

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES J. TURNER, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51706

**FILED**

**MAY 05 2009**

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ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

This is a proper person appeal from an order of the district court denying appellant James Turner, Jr.'s post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Turner proceeded to trial on charges of murder with the use of a deadly weapon and burglary while in possession of a firearm. On the third day of trial, Turner entered an Alford plea to first-degree murder. See North Carolina v. Alford, 400 U.S. 25 (1970). The district court sentenced Turner to serve a term of life in the Nevada State Prison with the possibility of parole. No direct appeal was taken.

On August 4, 2003, Turner filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court denied Turner's petition as untimely. On appeal, this court reversed and remanded for an evidentiary hearing on whether good cause existed to excuse Turner's untimely petition. Turner, Jr. v. State, Docket No. 42318 (Order of Reversal and Remand, August 19, 2004). On remand, the district court found that there was good cause to excuse Turner's untimely filing and ordered appellant to refile his petition. On August 1,

2005, Turner filed the instant petition. The State opposed Turner's petition. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent Turner. On August 8, 2008, the district court denied Turner's petition after conducting an evidentiary hearing. This appeal followed.

### Procedurally Barred Claims

In his petition, Turner contended that (1) the justice court failed to provide him with a preliminary hearing within 15 days of his arrest, (2) the justice court improperly denied his motion to dismiss counsel, (3) the police investigation was biased and inadequate, (4) the police improperly forced Turner to provide biological specimens, (5) the police improperly monitored phone calls Turner made from pretrial detention, (6) police officers threatened Turner while they administered psychotropic medication, (7) police officers seized a vehicle without a warrant, (8) the State coerced witnesses, (9) police officers committed perjury during the preliminary hearing, (10) the State failed to provide full discovery; (11) the State put forth insufficient evidence to bind Turner over at the preliminary hearing, (12) the State and district court violated Turner's speedy trial rights, (13) the State failed to respond to defense motions in a timely manner, (14) the State violated Turner's right to a fair trial by giving plea deals to codefendants, (15) the State committed prosecutorial misconduct, (16) a state investigator who was involved in Turner's case was subsequently convicted of misconduct related to other cases, (17) the district court caused undue delay in the presentation of the defense, (18) the district court failed to conduct hearings regarding the admissibility of photographs and evidence of phone conversations involving Turner, (20) the district court erred in failing to appoint counsel

to represent Turner on appeal, and (21) the justice court failed to appoint or permit Turner to retain counsel. As these claims do not address the voluntariness of Turner's plea or whether his plea was entered without the effective assistance of counsel, the claims fell outside the scope of claims permissible in a habeas corpus petition challenging a judgment of conviction based upon a guilty plea. See NRS 34.810(1)(a). Therefore, the district court did not err in denying these claims.

#### Claims of Ineffective Assistance of Counsel

Appellant also raised twenty claims of 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 was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland v. Washington, 466 U.S. 668, 697 (1984).

"[A] habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Factual findings of the district court that are supported by substantial evidence and are not clearly wrong are entitled to deference when reviewed on appeal. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, Turner claimed that defense counsel was ineffective for failing to provide him with some discovery materials and withholding other discovery materials for up to 40 days. Turner failed to demonstrate that his counsel was deficient or that he was prejudiced. Turner did not identify the discovery documents that he requested from counsel but did not receive. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Further, he failed to identify the discovery materials that his counsel purportedly delayed providing him and failed to demonstrate that absent the delay he would not have entered an Alford plea. Id. Therefore, the district court did not err in denying this claim.

Second, Turner claimed that defense counsel was ineffective for failing to file motions drafted by Turner. Turner failed to demonstrate that he was prejudiced. While Turner listed the motions he provided to his counsel, he did not identify the grounds upon which the motions rested and thus, failed to demonstrate that the motions would have been meritorious. Id.; see also Kirksey, 112 Nev. at 990, 923 P.2d at 1109 (providing that a petitioner claiming ineffective assistance of counsel for failure to file a motion must demonstrate that the motion was meritorious and there was a reasonable likelihood that had the district court granted the motion, the result of the trial would have been different). Turner failed to demonstrate that had counsel filed the requested motions he would have continued his trial and not entered an Alford plea. Therefore, the district court did not err in denying this claim.

Third, Turner claimed that defense counsel was ineffective for failing to subpoena witnesses to appear at the preliminary hearing. Turner failed to demonstrate that his counsel was deficient or that he was prejudiced. Turner did not identify the witnesses that his counsel failed to

subpoena or specify the substance of their purported testimony. See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. Therefore, the district court did not err in denying this claim.

Fourth, Turner claimed that defense counsel, Deputy Public Defender Drew Christensen, was ineffective for proceeding under a conflict of interest. Specifically, he claimed that he lost trust for his counsel and believed his counsel to be “in cahoots” with the State when his counsel did not share all the State’s discovery materials with him, failed to work on his case for forty days after Turner’s arrest, waived Turner’s speedy trial rights, and failed to file Turner’s proper person motions.

Turner failed to demonstrate that his counsel was deficient or that he was prejudiced. To show a Sixth Amendment violation of his right to counsel, appellant must demonstrate both an actual conflict and an adverse effect on his attorney’s performance. Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). “In general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties.” Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)). Where a petitioner demonstrates an actual conflict of interest that adversely affects his lawyer’s performance, this court presumes prejudice to the petitioner. Id. Turner did not allege that an actual conflict of interest existed, merely that he disagreed with decisions made by counsel during the course of representation causing him to lose trust in his counsel. See Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (holding that “[t]actical decisions by counsel are virtually unchallengeable absent extraordinary circumstances”).

Further, Turner was not represented by Deputy Public Defender Christensen at the time he entered his Alford plea. The record

indicates that the public defender's office promptly withdrew from representing Turner, and the district court appointed substitute counsel, when the district court issued a warrant for another suspect in the case, Marcus Lowe, who had been represented by the public defender's office in a prior matter. Therefore, the district court did not err in denying this claim.

Fifth, Turner claimed that Deputy Public Defender Christensen was ineffective for not objecting to the district court's failure to conduct a preliminary hearing within 15 days of Turner's arrest. Turner failed to demonstrate that he was prejudiced. The justice court must conduct its preliminary examination within 15 days of a defendant's first appearance unless the defendant waives the examination or good cause is shown to extend the time period. NRS 171.196(2); NRS 178.556(1). While the justice court did not conduct the preliminary examination within 15 days of appellant's first appearance, based on the State's motion to continue and Deputy Public Defender Christensen's stipulation to that motion, Turner did not demonstrate that a motion to dismiss on this basis would have been successful. See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. Therefore, the district court did not err in denying this claim.

Sixth, Turner claimed that his counsel violated his right to a speedy trial. Specifically, he claimed that Deputy Public Defender Christensen moved for a continuance of the trial date and waived Turner's right to a speedy trial by filing a pretrial petition for a writ of habeas corpus. Further, Alzora Jackson and Bret Whipple, who were later appointed to represent him, failed to compel a response from the State for a motion to enforce Turner's speedy trial rights, have the motion

addressed by the district court in a timely manner, or compel the State to respond to other defense motions in a timely manner. Turner believed an earlier trial date benefited him because it reduced the likelihood that the State would be able to locate other individuals suspected in the crime who might testify against Turner.

Even assuming that counsel had succeeded in compelling the district court to try him earlier, Turner failed to demonstrate that he would not have entered an Alford plea and continued with his trial merely because the State was unable to produce the co-assailants as witnesses. The record shows that the State was prepared to introduce testimony from witnesses that identified Turner and his cousin's car outside the victim's apartment around the time of the shooting. Turner's cousin would testify that the car was missing on the day of the murder and was returned to him by Turner's girlfriend, Terra McDonald, later that night. McDonald would testify that she drove Turner, Curtis Powers, and Marcus Lowe to the apartment and then left on foot. Further, the victim's husband would testify that Turner had threatened him, called him claiming that Turner was at the victim's apartment, and, the day after the murder, called him indicating that Turner made good on his threat. Moreover, the victim's husband heard Turner's voice while on the phone with the victim during the burglary. Therefore, the district court did not err in denying this claim.

Seventh, Turner claimed that defense counsel was ineffective for failing to investigate (1) the fact that Turner did not have his own record label, which was part of the asserted motive for the murder; (2) a supermarket security tape that would have refuted the co-assailants' claim that he forced them to go to the victim's home; and (3)

inconsistencies between the co-assailants' statements and other witness statements. He further claimed that defense counsel failed to investigate his claims that the Henderson Police Department was biased in its investigation of his case because (1) one of the co-assailants was arrested in possession of the murder weapon; (2) the co-assailants' statements to the police did not indicate what weapons those men carried during the burglary and murder; (3) Lowe stated in his statement to the FBI that "he did not want to have to 'shoot him (Turner) too," which implied that Lowe had also shot the victim; (4) the police neglected to videotape either co-assailants' statement; and (5) no warrants were sought to discover evidence against the co-assailants.

Turner failed to demonstrate that he was prejudiced. As noted above, there was substantial evidence that Turner participated in the burglary and murder. Even if some of the evidence indicated that another individual actually shot the victim, Turner could have been found guilty of felony murder as there was significant evidence that he participated in the underlying burglary during which the victim was murdered. See McKinney v. Sheriff, 93 Nev. 70, 72, 560 P.2d 151, 152 (1977). Further, Turner received a substantial benefit by entry of his Alford plea. A conviction on the original charges could have resulted in two equal and consecutive prison terms of life without the possibility of parole and one prison term of 2 to 15 years. See NRS 200.030(4)(b)(1); 1995 Nev. Stat., ch. 443, § 124, at 1215 (NRS 205.060); 1995 Nev. Stat., ch. 455, § 1, at 1431 (NRS 193.165). Pursuant to the negotiations, the State agreed not to pursue the charge of burglary while in the possession of a firearm or the deadly weapon enhancement to the open murder charge. Further, the State agreed to recommend a term of life with the possibility of parole for



the first-degree murder conviction. Thus, in light of the significant reduction in Turner's potential liability and the fact that none of the purported investigations address his liability under the felony murder rule, Turner failed to demonstrate that he would have continued his trial and not entered an Alford plea if his counsel had pursued the aforementioned investigation. Therefore, the district court did not err in denying this claim.

Eighth, Turner claimed that defense counsel was ineffective for failing to challenge the Henderson Police Department's withholding of McDonald's handwritten statement. He asserted that the failure to turn over the statement indicated that other documents may have been withheld. Turner failed to demonstrate that his counsel was deficient or that he was prejudiced. "Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material to either guilt or to punishment." Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000) (citing Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996)). Evidence is material if there is a reasonable probability that its disclosure would result in a different outcome. Id. "Exculpatory evidence is defined as evidence that will explain away the charge." King v. State, 116 Nev. 349, 359, 998 P.2d 1172, 1178 (2000) (citing Lay v. State, 110 Nev. 1189, 1197, 886 P.2d 448, 453 (1994)). Despite being given the opportunity to do so, Turner did not put forth evidence of what McDonald stated in her handwritten statement that would have explained away the charges or impeached McDonald's potential trial testimony. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). He further failed to identify what other evidence the State had withheld. Id. Finally, Turner failed to demonstrate that had the statement been disclosed he

would have continued his trial and not entered an Alford plea. Therefore, the district court did not err in denying this claim.

Ninth, Turner claimed that defense counsel was ineffective for failing to challenge the State's evidence. Specifically, Turner claimed that his counsel failed to challenge evidence gathered at the crime scene, from Turner's home, and from Turner during his arrest. Turner failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant did not allege how his counsel should have sought to challenge the evidence. Id. Therefore, the district court did not err in denying this claim.

Tenth, Turner claimed that defense counsel was ineffective for failing to challenge the seizure of DNA evidence from Turner because Turner's counsel was not present at the time the sample was collected. Turner failed to demonstrate that his counsel was deficient or that he was prejudiced. Turner was not entitled to counsel during the seizure of the biological specimen. See Barker v. State, 84 Nev. 224, 226, 438 P.2d 798, 800 (1968) (providing that defendant's constitutional rights were not violated where handwriting exemplar obtained in the absence of counsel). The record reveals that the police obtained a warrant to seize biological evidence from Turner and Turner did not assert that the search was defective for any other reason. Finally, Turner failed to demonstrate that had his counsel been present when the biological evidence was seized he would not have entered an Alford plea. Therefore, the district court did not err in denying this claim.

Eleventh, Turner claimed that defense counsel was ineffective for failing to challenge the photographic lineups during which witnesses identified him as a person they saw standing outside the victim's

apartment prior to the shooting. Specifically, Turner claims that the lineups were conducted after his name and description were released to the news media. He asserted that both witnesses routinely watched television and one of them even worked for a local newspaper. He further asserted that the initial descriptions provided by the witnesses were also inconsistent with his actual description.

Turner failed to demonstrate that his counsel was deficient. Turner did not demonstrate that the witnesses' identification process was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," merely because his photograph was released to the media the day before the photographic line-up was conducted. Simmons v. United States, 390 U.S. 377, 384 (1968); see also Cunningham v. State, 113 Nev. 897, 904, 944 P.2d 261, 265 (1997). While he alleged that both witnesses were television viewers and one worked for a local newspaper, he did not demonstrate that the identifications were based on seeing his photograph on the news. Moreover, Turner failed to demonstrate that but for counsel's failure to challenge the identification by those two witnesses, he would not have entered an Alford plea and would have insisted upon continuing his trial because, as discussed above, there was other substantial evidence that placed him at the victim's apartment at the time of the shooting. Therefore, the district court did not err in denying this claim.

Twelfth, Turner claimed that defense counsel was ineffective for failing to listen to voicemail messages on the victim's husband's phone prior to his preliminary hearing, move to suppress the messages, or employ a voice specialist to test the messages. Turner appears to have

claimed that his counsel should have sought an expert to refute the State's contention that Turner's voice was on the phone messages.

Turner failed to demonstrate that his counsel was deficient. Although given an opportunity at the evidentiary hearing, Turner did not seek to introduce any evidence concerning what expert his counsel should have called or what that expert's testimony would have been. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Further, the recordings of Turner's voice could be authenticated by anyone familiar with Turner's voice. See NRS 52.025; NRS 52.065. Finally, Turner did not identify any facts counsel should have argued in support of a motion to suppress the messages. See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. Therefore, the district court did not err in denying this claim.

Thirteenth, Turner claimed that defense counsel was ineffective for failing to move to suppress recordings of threats to potential witnesses Turner made while in pretrial detention. He further claimed that his counsel should have moved for a mistrial after the State mentioned the calls in its opening argument. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. A search occurs under the Fourth Amendment when the police intrude into an area in which a defendant has a reasonable expectation of privacy. See State v. McNichols, 106 Nev. 651, 799 P.2d 550 (1990); see also U.S. v. Van Poyck, 77 F.3d 285, 290 (9th Cir. 1996). A prisoner's expectation of privacy in his outbound telephone calls from jail is not reasonable. See Van Poyck, 77 F.3d at 290-91. Thus, Turner did not establish that a motion to suppress or a motion for a mistrial based on the mention of the recordings would have been successful, or that had counsel filed either motion he would not have entered an Alford plea. See Kirksey v. State,

112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996) (providing that a petitioner may demonstrate prejudice for a claim of ineffective assistance of counsel based on counsel's failure to seek suppression of illegally seized evidence where the petitioner shows "that the claim was meritorious and that there was a reasonable likelihood that the exclusion of the evidence would have changed the result of a trial."). Therefore, the district court did not err in denying this claim.

Fourteenth, Turner claimed that defense counsel was ineffective for failing to seek a Petrocelli hearing regarding the introduction of recordings of threats Turner made to potential witnesses while he was in pretrial detention. Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), holding modified by Sonner v. State, 112 Nev. 1328, 1334, 930 P.2d 707, 711 (1996). Turner failed to demonstrate that his trial counsel was deficient. Prior to trial, Turner's counsel moved to exclude evidence of Turner's recorded phone conversations that he made while in pretrial detention. Counsel objected both on the basis that the evidence was irrelevant and was related to uncharged conduct. The district court determined that the calls were relevant and were not separate acts as contemplated by Petrocelli, but a continuation of the acts for which Turner was on trial. Therefore, the district court did not err in denying this claim.

Fifteenth, Turner claimed that defense counsel was ineffective for failing to move for a hearing to exclude gruesome crime scene photographs. He asserted that one juror refused to continue with the trial after seeing the photographs. Turner failed to demonstrate that his counsel was deficient. The record indicates that Turner's counsel filed a pretrial motion to preclude photographs, which the district court denied.

To the extent that Turner also asserted that his counsel failed to challenge the introduction of the photographs at the time of introduction, Turner failed to demonstrate that his counsel was deficient or that he was prejudiced. “[E]ven gruesome photographs are admissible if they aid in ascertaining the truth, such as when used to show the cause of death, the severity of wounds and the manner of injury.” See Doyle v. State, 116 Nev. 148, 160, 995 P.2d 465, 473 (2000); Turpen v. State, 94 Nev. 576, 577, 583 P.2d 1083, 1084 (1978) (holding that the admissibility of autopsy photographs lies within the sound discretion of the district court and will not be overturned absent an abuse of discretion). Turner did not identify which photographs were so gruesome that his counsel should have objected to their admission. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Thus, he did not demonstrate that an objection to the photographs would have been successful or that had his counsel objected during the introduction of the photographs, he would not have entered an Alford plea and would have insisted on continuing the trial. Therefore, the district court did not err in denying this claim.

Sixteenth, Turner claimed that defense counsel was ineffective for failing to move for a mistrial after two jurors saw Turner in leg and arm restraints. Turner failed to demonstrate that his counsel was deficient. This court has recognized that visible “physical restraints may have a significant effect on the jury by eroding the presumption of innocence.” Hymon v. State, 121 Nev. 200, 207-08, 111 P.3d 1092, 1098 (2005) (citing Gonzalez v. Pliker, 341 F.3d 897, 899-900 (9th Cir. 2003); U.S. v. Durham, 287 F.3d 1297, 1304 (11th Cir. 2002); Dickson v. State, 108 Nev. 1, 3, 822 P.2d 1122, 1124 (1992)). In the instant case, two jurors briefly entered the courtroom prior to the proceedings while Turner was

being seated and his restraints were being removed. Turner's counsel testified that she explained to Turner that if he wanted to move for a mistrial and the motion was successful, they would pick a new jury and proceed to trial. Turner even acknowledged during the evidentiary hearing that his counsel was prepared to proceed to trial with another jury. As Turner's counsel consulted Turner and was prepared to seek a mistrial and pick a new jury, Turner failed to demonstrate that his belief that he would be compelled to be tried in front of the tainted jury forced him to enter an Alford plea. Therefore, the district court did not err in denying this claim.

Seventeenth, Turner claimed that defense counsel was ineffective for failing to investigate the fact that Turner was receiving psychiatric treatment and was being administered the psychotropic medications Doxepin, Sinequan, and Haldol in pretrial detention. He asserted that an investigation would have led his counsel to challenge his competency to enter a guilty plea.

Turner failed to demonstrate that his counsel was deficient or that he was prejudiced. A defendant is competent to enter a guilty plea if he has: (1) "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and (2) "a rational as well as factual understanding of the proceedings against him." Godinez v. Moran, 509 U.S. 389, 396 (1993) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)); see also 1995 Nev. Stat., ch. 637, § 23, at 2458 (NRS 178.400(2)). Nothing in the record indicates that any course of psychiatric treatment rendered Turner incompetent to enter a guilty plea. Turner's assertion that he was being treated and medicated at the detention center, without more, did not indicate that he was unable to understand the

charges and proceedings or assist his counsel in his defense. While Turner's counsel acknowledged that her notes indicated that Turner told her he was being medicated with Haldol, she stated that he did not exhibit any behavior that caused her to doubt his competency. Further, at the plea canvass, Turner responded appropriately and coherently to the district court's questions. It is not apparent from the record that Turner was impaired or that he did not understand the district court's questions. In the plea agreement, which Turner acknowledged that he read and signed, Turner denied that he was under the influence of any medication that impaired his ability to comprehend the proceedings against him. Turner failed to establish a reasonable probability that, had counsel investigated his competency or requested a competency hearing, the district court would have rejected his plea or he would have refused to enter an Alford plea and insisted on continuing his trial. Therefore, the district court did not err in denying this claim.

Eighteenth, Turner claimed that defense counsel was ineffective for coercing him into entering an Alford plea. Specifically, he stated that his counsel (1) led him to believe that he could be convicted of first-degree murder under the felony murder rule regardless of whether he actually shot the victim, (2) told him to consider that he might receive the maximum sentence considering the fact that the State gave the deal to the codefendants to testify that Turner killed the victim, (3) told him that he would never get out of prison if he was convicted at trial, (4) told him that he would never receive a fair trial, (5) told him that he had good issues to appeal, and (6) told him that a trial witness's testimony corroborated the co-assailant's claim that Turner forced them to accompany him to the victim's home. Turner also claimed that his counsel was ineffective for



failing to object to a trial witness's inconsistent testimony and bringing his mother and sister into the courtroom to tell him to take the deal so that he could have contact visits with his ill father. Turner failed to demonstrate that his counsel was deficient or that he was prejudiced. Turner's counsel correctly advised Turner that he could be held liable for felony murder even if he did not personally kill the victim so long as he participated in the underlying felony during which the victim was murdered. See McKinney v. Sheriff, 93 Nev. 70, 72, 560 P.2d 151, 152 (1977). Further, the record indicates that both of Turner's co-assailants signed agreements to testify in Turner's trial after accepting plea offers. As a conviction for first-degree murder with the use of a deadly weapon carried a possible sentence of two equal and consecutive terms of life without the possibility of parole, counsel's advice, that a conviction on those charges might mean that Turner could receive the maximum sentence and never get out of prison, was accurate. See NRS 200.030(4)(b)(1); 1995 Nev. Stat., ch. 455, § 1, at 1431 (NRS 193.165). Considering the significant evidence against Turner and the substantial benefit he received with the entry of his Alford plea, Turner failed to demonstrate that counsel coerced him to enter an Alford plea. Moreover, in his plea agreement, which Turner acknowledged that he read and signed, Turner acknowledged that he was not pleading guilty as a result of duress or coercion. The district court determined that Turner failed to demonstrate by a preponderance of the evidence that his counsel coerced him to enter an Alford plea, and substantial evidence supports the district court's determination. See State v. Rincon, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006). Therefore, the district court did not err in denying this claim.

Nineteenth, Turner claimed that defense counsel was ineffective for failing to provide him with a complete case file after his conviction. Turner did not explain how his counsel's failure to deliver him the case file after his conviction impacted his decision to enter an Alford plea. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying this claim.

Twentieth, Turner claimed that defense counsel failed to file an appeal despite his request to do so. "[A]n attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction." Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994); see Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999) (quoting Lozada, 110 Nev. at 354, 871 P.2d at 947)). "The burden is on the client to indicate to his attorney that he wishes to pursue an appeal." See Davis, 115 Nev. at 20, 974 P.2d at 660. A petitioner is entitled to an evidentiary hearing on claims supported by specific facts, which if true, would entitle the petitioner to relief. See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

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 on this issue. While the district court conducted an evidentiary hearing, it did not permit Turner to solicit testimony regarding this claim. 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. The district

court may exercise its discretion to appoint post-conviction counsel to represent appellant at the evidentiary hearing. If the district court determines that appellant was not deprived of a direct appeal, the district court shall enter a final written order to that effect.

#### Claims that the Plea was Invalid

Turner also raised eight claims in which he asserted that his Alford 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. Bryant 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). Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion. Hubbard, 110 Nev. at 675, 877 P.2d at 521. In determining the validity of a guilty plea, this court looks to the totality of the circumstances. State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. at 271, 721 P.2d at 367. In accepting an Alford plea, the district court "must determine that there is a factual basis for the plea," and "resolve the conflict between waiver of trial and the claim of innocence." Tiger v. State, 98 Nev. 555, 558, 654 P.2d 1031, 1033 (1982); see also State v. Gomes, 112 Nev. 1473, 1481, 930 P.2d 701, 706 (1996).

First, Turner claimed that his Alford plea was invalid because his counsel coerced him and was otherwise ineffective. Turner failed to demonstrate that his plea was invalid. As noted above, Turner failed to demonstrate that his counsel coerced him into entering an Alford plea or that his counsel otherwise rendered ineffective assistance. Therefore, the district court did not err in denying this claim.

Second, Turner claimed that his Alford plea was invalid because there was an insufficient factual basis for the plea in light of his contention that he did not murder the victim. Turner failed to carry his burden of demonstrating that his Alford plea was invalid in this regard. During the plea canvass the State proffered the entire record, in particular, the preliminary hearing, the State's opening statement, and all the evidence introduced at trial prior to Turner's decision to change his plea, as the factual basis for the guilty plea. According to the State's opening statement, it would prove that Turner kicked open the victim's door and fired several shots into her apartment, one of which killed her. The State noted that it would prove this with testimony from witnesses who saw Turner outside the victim's apartment shortly before the shooting; Turner's girlfriend who would testify that she drove Turner, Powers, and Lowe to the victim's home; and Powers and Lowe who would testify to Turner's conduct. Further, Turner acknowledged in the plea agreement that he was not required to admit guilt but believed that the State could present sufficient evidence to convict him of a more significant offense or more offenses at trial. Therefore, the district court did not err in denying this claim.

Third, Turner claimed that his Alford plea was invalid due to duress caused by the State and the justice court. Specifically, he claimed that the State (1) violated Brady, (2) failed to put forth sufficient evidence at the preliminary hearing to bind Turner over, (3) violated Turner's right to a speedy trial, (4) failed to respond to defense motions in a timely manner, (5) offered plea deals to his codefendants without corroborating evidence, (6) made prejudicial statements during opening argument and put forth prejudicial photographs, and (7) employed an investigator in

Turner's case that had been convicted of misconduct in other cases. He also claimed that the justice court (1) failed to ensure his constitutional rights were respected, (2) failed to conduct his preliminary hearing within 15 days of his arrest, and (3) failed to grant his proper person motion to dismiss Deputy Public Defender Christiansen. Turner failed to demonstrate that his plea was invalid. In his plea agreement, which Turner acknowledged that he read and signed, Turner acknowledged that he was not entering an Alford plea as a result of duress or coercion. The district court determined that Turner failed to demonstrate by a preponderance of the evidence that his plea was coerced, and substantial evidence supports the district court's determination. See State v. Rincon, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006). Therefore, the district court did not err in denying this claim.

Fourth, Turner claimed that his Alford plea was invalid due to the Henderson Police Department's violation of his constitutional rights. He stated that they arrested him and collected a DNA sample while taunting him about the lethal injection procedure. He asserted that the taunting, which occurred nearly one year prior to his plea, caused duress that invalidated his plea. Turner failed to demonstrate that his Alford plea was invalid. As discussed above, the police obtained a warrant to obtain a sample of Turner's DNA. Turner failed to demonstrate that seizure of his biological evidence was constitutionally infirm for any other reason. In his plea agreement, which Turner acknowledged that he read and signed, Turner acknowledged that he was not pleading guilty as a result of duress or coercion. The district court determined that Turner failed to demonstrate by a preponderance of the evidence that his plea was coerced, and substantial evidence supports the district court's

determination. See id. Therefore, the district court did not err in denying this claim.

Fifth, Turner claimed that his Alford plea was invalid due to the district court's violation of his constitutional rights. Specifically, he claimed that there was no factual basis for his plea and the district court deferred to the State before ruling on issues. Turner failed to demonstrate that his plea was invalid. As previously discussed, the State set forth a sufficient factual basis for Turner's Alford plea. Further, Turner failed to specifically identify the issues that he contended the district court relied too heavily on the State in deciding. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying this claim.

Sixth, Turner claimed that his plea was invalid because he was incompetent when he entered his Alford plea. Specifically, he claimed that he was receiving psychiatric treatment, was under the influence of psychotropic medication, and engaged in bizarre courtroom behavior. Appellant failed to demonstrate that his plea was invalid for this reason. As discussed previously, Turner failed to establish a reasonable probability that, had his competency been investigated, the district court would have rejected his plea. Therefore, the district court did not err in denying this claim.

Seventh, Turner claimed that his Alford plea was invalid because the amended information is "defective, misleading and confusing." He stated that he maintained his innocence at all times and the guilty plea agreement and plea canvass did not indicate that the Alford plea would be a guilty plea as a "culprit" to the crime as charged in the

amended information. At the evidentiary hearing, he stated that he believed that he was pleading guilty to a charge of accessory to murder.

Turner failed to demonstrate that his plea was invalid for this reason. The plea agreement that Turner acknowledged that he read and signed provided that Turner “agreed to plead guilty, pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to: FIRST DEGREE MURDER (Felony – NRS 200.010, 200.030), as more fully alleged in the charging document.” The amended information charged Turner with the first-degree murder of the victim as a principal or, in the alternative, as an aider and abettor under the theories of premeditated murder or murder during the perpetration or attempted perpetration of a burglary. Further, Turner acknowledged that he was pleading guilty to the charge of first-degree murder during the plea canvass. Moreover, as previously noted, his counsel had advised him that he could be convicted as a principal under the aiding and abetting theory. Therefore, the district court did not err in denying this claim.

Eighth, Turner claimed that his Alford plea was invalid because the plea canvass was inadequate and incomplete. Specifically, he claimed that (1) the amended information was not read into the record; (2) the plea canvass fails to specify the victim’s name, when the murder occurred, or whether Turner was pleading guilty as a principal or aider and abetter; (3) the plea agreement stated that Turner did not have to admit guilt; and (4) his counsel failed to deliver a letter drafted after the plea hearing to the State in which Turner professed his innocence so that the State could reopen the investigation.

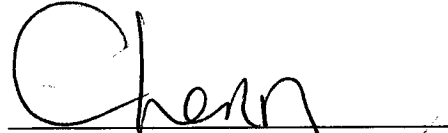
Turner failed to demonstrate that his Alford plea was invalid. The district court informed Turner that he was pleading guilty to the

charge of first-degree murder and Turner entered a guilty plea pursuant to Alford to that charge. While the amended information was not read into the record at the time of the Alford plea, it was referenced in the plea agreement and Turner acknowledged that he understood that it charged him with first-degree murder. The amended information set forth the victim's name and date of the offense. Regardless of whether the information charged Turner as a principal or aider and abettor, a guilty plea to the information pursuant to either theory would have resulted in a conviction for first-degree murder. See NRS 195.020. Although the guilty plea agreement acknowledged that Turner did not have to admit guilt, it still provided that he was entering a guilty plea. Further, the record indicates that Turner's counsel sent his letter to the State. 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 briefing and oral argument are unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). 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.<sup>1</sup>

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Donald M. Mosley, District Judge  
James J. Turner Jr.  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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<sup>1</sup>We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein.