agreement and during the plea canvass, appellant acknowledged that he understood that the district court could sentence him to any legally permissible sentence and was not bound by the plea negotiations. Moreover, both the plea agreement and the district court informed appellant of the potential sentences he faced for each count and of the fact that the sentence for robbery with the use of a deadly weapon was not probationable. As appellant was notified of the possible sentences and that he was not eligible for probation, he did not

⁴See NRS 62B.330(3)(c) (providing that the juvenile court lacks jurisdiction over a person charged with committing an offense “involving the use or threatened use of a firearm” if the “person was 16 years of age or older” at the time of the alleged act involving the use of a firearm and that “person previously had been adjudicated delinquent for an act that would have been a felony if committed by an adult”).

sustain his burden of showing he would not have pleaded guilty but for his counsel's assertion that appellant might receive probation.⁵ Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his counsel was ineffective for failing to explain the rights that appellant was waiving with his guilty plea. Appellant asserted that his age and past drug abuse necessitated that his counsel personally discuss each specific right with appellant. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. The guilty plea agreement, which appellant signed, set forth the specific constitutional rights that appellant waived as a result of his guilty plea. During the plea hearing, appellant acknowledged that his counsel had discussed the rights that appellant was waiving with his guilty plea and that appellant understood them. Further, appellant did not describe what specific rights he did not understand or why he would not have pleaded guilty had he been personally canvassed about those rights.⁶ Thus, appellant did not sustain his burden of showing that he would not have pleaded guilty and would have insisted upon going to trial had he received a more thorough explanation of each constitutional right he waived with his guilty plea. Therefore, the district court did not err in denying this claim.

⁵See Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975) (holding that the "mere subjective belief of a defendant as to potential sentence, or hope of leniency, unsupported by any promise from the State or indication by the court is insufficient to invalidate a guilty plea as involuntary or unknowing.").

⁶See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (holding that "bare" or "naked" claims, which are unsupported by specific facts, are insufficient to grant relief).

Fifth, appellant claimed that his trial counsel was ineffective for failing to argue for drug treatment or other alternatives at sentencing. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. During the sentencing hearing, both appellant and his counsel stated that appellant was a user of methamphetamine. The district court further acknowledged appellant's history of offenses and the influence of drugs in appellant's criminal history. Thus, appellant did not demonstrate that any failure on the part of his counsel prevented the district court from acknowledging appellant's history of drug abuse. Moreover, the district court did not have the authority to sentence appellant to a program of treatment for drug abuse because appellant pleaded guilty to two crimes against a person that were punishable as felonies.⁷ To the extent that appellant argued that his counsel should have argued for placement in a residential treatment facility as a condition of probation, he failed to establish prejudice as appellant was not eligible for probation.⁸ Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to present witnesses and mitigating evidence at his sentencing hearing. Appellant did not demonstrate that his counsel was deficient or that he was prejudiced. Appellant did not specifically identify the possible or potential witnesses who would have offered testimony or the possible

⁷See 2005 Nev. Stat., ch. 507, § 36 at 2880 (NRS 458.300(1)(a)).

⁸1995 Nev. Stat., ch. 455, § 1 at 1431 (NRS 193.165(5)(d)).

evidence that his counsel could have offered in mitigation.⁹ Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that his trial counsel was ineffective for failing to advise him about other alternatives to pleading guilty. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant did not identify what options his counsel failed to present to him prior to his decision to plead guilty.¹⁰ Therefore, the district court did not err in denying this claim.

Eighth, appellant claimed that his trial counsel was ineffective for informing appellant that he had no right to file a direct appeal. Appellant further claimed that trial counsel would not file a notice of appeal on appellant's behalf.

Based upon this court's review of the record on appeal, we conclude that the district court erred in failing to conduct an evidentiary hearing on these claims. Appellant is entitled to an evidentiary hearing if he raises claims that, if true, would entitle him to relief and if his claims were not belied by the record.¹¹ It is not a correct statement of law that a criminal defendant has no right to file a direct appeal from a judgment of conviction based upon a guilty plea. Rather, a direct appeal from a judgment of conviction based upon a guilty plea is limited in scope to "reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings" and those grounds permitted pursuant to

⁹See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

¹⁰See id.

¹¹See id.

NRS 174.035(3).¹² Although appellant was informed of his limited right to a direct appeal in the written guilty plea agreement,¹³ appellant claimed that trial counsel informed him that he did not have a right to a direct appeal. Misinformation about the availability of the right to a direct appeal may have the effect of deterring a criminal defendant from requesting a direct appeal. Notably, trial counsel has an obligation to file a direct appeal when a criminal defendant requests a direct appeal or otherwise expresses a desire to appeal.¹⁴ Without an evidentiary hearing on the underlying factual allegations supporting this claim, this court is unable to affirm the decision of the district court denying this claim. Therefore, we reverse the district court's decision to deny this claim and remand for an evidentiary hearing on whether trial counsel was ineffective in regards to the availability of a direct appeal.

Finally, appellant claimed that the district court erred in considering the fact that appellant was a gang member in sentencing appellant where that fact was suspect evidence and had not been proven beyond a reasonable doubt. As appellant's claim did not address the voluntariness of his plea or whether his plea was entered without the effective assistance of counsel, appellant's claim fell outside the scope of claims permissible in a habeas corpus petition challenging a judgment of

¹²See NRS 177.015(4); see also Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994); overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

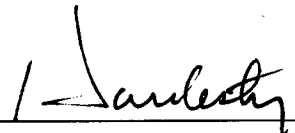
¹³See Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).


¹⁴See Thomas, 115 Nev. 148, 979 P.2d 222.

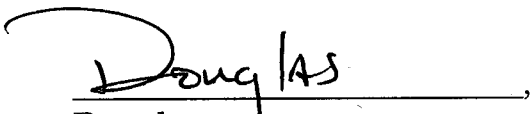
conviction based upon a guilty plea.¹⁵ Therefore, the district court did not err in denying this claim.

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.¹⁶ 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.¹⁷


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Jackie Glass, District Judge
Adrian Borunda
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

¹⁵NRS 34.810(1)(a).

¹⁶See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁷We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein.