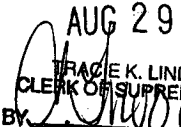


IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMUEL FLORES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50890

FILED

AUG 29 2008
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
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 a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

On April 6, 2007, the district court convicted appellant Samuel Flores, pursuant to a guilty plea, of one count of robbery with the use of a deadly weapon. The district court sentenced appellant to serve a term of 36 to 120 months for the robbery count and a consecutive term of 36 to 120 months for the deadly weapon enhancement in the Nevada State Prison. No direct appeal was taken.

On October 11, 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 December 26, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that his trial counsel was ineffective. 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 counsel's performance fell below an objective standard of reasonableness,¹ and that, but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial.² The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.³

First, appellant claimed that his trial counsel was ineffective for failing to advise him concerning the deadly weapon enhancement. Appellant failed to demonstrate he suffered prejudice. Appellant signed a written guilty plea agreement, which discussed the deadly weapon enhancement. The written guilty plea agreement stated that the sentence imposed for the deadly weapon enhancement would be an equal and consecutive term of not less than 2 years and a maximum term of 15 years. At the plea canvass, the district court discussed the deadly weapon enhancement, repeating the sentence range as discussed in the written guilty plea agreement. The district court also asked appellant if he used a deadly weapon while committing the robbery and appellant responded

¹See Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984).

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

³Strickland, 466 U.S. at 697.

affirmatively. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to discuss his right to a jury trial concerning the deadly weapon enhancement. Appellant failed to demonstrate he suffered prejudice. Appellant signed a written guilty plea agreement, in which he acknowledged he had read and understood its contents. In the written guilty plea agreement, appellant acknowledged that he understood and agreed to waive his right to a jury trial. At the plea canvass, the district court asked appellant if he had read and discussed the guilty plea agreement with his trial counsel and appellant stated that he had. Therefore, we conclude that the district did not err in denying this claim.

Appellant further 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.⁴ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.⁵ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.⁶ In addition, a defendant's mere subjective belief as to

⁴Bryant 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).

⁵Hubbard, 110 Nev. at 675, 877 P.2d at 521.

⁶State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. at 271, 721 P.2d at 367.

a potential sentence is insufficient to invalidate the guilty plea as involuntary and unknowing.⁷

Appellant claimed that his plea was invalid because the district court failed to inform him of his right to a jury trial on the deadly weapon enhancement. Appellant failed to carry his burden of demonstrating that his plea was invalid. As discussed previously, appellant was presented with the waiver of the right to a jury trial in the written guilty plea agreement. Further, appellant was personally canvassed about the six constitutional rights described in the written guilty plea agreement. Therefore, we conclude that the district court did not err in denying this claim.

Finally, appellant claimed that his trial counsel told him that he had no right to a direct appeal following a guilty plea and that, even though appellant asked his trial counsel to do so, his trial counsel failed to file a notice of 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 these claims. Appellant is entitled to an evidentiary hearing if he raised claims that, if true, would entitle him to relief and if his claims were not belied by the record.⁸ It is not a correct statement of law that a criminal defendant has no right to file a direct appeal from a judgment of

⁷Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975).

⁸See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

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).⁹ 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 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.¹¹ 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.

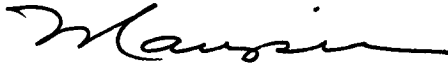
⁹See NRS 177.015(4); see also Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994); overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

¹⁰See Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).


¹¹See Thomas, 115 Nev. at 151, 979 P.2d at 224.

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.¹² 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.

Maupin


_____ J.

Cherry


_____ J.

Saitta

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Samuel Flores
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

¹²See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).