

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT LEE KIMMELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52518

FILED

NOV 12 2009

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Robert Lee Kimmell's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

On February 4, 2005, Kimmell pleaded guilty to one count of burglary and was sentenced to serve a prison term of 40 to 120 months to run consecutively to a sentence in another case. No direct appeal was filed. On September 26, 2005, Kimmell filed a post-conviction petition for a writ of habeas corpus. The district court denied the majority of Kimmell's claims but ordered an evidentiary hearing on his claims of ineffective assistance of trial counsel. At the conclusion of the hearing, the district court denied the remaining claims. This appeal followed.

On appeal, Kimmell claims that the district court erred in denying his claim that trial counsel was ineffective for failing to file a direct appeal. He also claims that the district court erred in denying his claims that the prosecutor engaged in malicious prosecution, he was disparately sentenced, and his guilty plea was involuntary, without first holding an evidentiary hearing. Kimmell's claims are without merit.

Appeal-deprivation claim

Kimmell claims that the district court erred in denying his claim of ineffective assistance of counsel based on trial counsel's failure to file a direct appeal. Kimmell asserts that he expressed displeasure with his conviction and specifically asked trial counsel to file a direct appeal. We conclude that the district court did not err.

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient, and that the petitioner was prejudiced by counsel's performance. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). "[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), and "when counsel's conduct completely denies a convicted defendant an appeal," this court presumes prejudice. Mann v. State, 118 Nev. 351, 353, 46 P.3d 1228, 1229 (2002). The district court's factual findings regarding ineffective assistance of counsel are entitled to deference when reviewed on appeal. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Here, the district court held an evidentiary hearing and considered the conflicting testimony of Kimmell and his trial counsel. Kimmell testified that he expressed dissatisfaction with his sentence and asked for an appeal and that counsel said, "I will handle it." In contrast, counsel testified that Kimmell was informed of his limited right to appeal when he pleaded guilty and denied discussing an appeal with Kimmell or telling Kimmell he would file a notice of appeal. The district court

accepted counsel's testimony, rejected Kimmell's version of events, and found that trial counsel was not ineffective. "[T]he district court is in the best position to adjudge the credibility of the witnesses and the evidence, and 'unless this court is left with the definite and firm conviction that a mistake has been committed,' this court will not second-guess the trier of fact." State v. Rincon, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006) (internal quotations omitted). There is nothing in the record to lead us to a firm conviction of error, and therefore we affirm the district court's denial of this claim.¹

Remaining claims

Kimmell claims that the district court erred in denying three of his remaining claims without an evidentiary hearing. In his petition below, Kimmell raised claims that (1) the prosecution committed misconduct by maliciously prosecuting him, (2) his sentence is unconstitutional because his girlfriend/codefendant received a lesser sentence for the same crime, and (3) his guilty plea was involuntary. Prior to the evidentiary hearing, the district court entered a written order denying each of these claims on the merits.

¹Kimmell also argues that the remedy set forth in Lozada—allowing petitioners who establish that they have been denied a direct appeal to raise direct appeal claims in a petition for a writ of habeas corpus, see 110 Nev. at 359, 871 P.2d at 950—is inadequate and unconstitutional. Kimmell's claim is moot because he failed to demonstrate that counsel deprived him of a direct appeal. Furthermore, on July 1, 2009, the Lozada remedy was replaced with new procedures permitting a petitioner who establishes that he was deprived of a direct appeal to file an untimely direct appeal in this court. See NRAP 4(c).

Kimmell was convicted pursuant to a guilty plea, and therefore his claims of malicious prosecution and disparate sentencing are not appropriately raised in a post-conviction petition for a writ of habeas corpus. See NRS 34.810(1)(a). Accordingly, those two claims are procedurally barred absent a showing of good cause and actual prejudice. NRS 34.810(1), (3). Because Kimmell's appeal-deprivation claim was unsuccessful, he has not demonstrated good cause and prejudice sufficient to overcome the procedural bars. Therefore, the district court did not err in summarily denying those claims.

Kimmell's remaining claim—that his guilty plea was entered involuntarily—is appropriately raised in a post-conviction petition. See NRS 34.810(1)(a). However, the district court concluded that this claim was belied by the record. See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that “the district court correctly denied the motion [to withdraw a guilty plea] without an evidentiary hearing” where the factual claims supporting the motion were belied by the record). We conclude that the district court did not err.

On appeal, Kimmell claims that his plea was coerced because the district court suggested that if he did not plead guilty his girlfriend would not get a plea offer. This is slightly different from Kimmell's claims in his petition that his plea was coerced because (1) his counsel told him that the judge had “just sentenced your girlfriend to 12 to 48 months ran [sic] concurrent so by law that's all he can do to you,” and (2) he was threatened with habitual criminal adjudication. Nevertheless, all of Kimmell's claims of coercion are belied by the record.

Kimmell's assertion that the district court told him his girlfriend would not receive a plea deal unless he pleaded guilty is belied

by the record. The only statement to that effect was made by the prosecutor and the prosecutor withdrew his statement prior to Kimmell's entry of plea. Moreover, the district court originally entered a plea of not guilty before Kimmell announced that he had changed his mind and wanted to plead guilty. And the district court declined to allow the change of plea until after a recess for Kimmell to discuss his plea with counsel. Thus, the record belies any claim that the district court overcame Kimmell's will and forced him to plead guilty involuntarily.

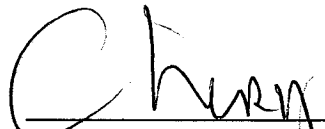
Likewise, Kimmell's assertion that he was promised a sentence of one to four years because his girlfriend had just received that sentence is belied by the record. At the time the alleged promise was made, Kimmell's girlfriend had just entered her plea and had been given a sentencing date one week in the future; thus, she had not yet been sentenced. Furthermore, the district court explicitly stated that he was going to separate Kimmell and his girlfriend for sentencing because he felt that Kimmell was more culpable. And during the oral canvass, Kimmell denied that anyone had made any promises to induce his plea and acknowledged that he faced a possible sentence of one to ten years. The written plea agreement that Kimmell signed also reiterated that the plea contemplated a sentence of one to ten years and that the district court had the sole discretion to determine the appropriate sentence.


In both the written guilty plea agreement and at the hearing where he entered his plea, Kimmell stated that he was pleading guilty voluntarily and that his plea was not the result of threats, coercion, or promises of leniency. Kimmell had a minimum of five prior felony convictions, and his written plea agreement explicitly stated that he was pleading guilty in exchange for the State's agreement not to seek habitual

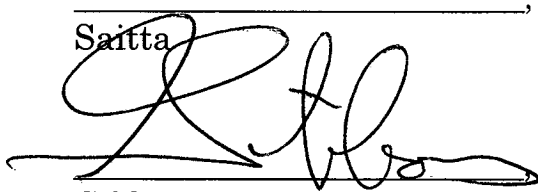
criminal status. He also admitted as much at the evidentiary hearing on his petition. “[A] defendant’s desire to plead guilty to an original charge in order to avoid the threat of the habitual criminal statute will not give rise to a claim of coercion.” Schmidt v. State, 94 Nev. 665, 667, 584 P.2d 695, 696 (1978). Accordingly, we conclude that the district court did not err in summarily denying Kimmell’s claim that his plea was involuntary.

Having considered all of Kimmell’s claims and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Steven R. Kosach, District Judge
Karla K. Butko
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk