IN THE SUPREME COURT OF THE STATE OF NEVADA

CRAIG KENNETH CLARK, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50537



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. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

On November 22, 2006, the district court convicted appellant, pursuant to a guilty plea, of attempted murder with the use of a deadly weapon. The district court sentenced appellant to serve two equal and consecutive terms of 57 to 144 months in the Nevada State Prison. No direct appeal was taken.

On June 21, 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 October 16, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that his 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.[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]

Appellant claimed that he did not fully understand the nature of the offense or the enhanced penalty prior to the district court accepting his guilty plea. He further claimed that he was not informed that he could be subject to the gang enhancement. Appellant failed to carry his burden of demonstrating that his plea was invalid. Appellant was correctly informed of the elements of the charged crime. Appellant acknowledged during the plea canvass that he was pleading guilty to the willfull, unlawful, and felonious attempt to kill the victim "by stabbing at or into the body of him with a knife and/or hacking at his head or body with . . . using one or more deadly weapons including a knife or a hatchet." Moreover, the information was attached to the guilty plea agreement. Appellant was also correctly informed, in both the plea agreement and the plea canvass, of the potential sentence he faced by pleading guilty,

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[1]Bryant 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).

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

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

including the deadly weapon enhancement.[4] Appellant was not sentenced pursuant to the gang enhancement. Thus, appellant was advised of the nature of the offenses to which he pleaded guilty as well as the potential penalties he faced as a result of his guilty plea. Therefore, the district court did not err in denying this claim.[5]

Appellant also contended that he received 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.[6] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[7]

First, appellant claimed that his counsel was ineffective for coercing him into pleading guilty by advising him that he could receive probation. Specifically, he claimed that his counsel told him that the

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[4]NRS 200.010; 2003 Nev. Stat., ch. 137, § 7, at 770-71 (NRS 200.030); NRS 193.330(1)(a)(1); 1995 Nev. Stat., ch. 455, § 1, at 1431 (193.165).

[5]To the extent that appellant contended that his counsel was ineffective for failing to explain the elements of the crime or the possible penalties, appellant failed to demonstrate that he was prejudiced for the reasons set forth above.

[6]Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

[7]Strickland v. Washington, 466 U.S. 668, 697 (1984).

prosecution would agree to a recommendation of probation and that the agreement was binding. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. In the plea agreement and during the plea canvass, appellant acknowledged that he understood that the district court could sentence him to any legally permissible sentence and was not bound by the plea negotiations. Moreover, the plea agreement and the district court informed appellant of the potential sentences he faced. In addition, appellant acknowledged during the plea canvass that probation was not an available sentence for the offense to which appellant pleaded guilty. As appellant was informed of the possible sentences, he did not sustain his burden of showing that he would not have pleaded guilty but for his counsel's assertion that appellant might receive probation.[8] Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his counsel was ineffective for failing to consult him about his right to an appeal. Appellant claimed that his counsel told him that appellant had no right to an appeal and would not file a notice of appeal on his 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

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[8]See Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975) (holding that the "mere subjective belief of a defendant as to potential sentence, or hope of leniency, unsupported by any promise from the State or indication by the court, is insufficient to invalidate a guilty plea as involuntary or unknowing.").

were not belied by the record.[9] 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 "reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings" and those grounds permitted pursuant to NRS 174.035(3).[10] Although appellant was informed of his limited right to a direct appeal in the written guilty plea agreement,[11] 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.[12] Without an evidentiary hearing on the underlying factual allegations supporting this claim, this court is unable to review the decision of the district court denying this claim. Therefore, we reverse the district court's decision to deny this claim and remand for an evidentiary hearing on whether trial counsel was ineffective with regard to the availability of a direct appeal.

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

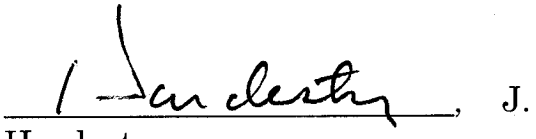
[10]See NRS 177.015(4); see also Franklin v. State, 110 Nev. 750, 751-52, 877 P.2d 1058, 1059 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

[11]See Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999).

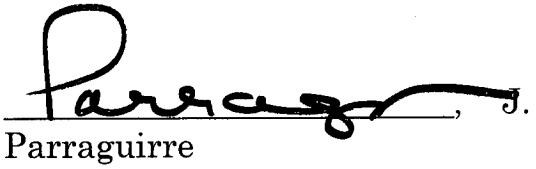
[12]See Thomas, 115 Nev. at 150-51, 979 P.2d at 223-24.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.[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.



_____, J.
Hardesty



_____, J.
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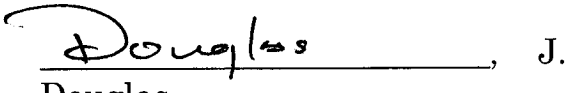

_____, J.
Douglas

cc: Hon. Stewart L. Bell, District Judge
Craig Kenneth Clark Jr.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

[13]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).