

IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON E. WALKUP,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50945

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 a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

On February 23, 2007, the district court convicted appellant, pursuant to a guilty plea, of one count of robbery with the use of a deadly weapon, one count of conspiracy to commit a crime, and one count of possession of a stolen vehicle. The district court sentenced appellant to serve two consecutive terms of 48 to 120 months in the Nevada State Prison for the robbery count, and concurrent terms of 12 months and 12 to 60 months for the conspiracy and possession counts, respectively. No direct appeal was taken.

On July 23, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the majority of the claims in the petition, but conceded that an evidentiary hearing was warranted on an appeal deprivation claim. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. On February 20, 2008, after conducting an evidentiary hearing, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of trial 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 fell below an objective standard of reasonableness. Further, a petitioner must demonstrate a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.¹ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.² A petitioner must prove the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence, and the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.³

First, appellant claimed that his trial counsel was ineffective for not providing competent advice regarding the range of punishments. Appellant claimed that his trial counsel failed to adequately inform him about the deadly weapon enhancement penalty and led him to believe that he would receive concurrent terms. Appellant failed to demonstrate that he was prejudiced. The written guilty plea agreement, which appellant acknowledged reading, signing and understanding, informed him that the penalty for the deadly weapon enhancement was an equal and consecutive

¹See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

²Strickland v. Washington, 466 U.S. 668, 697 (1984).

³Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

term. In the written guilty plea agreement and during the guilty plea canvass, appellant indicated that he had not been made any promises not contained in the plea negotiations. During the guilty plea canvass, appellant further affirmatively acknowledged that trial counsel had reviewed the written guilty plea agreement with him. Trial counsel testified during the evidentiary hearing that he informed appellant the deadly weapon enhancement was a consecutive sentence. 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 investigate and offer a defense and failing to insure that appellant understood the charges. Appellant failed to set forth any specific facts in support of these claims; thus, appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. In signing the written guilty plea agreement, appellant acknowledged that he had discussed the charges and discussed possible defenses and defense strategies with his trial counsel. Therefore, we conclude that the district court did not err in denying these claims.

Third, appellant claimed that his trial counsel coerced his guilty plea by informing appellant that he would lose at trial. Appellant failed to demonstrate that his trial counsel coerced his guilty plea in the instant case. In entering his guilty plea, appellant affirmatively indicated that his guilty plea was not the product of any threats. In signing the written guilty plea agreement, appellant further acknowledged that he was not entering the guilty plea under duress or coercion. Trial counsel's candid advice regarding the potential outcome of a trial is not deficient. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to inform him of alternative choices among different guilty pleas. Specifically, appellant claimed that his trial counsel should have informed him of a nolo contendere plea because he maintained his innocence throughout the proceedings. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Although there is a distinction between a guilty plea and a nolo contendere plea regarding the defendant's admission of guilt, there is no fundamental difference in the outcome of the guilty plea—criminal liability for the offense to which the defendant entered a guilty plea.⁴ Appellant failed to demonstrate that his decision not to go to trial would have changed regardless of the type of plea entered because the essential consequences of the two pleas are the same in a criminal case. Therefore, we conclude that the district court did not err in denying the claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to file an appeal after being requested to 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

⁴See NRS 174.035(1); State v. Gomes, 112 Nev. 1473, 1479, 930 P.2d 701, 706 (1996); Tiger v. State, 98 Nev. 555, 558, 654 P.2d 1031, 1033 (1982).

behalf.⁵ Prejudice is presumed where a defendant expresses a desire to appeal and counsel fails to do so.⁶

At the evidentiary hearing, appellant stated that he had asked for an appeal. Appellant's trial counsel testified that he vaguely remembered appellant asking after sentencing whether he could appeal, "and I said you entered a plea of guilty, and the factual questions by the Judge were complete and accurate. I don't think you have any standing or basis for an appeal, but if you want to, you can file post-conviction relief, get some other attorney, and see what you can do about it. But on direct appeal, I—if I recall, and it's very vague, I said he does not have a direct appeal on the plea." Appellant's trial counsel was then asked by the district court if he remembered appellant ever saying "I would like to appeal my conviction in this case" to which trial counsel responded in the negative. Appellant's trial counsel then gave an inconsistent answer when cross-examined by appellant in the following exchange:

Appellant: On the day I asked you for an appeal, you said, you told me no, right?

Trial Counsel: Right.

Appellant: On the day I asked you to appeal my guilty plea agreement, you said that I wasn't able to?

Trial Counsel: After the sentencing.

Appellant: Yeah, it was after the sentencing.

⁵See 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).

⁶Mann v. State, 118 Nev. 351, 353-54, 46 P.3d 1228, 1229-30 (2002).

Trial Counsel: You asked me about an appeal. We had a conversation. I believe it was on the phone.

Appellant: Yes.

Trial Counsel: And I told you that you don't have a direct appeal, but you could do a post-conviction relief.

Appellant: Okay. When I called you, that's the only thing that I recall was that you said, no.

Is that what you said?

Trial Counsel: Okay. I don't recall just saying no. I recall telling you, you could file a post-conviction relief, and use another attorney, and even charge me with being incompetent

On redirect, trial counsel then appeared to somewhat contradict himself again by testifying that he did not tell appellant that he could not file an appeal. Trial counsel further testified that he informed appellant that a direct appeal was a waste of time unless there was a constitutional issue or an egregious breach of the plea agreement.

The district court found that appellant had not been deprived of a direct appeal. Specifically, the district court found that after appellant inquired about a direct appeal, trial counsel instructed appellant that there were non-frivolous issues for an appeal and further instructed appellant that he had post-conviction options if he desired. The district court further found that trial counsel never specifically told appellant that he could not appeal, but only informed him that his issues were limited on appeal.

Having reviewed the documents before this court, we conclude that appellant demonstrated by a preponderance of the evidence that his trial counsel was ineffective for failing to file a notice of appeal in the instant case. The record on appeal indicates that appellant expressed

dissatisfaction with his conviction and requested a direct appeal. Trial counsel's advice was inaccurate in at least two respects. First, although appellant's trial counsel may have believed that there were not any non-frivolous issues to argue in a direct appeal, appellant's trial counsel had an obligation to file a notice of appeal because appellant had indicated a desire for an appeal and dissatisfaction with his conviction.⁷ Post-conviction relief was not the only remedy available to appellant to challenge this judgment of conviction, and prejudice is presumed under the facts presented in this case.⁸ Second, on a direct appeal from a judgment of conviction based upon a guilty plea, an appellant may raise more than a constitutional violation or an egregious breach of the plea agreement.

These claims could include a challenge to the constitutional validity of the statute on which the conviction was based; a challenge to the sentence imposed on constitutional or other grounds; a claim that the state breached the plea agreement at sentencing; a challenge to the procedures employed that led to the entry of the plea, if that challenge does not address the voluntariness of the plea; and a claim that the district court entertained an actual bias or that there were

⁷Hathaway, 119 Nev. at 254, 71 P.3d at 507; Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999); Lozada, 110 Nev. at 354, 871 P.2d at 947. We note that this court has held that there is an exception to counsel's ethical obligation not to raise frivolous issues where counsel must pursue an appeal considered frivolous by counsel. See Ramos v. State, 113 Nev. 1081, 944 P.2d 856 (1997).

⁸Hathaway, 119 Nev. at 254, 71 P.3d at 507; Lozada, 110 Nev. at 354-58, 871 P.2d at 947-49.

other conditions that rendered the proceedings unfair. This list is intended to be illustrative, rather than inclusive.⁹

In light of the testimony presented at the evidentiary hearing that indicated that appellant requested an appeal and expressed dissatisfaction with his conviction and in light of trial counsel's inaccurate advice regarding appellant's appeal rights, it is unnecessary to remand this matter for further evidentiary proceedings as the record before this court establishes that appellant demonstrated the factual allegation underlying his claim of ineffective assistance of counsel by a preponderance of the evidence. Therefore, we reverse the district court's order in part, and we remand this matter to the district court for the appointment of counsel. Appellant may raise any claims appropriate for a direct appeal in a petition for a writ of habeas corpus filed in the district court pursuant to the remedy set forth in Lozada.¹⁰

Next, appellant claimed that his guilty plea was not valid. A guilty plea is presumptively valid, and a petitioner carries the burden of

⁹Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

¹⁰Lozada, 110 Nev. at 359, 871 P.2d at 950. In his petition, appellant claimed that the district court relied upon uncharged or dismissed charges, the plea agreement had been breached, the district court improperly participated in the plea negotiations, and the district court erred in imposing the deadly weapon enhancement. Because these claims would be more appropriately raised on direct appeal, we decline to reach them here.

establishing that the plea was not entered knowingly and intelligently.¹¹ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.¹² In determining the validity of a guilty plea, this court looks to the totality of the circumstances.¹³

Appellant appeared to claim that he did not understand the range of punishments, the nature of the charges, or the right to have a jury determine the deadly weapon enhancement. Appellant failed to carry his burden of demonstrating that his guilty plea was invalid in this regard. The written plea agreement, which appellant acknowledged reading, signing and understanding, specifically informed appellant of the range of punishment, the nature of the charges, and the waiver of the right to a jury trial by virtue of the guilty plea. Therefore, the district court did not err in denying this claim.

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.¹⁴ Accordingly, we

¹¹Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

¹²Hubbard, 110 Nev. at 675, 877 P.2d at 521.

¹³State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

¹⁴See 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.¹⁵

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

cc: Hon. James M. Bixler, District Judge
Jason E. Walkup
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

¹⁵We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.