

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM WHITSETT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50192

FILED

APR 10 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is a proper person appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

On September 1, 2006, the district court convicted appellant, pursuant to a guilty plea, of one count of burglary (count 1) and one count of robbery of a victim 60 years of age or older (count 2). The district court sentenced appellant to serve a term of 28 to 72 months (count 1) and two consecutive terms of 30 to 120 months (count 2) in the Nevada State Prison. Appellant did not file a direct appeal.

¹On December 12, 2007, appellant filed a motion to consolidate this case with his appeal in Whitsett v. State, Docket No. 50283. This court denies appellant's motion to consolidate these appeals.

On June 11, 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 27, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that his guilty plea was invalid. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.² Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.³ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.⁴

First, appellant contended his guilty plea was invalid because he was incompetent when he entered the plea. Appellant contended that because his presentence investigative report indicated that he had reported that he was suicidal and being prescribed psychotropic drugs there was serious doubt regarding his competence to enter his plea. Our

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

³Hubbard, 110 Nev. at 675, 877 P.2d at 521.

⁴State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

review of the record reveals that appellant failed to demonstrate that he was incompetent to enter his guilty plea. This court has held that the test for determining competency is “whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.”⁵ Appellant must demonstrate incompetence by a preponderance of the evidence.⁶ Depression and drug treatment are insufficient to prove incompetence, and appellant failed to demonstrate that he could not communicate with his counsel with a sufficient degree of understanding or that he did not understand the nature of the charges against him. Therefore, the district court did not err in denying appellant’s claim.

Second, appellant claimed that his guilty plea was invalid because the district court failed to canvass him properly regarding his potential sentence under the plea agreement. Appellant failed to demonstrate that he was improperly canvassed regarding his guilty plea. At the hearing regarding appellant’s guilty plea, the district court asked appellant if he had the opportunity to discuss the charge and the plea with his counsel and appellant indicated that he had discussed the charge and

⁵Melchor-Gloria v. State, 99 Nev. 174, 179-180, 660 P.2d 109, 113 (1983) (quoting Dusky v. United States, 362 U.S. 402 (1960)).

⁶Cooper v. Oklahoma, 517 U.S. 348, 355-56 (1996).

plea with his counsel. Furthermore, the district court specifically asked appellant whether he had read and understood everything in the written plea agreement, as well as the charge to which he was pleading guilty, and appellant indicated that he had read and understood the agreement. Notably, the guilty plea agreement, which appellant signed, stated that appellant could receive a sentence of 1 to 10 years for burglary, 2 to 15 years for robbery and an equal and consecutive term of 2 to 15 years for perpetrating a crime against a person aged 60 or older. Therefore, the district court did not err in denying appellant's claim.

In his petition, appellant also raised claims of ineffective assistance of 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.⁷ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁸

⁷Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁸Strickland v. Washington, 466 U.S. 668, 697 (1984).

First, appellant claimed that his counsel was ineffective for failing to raise competency as an issue in this case. Specifically, appellant contended that he was incompetent because he was suicidal and was taking psychotropic drugs at the time he entered his plea. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. As noted above, appellant failed to demonstrate that he was incompetent to enter his guilty plea. Thus, appellant failed to demonstrate that his counsel was ineffective for failing to raise the issue of competence. Therefore, the district court did not err in denying appellant's claim.

Second, appellant claimed that his counsel was ineffective for failing to advise him that the victim admitted that he could not recognize the person who committed the robbery. Appellant contended that instead of informing him about this fact, and moving to dismiss the case at the preliminary hearing, his counsel erroneously advised him to waive the preliminary hearing. Appellant failed to demonstrate that he was prejudiced. Importantly, video surveillance of the crime showed appellant following the victim and his wife from an elevator, through a parking garage, and to their vehicle. After the victim and his wife entered the vehicle, appellant also entered the vehicle, exited quickly, and ran through the parking lot. Under the circumstances, appellant failed to demonstrate a reasonable probability of a different outcome had appellant's counsel informed him of the victim's inability to identify his assailant. Therefore, the district court did not err in denying appellant's claim.

Finally, appellant claimed that he asked his counsel to file an appeal but his counsel refused to file an appeal. This court's review of the record on appeal reveals that the district court erroneously denied appellant's petition without conducting an evidentiary hearing on this claim.⁹ 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.¹⁰ Notably, in its opposition to appellant's petition, the State requested a limited evidentiary hearing on this particular issue. Nevertheless, the district court denied appellant's petition without holding an evidentiary hearing and without addressing the issue in its order denying the instant petition. Therefore, we reverse and remand this matter to the district court for a limited evidentiary hearing on the issue of whether appellant's counsel refused to file an appeal after being asked by appellant to do so. The district court may exercise its discretion as to whether to appoint post-conviction counsel to assist appellant at the evidentiary hearing.¹¹ If the district court determines that appellant was denied his right to a direct appeal, the district court shall appoint counsel

⁹See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

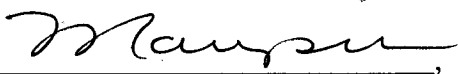
¹⁰See Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

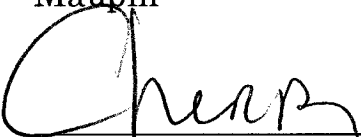
¹¹NRS 34.750.


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 oral argument and briefing are unwarranted in this matter.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.
Maupin


_____, J.
Cherry


_____, J.
Saitta

¹²Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

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

¹⁴This order constitutes our final disposition of this appeal. Any subsequent appeal from an order of the district court denying appellant's appeal deprivation claim and the claims not reached in this order shall be docketed as a new matter.

cc: Hon. Valerie Adair, District Judge
William Whitsett
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk