

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHANCE WILLIAM SHAVER,
Appellant,
vs.
WARDEN, LOVELOCK
CORRECTIONAL CENTER, CRAIG
FARWELL,
Respondent.

No. 50098

FILED

DEC 03 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 Chance Shaver's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On November 5, 2002, the district court convicted appellant Chance Shaver, pursuant to a guilty plea, of two counts of robbery with the use of a deadly weapon. The district court sentenced appellant to serve in the Nevada State Prison two consecutive terms of 24 to 60 months for each of the robbery counts, the terms to run concurrent between counts. No direct appeal was taken.

On October 7, 2003, appellant filed a timely proper person petition for a writ of habeas corpus in the district court. The State opposed the petition. Counsel was appointed to represent appellant, and after conducting an evidentiary hearing, the district court denied appellant's petition on July 20, 2007. This appeal followed.

In his petition, appellant argues that the district court erred in denying his claims challenging the validity of the guilty plea. A guilty

plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.¹ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.² In determining the validity of a guilty plea, this court looks to the totality of the circumstances.³ Factual findings of the district court that are supported by substantial evidence and are not clearly wrong are entitled to deference when reviewed on appeal.⁴

Specifically, appellant argues that he was not competent when he entered his guilty plea and that this affected his guilty plea. Appellant claims that he was not examined by a neuropsychologist, who he argues would be the proper expert to determine competency when a defendant has an organic brain disorder. Appellant fails to carry his burden of demonstrating that his plea was invalid. This court has held that the test for determining competency is “whether [the defendant] has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding—and whether he has a rational as well as factual

¹Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994).

²Hubbard, 110 Nev. at 675, 877 P.2d at 521.

³State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. at 271, 721 P.2d at 367.

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

understanding of the proceedings against him.”⁵ A neuropsychologist testified at the evidentiary hearing that appellant had organic personality damage and that he had concerns about appellant’s ability to aid his counsel or understand the proceedings. The neuropsychologist stated that he could not determine appellant’s understanding of the proceedings at the time of his guilty plea because he had not examined appellant prior to his plea. The district court determined that appellant failed to demonstrate that he was actually incompetent at the time of his guilty plea and stated that the testimony from the neuropsychologist would not have altered the outcome of the proceedings given the conclusions of other experts who examined appellant prior to his guilty plea. A review of the record reveals that appellant was examined by multiple psychologists prior to his guilty plea and he was determined to be competent. Substantial evidence supports the conclusions of the district court, and thus, we conclude that the district court did not err in denying this claim.

Next, appellant argues that the district court erred in denying his claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel’s performance fell below an objective standard of reasonableness, and there is a reasonable probability that in the absence of counsel’s errors, the results of the

⁵Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960) (alteration in original)).

proceedings would have been different.⁶ The court need not consider both prongs if the petitioner makes an insufficient showing on either prong.⁷ A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel by a preponderance of the evidence, and the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁸

First, appellant argues that his trial counsel was ineffective for failing to seek the opinion of a neuropsychologist when determining the competency of appellant. At the evidentiary hearing, JoNell Thomas, an attorney and adjunct faculty member for Boyd School of Law at UNLV, testified that it is common practice for counsel to have clients with appellant's type of brain damage examined by a neuropsychologist rather than a psychologist due to the specialized training a neuropsychologist has in brain damage diagnoses and treatment. Appellant argues that reasonable counsel would have a client examined by a neuropsychologist when made aware of the types of brain damage that appellant suffers from. The district court concluded that the outcome of the proceedings would not have been different had a neuropsychologist testified at the competency hearing given the conclusions of other experts who examined appellant prior to his guilty plea. Appellant fails to demonstrate that his

⁶See Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432, 33, 683 P.2d 504, 505 (1984) (adopting test set forth in Strickland).

⁷Strickland, 466 U.S. at 697.

⁸Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

trial counsel was deficient or that he was prejudiced. At the evidentiary hearing, the neuropsychologist stated that he had concerns about appellant's ability to aid his counsel and to understand the proceedings, but the neuropsychologist did not conclude that appellant was incompetent prior to his guilty plea. From the record, it appears that the experts who examined appellant prior to his guilty plea were aware of his brain damage, and they concluded that appellant was competent. We agree with the district court's determination that the testimony of the neuropsychologist had no reasonable probability of altering the outcome in the instant case. Therefore, the district court did not err in denying this claim.

Second, appellant argues his trial counsel was ineffective for failing to file a direct appeal. Appellant argues that his trial counsel should have filed a direct appeal because language in the guilty plea agreement specifically reserved the right to appeal from the judgment of conviction and appellant's parents discussed filing an appeal with appellant's trial counsel.

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.⁹ "The burden is on the client to indicate to his attorney that he wishes to pursue an appeal."¹⁰

⁹See Thomas v. State, 115 Nev. 148, 151, 979 P.2d 222, 224 (1999).

¹⁰Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999).

Appellant fails to demonstrate that he asked his trial counsel to file an appeal and his trial counsel failed to do so.¹¹ At the evidentiary hearing, appellant's first counsel testified that he added the language reserving the right to appeal in the guilty plea agreement. Appellant's first trial counsel testified that he felt some of the pretrial motions may have had merit on appeal. However, appellant's third counsel testified that he explained the possibility of an appeal with appellant and told appellant to call him within 30 days if he wished to appeal. Appellant's parents told his third counsel they wanted to file an appeal, but the third trial counsel told them that he needed to be told to file an appeal by appellant. The third counsel testified that he did not receive communication from appellant signifying a desire to appeal. The evidence presented at the hearing substantially supports the district court's finding that appellant did not request a direct appeal. Therefore, the district court did not err in denying this claim.

Finally, appellant argues that NRS 62B.330(3) is unconstitutional. This claim is outside the scope of claims permissible in a petition for a writ of habeas corpus challenging a judgment of conviction based on a guilty plea.¹² Therefore, the district court did not err in denying this claim.¹³

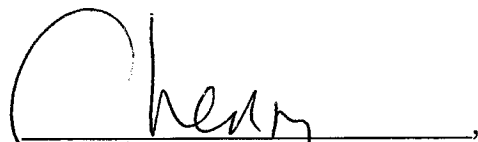

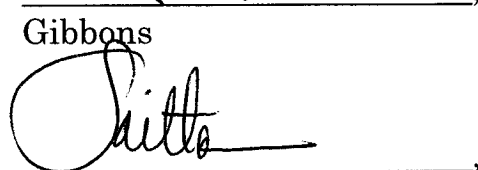
¹¹We note that appellant had three separate counsel: the first negotiated his plea; the second appeared for only one hearing; and the third counsel aided him during the sentencing hearing.

¹²NRS 34.810(1)(a).

¹³Appellant failed to demonstrate any ineffective assistance of counsel in this regard.

Accordingly, having considered appellant's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

 _____ J.
Cherry
 _____ J.
Gibbons
 _____ J.
Saitta

cc: Hon. Connie J. Steinheimer, District Judge
Thomas & Mack Legal Clinic
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk