IN THE SUPREME COURT OF THE STATE OF NEVADA

GEORGE ANTHONY MEDINA-SANCHEZ A/K/A GEORGE ANTHONY MEDINASANCHEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50611

FILED

JUN 09 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. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

On March 1, 2007, the district court convicted appellant, pursuant to a guilty plea, of battery with the use of a deadly weapon (Count 1) and discharging a firearm out of a motor vehicle (Count 2). The district court sentenced appellant to serve a term of 24 to 72 months for count 1 and a consecutive term of 26 to 120 months for count 2 in the Nevada State Prison. No direct appeal was taken.

On July 13, 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 November 15, 2007, the district court denied appellant's petition. This appeal followed.

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In his petition, appellant claimed that the district court abused its discretion in sentencing him to consecutive terms and sentencing him based on suspect evidence. As these claims did not address the voluntariness of appellant's plea or whether his plea was entered without the effective assistance of counsel, appellant's claims fell outside the scope of claims permissible in a habeas corpus petition challenging a judgment of conviction based upon a guilty plea.[1] Therefore, the district court did not err in denying these claims.

In his petition, appellant 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 of a different outcome in the proceedings.[2] To demonstrate prejudice sufficient to invalidate the decision to enter a guilty plea, a petitioner must demonstrate that he would not have pleaded guilty and would have insisted upon going to trial.[3] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[4]

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[1]NRS 34.810(1)(a).

[2]Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

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

[4]Strickland, 466 U.S. at 697.

First, appellant claimed that his counsel coerced him into pleading guilty by telling him that the plea agreement guaranteed concurrent sentences. Appellant failed to demonstrate that he was prejudiced. 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. Further, appellant acknowledged that he could receive consecutive sentences. In addition, appellant acknowledged that he was not pleading guilty based on any promise. As appellant was notified of the possibility of consecutive sentences, he did not sustain his burden of showing that he would not have pleaded guilty but for his counsel's failure to inform him of the possibility of the imposition of consecutive sentences or counsel's prediction that appellant would receive concurrent sentences.[5] Therefore, the district court did not err in denying this claim.[6]

Second, appellant claimed that his counsel was ineffective for failing to inform him of the correct sentencing range. Appellant failed to demonstrate that he was prejudiced. The plea agreement, which appellant signed, stated that he faced a sentence of 2 to 10 years for battery with the use of a deadly weapon and a sentence of 2 to 15 years for

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[5]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").

[6]To the extent that appellant claimed that his guilty plea was involuntary based on his belief that the sentences were to run concurrent, appellant's claim failed for the reasons discussed above.

discharging a firearm out of a motor vehicle. Further, during the plea canvass, the district court informed appellant that he faced a maximum sentence of 10 years for battery with the use of a deadly weapon, and a sentence of 2 to 15 years for discharging a firearm from a motor vehicle. These were correct statements of the sentencing ranges.[7] Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his counsel failed to assist him at critical stages of the proceedings as appellant's counsel intended to coerce appellant to plead guilty. Specifically, appellant asserted that the record is devoid of any challenges to the prosecution. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant did not identify the pretrial proceedings at which he asserted his counsel failed to represent him.[8] Further, appellant failed to identify what actions his counsel should have taken to assist him prior to appellant pleading guilty.[9] Lastly, appellant acknowledged that he was not pleading guilty as a result of any threat or promise. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his counsel failed to call any witnesses in mitigation. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant did not specifically identify the witnesses who would have offered testimony or the possible

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[7]See NRS 200.481(2)(e)(1); NRS 202.287(1)(b).

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

[9]See id.

testimony that would have been offered.[10] Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his counsel was ineffective for failing to file a notice of appeal despite appellant's request that he do so. This court has held that if a defendant expresses a desire to appeal, counsel is obligated to file a notice of appeal on the defendant's behalf.[11] Prejudice is presumed where a defendant expresses a desire to appeal and counsel fails to do so.[12] A petitioner is entitled to an evidentiary hearing on claims supported by specific facts, which if true, would entitle the petitioner to relief.[13]

It appears from this court's review of the record on appeal that the district court erred in denying this claim without first conducting an evidentiary hearing. Appellant's appeal deprivation claim was supported by specific facts and was not belied by the record on appeal, and if true, would have entitled him to relief. Therefore, we reverse the district court's order to the extent that it denied appellant's appeal deprivation claim, and we remand this matter to the district court to conduct an evidentiary hearing on appellant's appeal deprivation claim.[14] If the

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[10]See id.

[11]See Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003); Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999); see also Roe v. Flores-Ortega, 528 U.S. 470 (2000).

[12]Mann v. State, 118 Nev. 351, 353-54, 46 P.3d 1228, 1229-30 (2002).

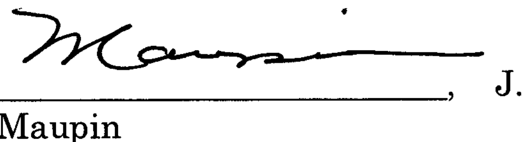
[13]See Hargrove, 100 Nev. 498, 686 P.2d 222.

[14]The district court may exercise its discretion to appoint counsel to represent appellant at the evidentiary hearing. See NRS 34.750.

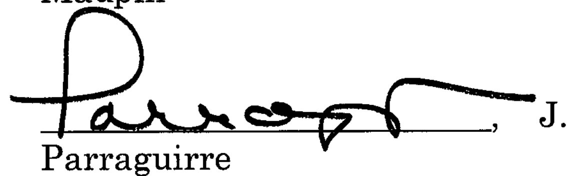
district court determines that appellant was not deprived of a direct appeal without his consent, the district court shall enter a final written order to that effect. We affirm the remainder of the district court's order denying his petition for the reasons set forth above.

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

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



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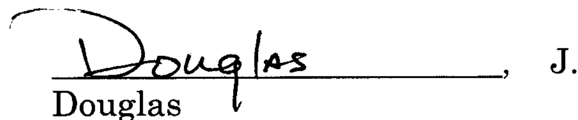

_________________________, J.
Douglas

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

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

cc: Hon. Michael Villani, District Judge
George Anthony Medina-Sanchez
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk