

IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON THOMAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49857

FILED

MAY 08 2008

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Aaron Thomas' post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Thomas was convicted, pursuant to a jury verdict, of possession of a stolen vehicle (count I), conspiracy to commit robbery (count III), robbery with the use of a deadly weapon (counts IV, VI, and VIII), burglary while in the possession of a firearm (counts X and XII), attempted burglary while in the possession of a firearm (count XI), and grand larceny (count XIV).¹ The district court sentenced Thomas to serve a prison term of 22-96 months each for counts I and III, two consecutive

¹We note that there is a clerical error in the judgment of conviction. The judgment incorrectly states that Thomas was convicted pursuant to a guilty plea. In fact, Thomas was convicted pursuant to a jury verdict. Following this court's issuance of its remittitur, the district court shall correct this error in the judgment of conviction. See NRS 176.565 (providing that clerical error in judgments may be corrected at any time); Buffington v. State, 110 Nev. 124, 126, 868 P.2d 643, 644 (1994) (explaining that the district court does not regain jurisdiction following an appeal until supreme court issues its remittitur).

prison terms of 30-100 months each for counts IV, VI, and VIII, 30-120 months each for counts X and XII, 12-36 months for count XI, and 22-96 months for count XIV; all of the counts were ordered to run concurrently. The district court ordered Thomas to pay \$3,749.46 in restitution. This court dismissed Thomas' untimely direct appeal due to a lack of jurisdiction.²

On November 16, 2004, Thomas filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition, but requested an evidentiary hearing to determine if Thomas was improperly deprived of a direct appeal due to the ineffective assistance of his trial counsel. The district court conducted a hearing, heard the testimony of Thomas' former counsel, and found that Thomas was denied his right to a direct appeal and, therefore, was entitled to the Lozada remedy.³ Accordingly, the district court appointed new counsel to represent Thomas and counsel filed two supplemental petitions on his behalf. The State filed another opposition to the petition. Subsequently, the district court conducted an evidentiary hearing and, on June 27, 2007, entered an order denying Thomas' petition. This timely appeal followed.

First, Thomas contends that the district court erred in finding that he did not receive ineffective assistance of counsel. Specifically,

²Thomas v. State, Docket No. 44070 (Order Dismissing Appeal, November 1, 2004).

³Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994) ("an attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction").

Thomas argues that trial counsel was ineffective for “miscalendaring” the entry of plea hearing and failing to review the proposed guilty plea agreement with him. As a result, Thomas claims that he instead proceeded to trial and was convicted on more counts than he would have pleaded to. We disagree with Thomas’ contention.

In its order denying Thomas’ petition, the district court noted that, at the evidentiary hearing, the prosecutor testified that “he ultimately withdrew his [plea] offer because [Thomas] stated that he did not want to plead guilty and the overflow judge, the Honorable Stewart Bell, strongly encouraged [Thomas] to accept the negotiations; thus, he had serious concerns that a guilty plea would later be invalidated.” Accordingly, the district court found that Thomas’ counsel was not ineffective.

The district court’s factual findings are entitled to deference when reviewed on appeal.⁴ Thomas has not demonstrated that the district court’s findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, Thomas has not demonstrated that the district court erred as a matter of law. Therefore, we conclude that the district court did not err by rejecting this claim.⁵

⁴See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

⁵In its fast track response, the State contends that ineffective assistance of counsel claims cannot be properly raised in a Lozada petition because such a petition is “the equivalent of a direct appeal” and ineffective assistance claims cannot be raised in a direct appeal. See generally Johnson v. State, 117 Nev. 153, 160-61, 17 P.3d 1008, 1013 (2001). As we have previously pointed out to the State in response to this argument, this court has never limited the Lozada proceeding in such a manner, and the contention that ineffective assistance of counsel claims are beyond the scope of relief contemplated by Lozada is a misstatement of
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Second, Thomas contends that his conviction should be reversed because the investigating officer, while testifying on behalf of the State, referred to his probation officer. Thomas claims that the admission of the officer's statement amounted to impermissible prior bad act evidence and "could lead the jury to think he is of bad character so he probably committed the crime since he was already on probation."

Initially, we note that Thomas did not object to the challenged statement. "Failure to object to the admission of evidence generally precludes review by this court, although the court may address plain error."⁶ In this case, the district court found that any error was harmless beyond a reasonable doubt because the statement was unsolicited and inadvertent.⁷ Additionally, Thomas has not demonstrated that the testimony had a prejudicial impact on the verdict.⁸ Therefore, we conclude that the district court did not err by rejecting this claim.

Finally, Thomas contends that the Lozada remedy is inadequate for the deprivation of his right to a direct appeal. We

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law. See generally Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004) (nothing precludes simultaneously raising an appeal deprivation claim and traditional post-conviction issues).

⁶See Herman v. State, 122 Nev. 199, 204, 128 P.3d 469, 472 (2006); see also NRS 178.602.

⁷See Rice v. State, 108 Nev. 43, 44, 824 P.2d 281, 282 (1992).

⁸See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

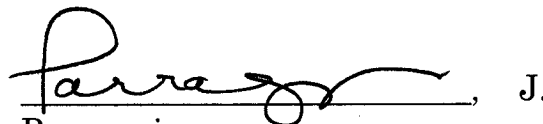
disagree.⁹ This court has repeatedly stated that the Lozada remedy is the functional equivalent of a direct appeal, and when a defendant is denied his right to an appeal, as in Thomas' case, a habeas petition is the proper avenue for raising direct appeal issues that would not otherwise be reviewed.¹⁰ Therefore, we decline to revisit this issue and conclude that the district court did not err by rejecting this claim.

Having considered Thomas' contentions and concluded that they are without merit, we

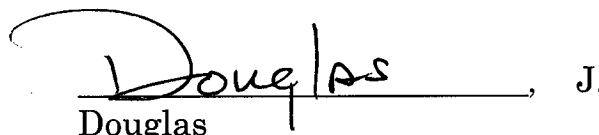
ORDER the judgment of the district court AFFIRMED.



Maupin



Parraguirre



Douglas

⁹Thomas also claims that he should be allowed to withdraw his guilty plea. Thomas, however, did not plead guilty and was convicted pursuant to a jury verdict.

¹⁰See Evitts v. Lucey, 469 U.S. 387, 399 (1985) (expressing approval of a state court's use of a "post-conviction attack on the trial judgment as 'the appropriate remedy for frustrated right of appeal'" (quoting Hammershoy v. Commonwealth, 398 S.W.2d 883 (Ky. 1966)); see also Gebers v. State, 118 Nev. 500, 50 P.3d 1092 (2002) (approving of the Lozada remedy for meritorious appeal deprivation claims); Mann v. State, 118 Nev. 351, 46 P.3d 1228 (2002).

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