

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILBERT LEWIS A/K/A WILBERT
LEWIS, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50802

WILBERT LEWIS A/K/A WILBERT
LEWIS, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50803

FILED

OCT 16 2008

THOMAS K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

These are proper person appeals from orders of the district court denying appellant's post-conviction petitions for a writ of habeas corpus. We elect to consolidate these appeals for disposition.¹ Eighth Judicial District Court, Clark County; Michael Villani, David B. Barker, Judges.

Docket No. 50802

On August 3, 2007, the district court convicted appellant, pursuant to a guilty plea, of larceny from a person. The district court

¹See NRAP 3(b).

adjudicated appellant a habitual criminal and sentenced appellant to serve a term of five to twenty years in the Nevada State Prison. No direct appeal was taken.

On October 2, 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 January 16, 2008, the district court denied appellant's petition. This appeal followed.

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 The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.³

First, appellant claimed that his counsel was ineffective for permitting him to be sentenced as a small habitual criminal without requiring proof of prior convictions at the sentencing hearing. Appellant

²Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

³Strickland, 466 U.S. at 697.

asserted that he did not waive proof of prior convictions or stipulate to the existence of prior convictions.

Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Because appellant had more than three prior felony convictions, he was eligible for "large" habitual treatment under NRS 207.010. In his guilty plea agreement, appellant stipulated to "small" habitual criminal treatment, and appellant was informed of the potential sentence for "small" habitual criminal treatment. The presentence investigation report described five prior felony convictions. During the guilty plea canvass, appellant's trial counsel informed the district court that the matter had been negotiated as part of a global negotiation and that appellant "will stipulate to the small habitual in both cases of five to twenty. At the time of sentencing, the State would make no recommendation as to concurrent or consecutive time." Counsel further stated that the State agreed to dismiss two other cases. Appellant then personally stipulated to the small habitual criminal sentence during the canvass. Appellant did not dispute the existence of prior felony convictions. Appellant failed to demonstrate that there was a reasonable probability of a different outcome at sentencing had trial counsel objected at sentencing. Therefore, we affirm the denial of this claim.

Second, appellant claimed that his trial counsel was ineffective for informing appellant that he had no right to file a direct appeal.

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 this claim. Appellant is entitled to an evidentiary hearing if he raises claims that, if true, would entitle him to relief and if his claims were

not belied by the record.⁴ 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).⁵ Although appellant was informed of his limited right to a direct appeal in the written guilty plea agreement,⁶ 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.⁷ Without an evidentiary hearing on the underlying factual allegations supporting this claim, this court is unable to affirm 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 in regards to the availability of a direct appeal.

⁴See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

⁵See 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).

⁶See Davis v. State, 115 Nev. 17, 19, 974 P.2d 658, 659 (1999).

⁷See Thomas, 115 Nev. 148, 979 P.2d 222.

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On August 1, 2007, the district court convicted appellant, pursuant to a guilty plea, of failure to stop on the signal of a peace officer. The district court adjudicated appellant a habitual criminal and sentenced him to serve a term of five to twenty years in the Nevada State Prison. No direct appeal was taken.

On October 2, 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 January 7, 2008, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that he received ineffective assistance of counsel. First, appellant claimed that his counsel was ineffective for permitting the State to present five judgments of conviction in support of habitual criminal adjudication without objecting to the introduction of the convictions. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant did not state on what basis his counsel should have objected to the prior convictions or demonstrate a reasonable probability of a different outcome if counsel had objected.⁸ Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his counsel was ineffective for permitting him to be sentenced as a habitual criminal based solely on his stipulation to habitual criminal status as there was not sufficient proof of

⁸Hargrove, 100 Nev. at 502, 686 P.2d at 225.

prior convictions. Specifically, appellant contended that he did not stipulate to any prior felony convictions and, though the district court received evidence of prior convictions in the form of prior judgments of conviction, it did not specify on which prior convictions it was relying for its adjudication. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. The district court minutes and transcript of appellant's sentencing hearing indicated that the district court received documents that evidenced appellant's prior convictions. Further, the record contains copies of appellant's prior convictions. Moreover, appellant did not assert, either in his petition or during the sentencing hearing, that he had not in fact been convicted of the requisite number of prior felonies, two, to be eligible for small habitual criminal treatment.⁹ Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for informing appellant that he had no right to file a direct appeal.

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 this claim. As noted above, 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. Although appellant was informed of his limited right to a direct appeal in the written guilty plea agreement,¹⁰ appellant claimed that trial counsel informed him that he did not have a right to a direct appeal. Misinformation about the availability

⁹See NRS 207.010(1)(a).


¹⁰See Davis, 115 Nev. at 19, 974 P.2d at 659.

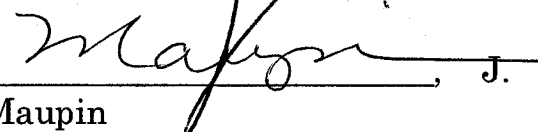
of the right to a direct appeal may have the effect of deterring a criminal defendant from requesting a direct appeal. Without an evidentiary hearing on the underlying factual allegations supporting this claim, this court is unable to affirm the decision of the district court denying this claim. Therefore, we reverse the district court's decision to deny this claim and remand for an evidentiary hearing on whether trial counsel was ineffective in regards to the availability of a direct appeal.

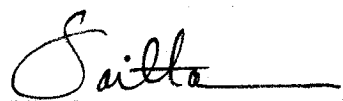
Conclusion

Having reviewed the records on appeal, and for the reasons set forth above, we conclude that briefing and oral argument are unwarranted.¹¹ Accordingly, we

ORDER the judgments of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND these matters to the district court for proceedings consistent with this order.


_____, J.
Cherry


_____, J.
Maupin


_____, J.
Saitta

¹¹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. David B. Barker, District Judge
Hon. Michael Villani, District Judge
Wilbert Lewis
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Eighth District Court Clerk