

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDREW PAUL MAGYOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52072

FILED

FEB 26 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

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 June 12, 2007, the district court convicted appellant, pursuant to a guilty plea, of one count of driving and/or being in actual physical control while under the influence of intoxicating liquor (a felony pursuant to NRS 484.3792(2)). The district court sentenced appellant to serve a term of 12 to 36 months in the Nevada State Prison. No direct appeal was taken.

On February 4, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition, and appellant filed a response. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. On June 12, 2008, after conducting an evidentiary hearing, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised three 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 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. Means 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).

First, appellant claimed that his trial counsel was ineffective for failing to properly investigate. Appellant claimed that trial counsel failed to discover that he was wrongfully charged with a felony because he did not have 2 prior convictions within the last seven years preceding the instant offense. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant was charged with a felony-level driving under the influence offense pursuant to NRS 484.3792(2), which provides that an offender with a prior felony-level driving under the influence of conviction will have subsequent driving

under the influence offenses treated as a felony-level offenses regardless of the timing of the prior felony-level offenses.¹ The record on appeal indicates that appellant had a prior felony-level driving under the influence conviction. Thus, appellant's instant offense was correctly treated as a felony-level offense. Therefore, we conclude that the district court did not err in denying this claim.²

Appellant next claimed that his trial counsel was ineffective for failing to file a motion to suppress the blood sample because the blood sample was obtained 11 minutes beyond the 2-hour procedure limit. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Trial counsel testified at the evidentiary hearing that he did not file a motion to suppress because the matter was being negotiated. This information regarding the blood sample was available to trial counsel as it was briefly discussed during the hearing in which appellant waived his preliminary examination, and it further appears that this information formed the basis for the plea offer.

¹NRS 484.3792(3) further provides, in pertinent part, "An offense which is listed in paragraphs (a) to (e), inclusive, of subsection 2 that occurred on any date preceding the date of the principal offense or after the principal offense constitutes a prior offense for the purposes of this section when evidenced by a conviction, without regard for the sequence of the offenses and convictions."

²To the extent that appellant claimed that his guilty plea was not entered knowingly because of alleged misinformation regarding the felony-level status, appellant failed to carry his burden of demonstrating that his plea was invalid. See State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).



Appellant failed to demonstrate that a motion to suppress would have been successful or that but for counsel's failure there was a reasonable probability that he would not have entered a guilty plea and would have insisted on going to trial. Therefore, we conclude that the district court did not err in denying this claim.

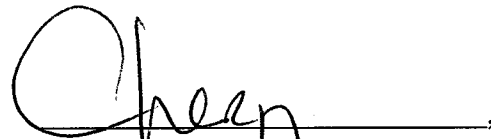
Next, appellant claimed that trial counsel was ineffective for failing to file a direct appeal despite being asked to do so.

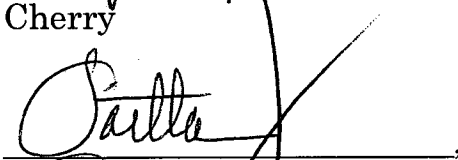
This court has held that if a defendant expresses a desire to appeal, counsel is obligated to file a notice of appeal on the defendant's behalf. See Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003); Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999); see also Roe v. Flores-Ortega, 528 U.S. 470 (2000). Prejudice is presumed where a defendant expresses a desire to appeal and counsel fails to do so. Mann v. State, 118 Nev. 351, 353-54, 46 P.3d 1228, 1229-30 (2002).


The district court determined that appellant had failed to demonstrate that he had asked for an appeal by a preponderance of the evidence. Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant had failed to carry his burden. At the evidentiary hearing, trial counsel testified that he did not recall defendant asking for an appeal, there was not a note in the case file, and if appellant had asked for an appeal, trial counsel would have filed the notice of appeal. Trial counsel further testified that he was not aware of any non-frivolous issues. Therefore, we conclude that 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 appellant is not entitled to relief and that briefing and oral argument are unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.³


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

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

³We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.