

IN THE SUPREME COURT OF THE STATE OF NEVADA

STANLEY AUTREY JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50614

FILED

JUN 13 2008

TRACIE LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF 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; Michelle Leavitt, Judge.

On November 8, 2006, the district court convicted appellant, pursuant to a guilty plea, of one count of possession of a stolen vehicle and one count of possession of a controlled substance. The district court sentenced appellant to serve a term of 48 to 120 months in the Nevada State Prison for possession of a stolen vehicle, and a concurrent term of 19 to 48 months for possession of a controlled substance. No direct appeal was taken.

On October 30, 2007, a proper person post-conviction petition for a writ of habeas corpus was received by the district court.¹ 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 December 27, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant first contended that the district court breached the plea agreement by sentencing him to a prison term rather than probation. As appellant's claim did not address the voluntariness of his plea or whether his plea was entered without the effective assistance of counsel, appellant's claim fell outside the scope of claims permissible in a habeas corpus petition challenging a judgment of conviction based upon a guilty plea.² Therefore, the district court did not err in denying this claim.

Next, appellant claimed that his trial counsel was ineffective. To state a claim of ineffective assistance of counsel sufficient to invalidate

¹We note that the district court failed to file the petition for a writ of habeas corpus due to a processing error. However, it appears that the petition was received by the clerk of the district court and forwarded to the district court judge and District Attorney's office. Accordingly, we order the clerk of the district court to file the petition nunc pro tunc to October 30, 2007, the date the petition was received and processed by the district court.

²NRS 34.810(1)(a).

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.³ To demonstrate prejudice sufficient to invalidate a guilty plea, a petitioner must demonstrate that he would not have pleaded guilty and would have insisted upon going to trial.⁴ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁵

Appellant claimed that his counsel was ineffective for failing to file a presentence motion to withdraw the guilty plea when it became apparent that appellant was not eligible for drug court, a condition of probation appellant accepted in exchange for the State's promise not to oppose probation. NRS 176.165 permits a defendant to file a motion to withdraw a guilty plea before sentencing. The district court may grant such a motion in its discretion for any substantial reason that is fair and just.⁶ In considering whether a defendant has "advanced a substantial,

³Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁴Hill v. Lockhart, 474 U.S. 52 (1985) (applying Strickland, 466 U.S. 668); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁵Strickland, 466 U.S. at 697.

⁶State v. District Court, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969).

fair, and just reason to withdraw a [guilty] plea, the district court must consider the totality of the circumstances to determine whether the defendant entered the plea voluntarily, knowingly, and intelligently.”⁷

Based upon a review of the record we cannot affirm the district court’s denial of this claim because it is unclear whether appellant had a substantial, fair, and just reason to withdraw his guilty plea, namely, that it was not entered knowingly and intelligently. According to the plea agreement, appellant agreed to plead guilty to both counts charged in the information and stipulated to consecutive sentences in exchange for the State’s agreement not to oppose probation with drug court as a condition of that probation. Appellant acknowledged that he faced consecutive prison terms if he failed to complete drug court. The plea agreement and hearing master informed appellant of the maximum penalties he faced as a result of his plea, and the fact that the district court was not bound by any agreement of the parties and that the matter of sentencing was to be determined solely by the district court. Further, in the plea agreement, appellant acknowledged that he had not been promised or guaranteed any particular sentence, including probation, by anyone. However, the record is devoid of any facts regarding whether appellant was accurately advised of whether he was eligible for drug court.

⁷Crawford v. State, 117 Nev. 718, 722, 30 P.3d 1123, 1125-26 (2001) (citing Woods v. State, 114 Nev. 468, 475, 958 P.2d 91, 95-96 (1998) and State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000)).

Further, there are no facts in the record related to whether appellant was advised of the effect that a rejection from the drug court would have under the plea agreement. Thus, considering the significance of the drug court probation condition in appellant's plea agreement, it is unclear if appellant would have elected to plead guilty to both counts of the information if he had understood that he was not eligible for drug court.⁸

Accordingly, we remand this claim for an evidentiary hearing to determine whether appellant's counsel was ineffective for failing to move to withdraw appellant's guilty plea based on the fact that appellant's guilty plea was not voluntary. In particular, the district court should determine whether appellant was informed that he was ineligible for drug court and whether appellant's counsel was aware of any facts that would render appellant ineligible for drug court. The district court may wish to exercise its discretion to appoint counsel for the evidentiary hearing.⁹


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.¹⁰ Accordingly, we


⁸To the extent that appellant claimed that his guilty plea was involuntary due to the ineffective assistance of counsel, we are further unable to affirm the district court's order denying this claim for the reasons discussed above.

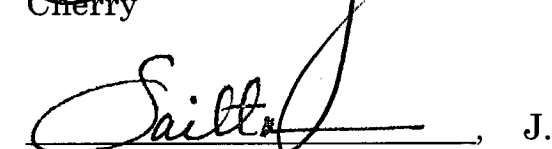
⁹See NRS 34.750.

¹⁰See Lockett 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.¹¹


Maupin J.


Cherry J.


Saitta J.

cc: Hon. Michelle Leavitt, District Judge
Stanley Autrey Johnson
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

¹¹This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.