

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL GONZALEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49979

FILED

DEC 03 2007

JAWETTE M. BLOOM
CLERK OF SUPREME COURT
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 September 1, 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 in the Nevada State Prison the following terms: (1) for count 1, a term of 24 to 72 months; (2) for count 2, a term of 48 months to 150 months to be served concurrently with count 1; and (3) for count 3, two consecutive terms of 36 to 150 months, count 3 to run concurrent with count 2.¹ Appellant did not file a direct appeal.

On April 13, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

¹Petitioner contended that he received the deadly weapon enhancement for two counts, however, our review of the record reveals that he only received the enhancement on count 3.

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 18, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of trial counsel. 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 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.² The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.³

First, appellant contended that his counsel was ineffective by coercing appellant to plead guilty. Appellant claimed that his counsel led appellant to believe that he would receive probation if he entered the guilty plea. This claim is without merit.⁴ Appellant acknowledged at the arraignment and in the written guilty plea agreement that count 3 was a nonprobationable offense. Appellant also acknowledged at the

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

³See Strickland v. Washington, 466 U.S. 668, 697 (1984).

⁴See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (stating that a petitioner is not entitled to an evidentiary hearing on claims that are belied by the record).

arraignment and in the guilty plea agreement that the court was not obligated to accept his attorney or the State's sentencing recommendation and no one could promise him leniency or special treatment. Therefore, the district court did not err in denying this claim, and we affirm the denial of this claim.

Second, appellant claimed that his counsel was ineffective for failing to investigate facts, to present mitigating witnesses, and to file motions on appellant's behalf. Appellant failed to identify what facts his counsel should have investigated and what additional preparation his counsel should have undergone such that appellant would not have pleaded guilty and would have insisted on proceeding to trial.⁵ Additionally, a defendant only has a right to call mitigating witnesses in first-degree murder cases.⁶ Therefore, the district court did not err in denying this claim, and we affirm the denial of this claim.

Finally, appellant claimed that his counsel was ineffective for failing to inform appellant of his right to appeal and failing to file an appeal after being requested to do so by the appellant.

This court has held that "an attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction."⁷ Prejudice is presumed under

⁵See id. at 502, 686 P.2d at 225.

⁶See 2003 Nev. Stat., ch. 366, § 1, at 2082 (NRS 175.552(3)); NRS 176.015.

⁷Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994).

these facts.⁸ If appellant is able to demonstrate that his trial counsel ignored his request for an appeal, he has established ineffective assistance of trial counsel.⁹

A petitioner is entitled to an evidentiary hearing when he raises claims supported by specific facts, not belied by the record, which, if true would entitle him to relief.¹⁰ Because appellant's claim was supported by specific facts and not belied by the record, the district court erred in denying this claim without conducting an evidentiary hearing.

Accordingly, we reverse the order of the district court in part, and remand this case to the district court to conduct an evidentiary hearing to determine whether appellant's counsel failed to file a direct appeal after appellant requested a direct appeal.¹¹ The district court may exercise its discretion as to whether to appoint post-conviction counsel to

⁸See Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003).

⁹See Mann v. State, 118 Nev. 351, 353-54, 46 P.3d 1228, 1229-30 (2002).


¹⁰See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

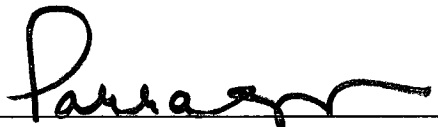
¹¹In his petition, appellant also claimed that the district court abused its discretion in applying the deadly weapon enhancement because the enhancement required a factual finding made by a jury and the sentencing enhancement constituted double jeopardy. In light of this disposition relating to the appeal deprivation claim, we decline to reach the merits of these claims. If the district court determines that the appeal deprivation claim lacks merit, the district court shall resolve these claims in the final order denying his petition. If the district court determines that appellant was deprived of a direct appeal without his consent, these claims may be raised by appointed counsel in the petition filed pursuant to Lozada.

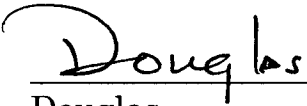
assist appellant at the evidentiary hearing. If the district court determines appellant was denied his right to a direct appeal, the district court shall appoint counsel to represent appellant and shall permit appellant to file a petition for a writ of habeas corpus raising issues appropriate for direct appeal.¹²

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that briefing and oral argument are unwarranted.¹³ 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.¹⁴


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

¹²See Lozada, 110 Nev. at 359, 871 P.2d at 950.

¹³See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁴This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

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