

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 50283

FILED

APR 07 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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.¹ Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

On August 18, 2006, the district court convicted appellant, pursuant to a guilty plea, of one count of robbery of a victim 60 years of age or older. The district court sentenced appellant to serve two consecutive terms of 36 to 120 months in the Nevada State Prison. Appellant did not file a direct appeal.

On May 29, 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

¹On December 12, 2007, appellant filed a motion to consolidate this case with his appeal in Whitsett v. State, Docket No. 50192. This court denies appellant's motion to consolidate these appeals.

district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On September 18, 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. Specifically, appellant contended that his presentence investigative report raised doubts about his competency. Our 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

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.

him.”⁵ Appellant must demonstrate incompetence by a preponderance of the evidence.⁶ Here, appellant failed to state what facts contained in his presentence report raised doubts about his competency. Thus, appellant’s petition contained only bare and naked claims for relief that were unsupported by any specific factual allegations.⁷ 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.⁸ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁹

First, appellant claimed that his counsel was ineffective for failing to raise competency as an issue in this case. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced.

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).

⁷See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

⁸Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁹Strickland v. Washington, 466 U.S. 668, 697 (1984).

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 raise a defense of actual innocence in regard to victim Richard Davies. Specifically, appellant claimed that the grand jury testimony demonstrated that he did not rob Davies. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. Importantly, during the plea canvass appellant acknowledged that he had read, signed and understood the written plea agreement and that he had discussed all possible defenses with his counsel. In his guilty plea agreement, appellant pleaded guilty to one count of robbery of a victim over the age of 60 and admitted that he had committed this crime against the following victims: Richard Davies, and/or Josefino Amigable, and/or Virgil Kendall, and/or Peter Payne. Under these circumstances, appellant failed to demonstrate the probability of a different outcome had counsel raised a defense of actual innocence with regard to Richard Davies because he was only convicted of one count of robbery of a victim over the age of 60 but admitted he had perpetrated this crime against several individuals.

Moreover, a review of the grand jury testimony belies appellant's claim that grand jury testimony demonstrates his actual innocence.¹⁰ Notably, witness Ruth Speidel testified that she had seen

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

appellant outside the men's restroom where Davies was robbed shortly before the incident. Speidel further testified that she subsequently saw appellant running out of the casino and heard Davies yelling for help. Speidel was able to immediately identify appellant from a photographic lineup. Furthermore, Detective Janie Carr of the Las Vegas Metropolitan Police Department testified that appellant admitted to a robbery in the men's restroom at the Sam's Town Casino in March of 2006. Notably this was when and where Davies was robbed. This testimony falls far short of demonstrating appellant's innocence; therefore, the district court did not err in denying appellant's claim.

Third, appellant claimed that his counsel was ineffective for failing to challenge the imposition of the sentence enhancement for a crime involving a victim over 60 years of age when appellant had been deprived of a jury trial. Appellant also claimed that he was improperly denied the right to a jury trial on the sentence enhancement for a crime involving a victim over 60 years of age. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. Notably, in the guilty plea agreement, which appellant acknowledged reading, signing and understanding, appellant pleaded guilty to robbery, victim age 60 years or older. Appellant admitted this fact again at the plea canvass. Thus, appellant made or adopted factual statements sufficient to constitute an admission of guilt.¹¹ For that reason, the district court was permitted to impose the older victim enhancement and a jury trial was not

¹¹See Croft v. State, 99 Nev. 502, 505, 665 P.2d 248, 250 (1983).

required on this claim and counsel was not ineffective in this regard.¹² Therefore, the district court did not err in denying appellant's claims.

Appellant also claimed that he was improperly denied the right to a jury trial on the sentence enhancement for a crime involving a victim over 60 years of age. This claim 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.¹³ Therefore, the district court did not err in denying appellant's claim.

Next, appellant claimed that his guilty plea agreement and sentence were void for lack of a written plea agreement. This claim is belied by the record.¹⁴ Appellant signed a guilty plea agreement in the instant case, district court case number 222265, on June 29, 2006. At appellant's plea canvass, appellant admitted that he had read and understood his guilty plea agreement. 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 failed 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

¹²See Blakely v. Washington, 542 U.S. 296, 303 (2004) (stating that precedent makes it clear that the statutory maximum that may be imposed is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant") (emphasis in original).

¹³See NRS 34.810(1)(a).

¹⁴See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

claim.¹⁵ 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.¹⁶ 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.¹⁷ If the district court determines that 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.¹⁸

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.¹⁹ Accordingly, we

¹⁵See id.

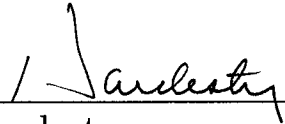
¹⁶See Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

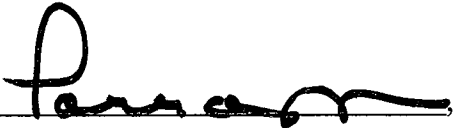
¹⁷NRS 34.750.

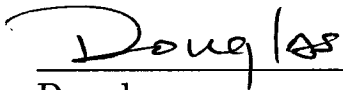
¹⁸Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

¹⁹Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

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.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

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