

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRANDON DOUGLAS ALLAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50480

FILED

APR 18 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. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

On June 23, 2000, the district court convicted appellant, pursuant to a jury verdict, of murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life with the possibility of parole after 20 years in the Nevada State Prison. On appeal, this court reversed appellant's judgment of conviction and remanded the matter to the district court.¹ The remittitur issued on April 18, 2002. On August 29, 2003, the district court convicted appellant, pursuant to a guilty plea, of murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life

¹Allan v. State, 118 Nev. 19, 38 P.3d 175 (2002).

with the possibility of parole after 10 years in the Nevada State Prison. Appellant did not file a direct appeal.

On August 26, 2004, 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 October 23, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that his guilty plea was invalid because the district court failed to canvass him appropriately. Specifically, appellant claimed that the district court failed to: (1) inform him that NRS 193.165 required his sentence for the deadly weapon enhancement to run consecutively, (2) inform him that the elements of second-degree murder do not include use of a weapon, and (3) inform him that a collateral effect of his plea would include use of his conviction as evidence to support the sentencing of appellant as an habitual offender if appellant continued to engage in criminal activity.

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

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

discretion.³ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.⁴

Appellant failed to carry his burden of demonstrating that his guilty plea was invalid. The totality of the circumstances demonstrates that appellant understood the elements of the crimes and knowingly admitted to the facts supporting the crimes. Appellant admitted at the plea canvass that he had read and understood the plea agreement, which set forth the elements of the crime, as well as the possible punishments appellant could receive. Moreover, during the plea canvass, appellant's counsel stated the potential sentences and stipulation that appellant would be sentenced to one term of life with the possibility of parole plus an equal and consecutive term for the weapon enhancement. Appellant stated on the record that he agreed with the negotiations and indicated that he had discussed his case with counsel and agreed with all the terms of the guilty plea agreement. Additionally, the State went over all of the elements of the crime, and appellant indicated that he understood the elements. Notably, a defendant must only be made aware of the direct consequences of a guilty plea prior to its entry.⁵ A consequence is direct if it has "a 'definite, immediate and largely automatic effect on the range of the defendant's punishment.'"⁶ The mere possibility that appellant might

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.

⁵Little v. Warden, 117 Nev. 845, 849, 34 P.3d 540, 542-43 (2001).

⁶Id. (quoting Torrey v. Estelle, 842 F.2d 234, 236 (9th Cir. 1988)).

be sentenced as an habitual criminal if he continued to commit crimes does not constitute such a direct consequence. Therefore, the district court did not err in denying appellant's claim.

In his petition, appellant claimed that his counsel was ineffective for failing to state on the record the elements of the crime and the consequences of the plea. Appellant further claimed that his trial counsel, in secret, told him that he was eligible to be sentenced to a term of 10 to 25 years, that he could avoid a sentence of 10 years to life, and that he was eligible to have the sentence enhancement for use of a deadly weapon run concurrently.

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

Our review of the record on appeal reveals that appellant's claim lacked merit. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. As noted above, during the plea canvass appellant's counsel stated the potential sentences on the record

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).

and appellant acknowledged that he agreed with the plea negotiations. Furthermore, the State went over all of the elements of the crime and appellant indicated that he understood the elements. Finally, the district court asked appellant if he understood that the maximum penalty in his case was life in prison with parole eligibility beginning after 10 years and that his sentence would be enhanced with a consecutive life term and appellant replied, "yes, I understand that." Therefore, the district court did not err in denying appellant's claim.

Appellant also claimed that: (1) he was inappropriately deprived of his right to be presented with a grand jury indictment, (2) his sentence violated his equal protection rights because he was sentenced differently than other similarly situated offenders, and (3) the deadly weapon enhancement should not apply in his case because the use of a deadly weapon is an element of the crime of second-degree murder. These claims fell outside the scope of claims permissible in a petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea.⁹ Therefore, the district court did not err in denying these claims.

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.¹⁰ A petitioner is entitled to an evidentiary hearing when he sets

⁹NRS 34.810(1)(a).

¹⁰See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

forth claims not belied by the record, which if true, would entitle him to relief.¹¹ 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.¹² Here, 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.¹³ 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.¹⁴

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.¹⁵ Accordingly, we

¹¹Id. at 503, 686 P.2d at 225.

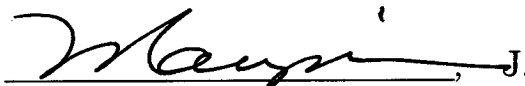
¹²See Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

¹³NRS 34.750.

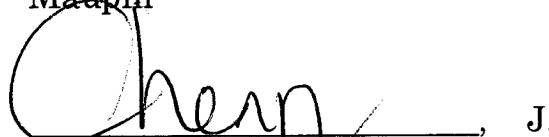
¹⁴Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

¹⁵Luckett 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.¹⁶

 J.

Maupin

 J.

Cherry

 J.

Saitta

cc: Hon. Robert H. Perry, District Judge
Brandon Douglas Allan
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

¹⁶This order constitutes our final disposition of this appeal. Any subsequent appeal from an order of the district court denying appellant's appeal deprivation claim shall be docketed as a new matter.