

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERTO MANUEL LOPEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50189

FILED

MAR 06 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Vance
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 a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

On September 13, 2006, the district court convicted appellant, pursuant to a guilty plea, of one count of discharging at or into a structure, vehicle, aircraft, or watercraft and with the intention to promote, further or assist a criminal gang. The district court sentenced appellant to serve two consecutive terms of 12 to 48 months in the Nevada State Prison. No direct appeal was taken.

On May 31, 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 August 28, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of trial counsel.¹ 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 claimed that his trial counsel was ineffective for failing to inform him of the direct consequences of his guilty plea and for failing to ensure that appellant had a complete understanding of the charge. Specifically, appellant claimed that the gang enhancement pursuant to NRS 193.168 was not explained to him and he was not informed that he had a right to a jury determination of the facts

¹To the extent that appellant raised any claims independent from his claims of ineffective assistance of counsel, those claims fell outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea. See NRS 34.810(1)(a).

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

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

supporting the gang enhancement. Appellant failed to demonstrate that he was prejudiced. The written guilty plea agreement, which appellant acknowledged reading and understanding, informed appellant of the potential penalties he faced by entry of his guilty plea and the waiver of certain constitutional rights, including the right to a jury trial. Appellant was further personally canvassed about the potential penalties he faced by entry of his guilty plea. The elements of the crime and enhancement were set forth in the criminal information attached to the written guilty plea agreement. In the written guilty plea agreement, appellant affirmatively acknowledged that the elements and the waiver of constitutional rights had been thoroughly explained to him by his trial counsel. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that trial counsel used coercive techniques and promises to induce his guilty plea. Specifically, appellant claimed that trial counsel failed to explain anything to him and merely informed him that it was in his best interests to enter a guilty plea. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. During the guilty plea canvass and in the written guilty plea agreement, appellant affirmatively acknowledged that his guilty plea was not the product of threats. Appellant failed to indicate what information trial counsel should have presented to him that would have had a reasonable probability of altering his decision to enter a guilty plea in the instant case or how trial counsel's advice was deficient in the instant case. In the written guilty plea agreement, appellant

affirmatively acknowledged that he had discussed with his trial counsel all possible defenses, defense strategies and circumstances that might be in appellant's favor. In addition to the count to which appellant pleaded guilty, appellant was originally charged with conspiracy to discharge a firearm at or into a structure, vehicle, aircraft, or watercraft and assault with a deadly weapon and with the intention to promote, further or assist a criminal gang. Thus, appellant faced a potentially greater penalty had he gone to trial on all of the original charges. Therefore, we conclude that the district court did not err in denying this claim.

Next, 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.⁴ 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

⁴See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

“reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings” and those grounds permitted pursuant to NRS 174.035(3).⁵ Although appellant was informed of his limited right to a direct appeal in the written guilty plea agreement,⁶ 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.⁷ Without an evidentiary hearing on the underlying factual allegations supporting these claims, this court is unable to affirm the decision of the district court denying these claims. Therefore, we reverse the district court’s decision to deny these claims and remand for an evidentiary hearing on whether trial counsel was ineffective in regards to the availability of a direct appeal.

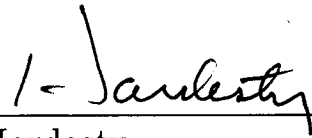
⁵See NRS 177.015(4); see also Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994); overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

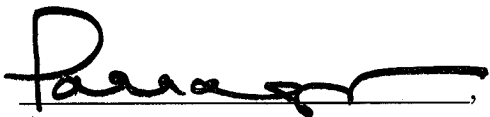
⁶See Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).

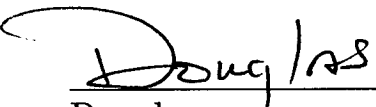
⁷See Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

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.⁸ 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.⁹


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Michael Villani, District Judge
Roberto Manuel Lopez
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

⁸See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁹This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.