

IN THE SUPREME COURT OF THE STATE OF NEVADA

SOLOMON M. BROOKS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52701

**FILED**

**OCT 28 2009**

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; David B. Barker, Judge.

On September 13, 2007, the district court convicted appellant, pursuant to a guilty plea, of battery with the use of a deadly weapon resulting in substantial bodily harm and attempted robbery. The district court sentenced appellant to serve a term of 26 to 120 months in the Nevada State Prison for the battery charge and a consecutive term of 16 to 96 months for the attempted robbery charge. Appellant's untimely direct appeal was dismissed by this court due to a lack of jurisdiction. Brooks v. State, Docket No. 50380 (Order Dismissing Appeal, April 9, 2008).

On October 15, 2007, appellant filed a motion to withdraw his plea and, in the alternative, modify his sentence in the district court. The State opposed the motion. Appellant filed a supplement to the motion. On December 27, 2007, the district court entered an order denying the motion. On appeal, this court affirmed the order of the district court. Brooks v. State, Docket No. 50991 (Order of Affirmance, January 1, 2009).

On May 16, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. After conducting an evidentiary hearing, the district court denied the petition on November 17, 2008. This appeal followed.

First, appellant claimed that the district court sentenced him based on mistakes of fact in his Presentence Investigation Report (PSI). This claim is outside of the claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based on a guilty plea. NRS 34.810(1)(a). Therefore, the district court did not err in denying this claim.

Next, appellant raised seven claims of ineffective assistance of trial counsel. The right to the effective assistance of counsel applies “when deciding whether to accept or reject a plea bargain.” Larson v. State, 104 Nev. 691, 693 n.6, 766 P.2d 261, 262 n.6 (1988) (citing McMann v. Richardson, 397 U.S. 759 (1970)). To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a

petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and there is a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different. See Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test set forth in Strickland). The court need not consider both prongs if the petitioner makes an insufficient showing on either prong. Strickland, 466 U.S. at 697. A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel 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).<sup>1</sup>

First, appellant claimed that his trial counsel Gregory Knapp was ineffective for coercing his plea. Appellant claimed that Mr. Knapp coerced his plea by the following: (1) promising him he would receive probation or a sentence of two to five years; (2) failing to give him a copy of

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<sup>1</sup>We note that Gregory Knapp represented appellant until he entered his guilty plea. After the entry of the plea, but prior to sentencing, appellant discharged Mr. Knapp and hired Thomas Ericsson to represent him.

the guilty plea agreement or the pre-sentence investigation report in a timely manner; (3) failing to allow him enough time to read the guilty plea agreement thoroughly; and (4) threatening that he would get 40 years in prison. Appellant failed to demonstrate that Mr. Knapp's performance was deficient or that he was prejudiced. This court considered and rejected the underlying arguments in his motion to withdraw his plea. Because this court has rejected the merits of the underlying claim, appellant cannot demonstrate that Mr. Knapp was deficient or that he was prejudiced.

In addition, at the evidentiary hearing, Mr. Knapp testified that he did not promise appellant any specific sentence, that he and appellant had discussed the guilty plea agreement and that it listed the terms that had been agreed to when appellant waived his right to a preliminary hearing. Further, appellant received a substantial benefit with his plea, as the State agreed to reduce a charge of attempted murder to battery with the use of a deadly weapon resulting in substantial bodily harm. The district court determined that appellant failed to demonstrate that Mr. Knapp coerced his plea and substantial evidence supports that determination. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that Mr. Knapp was ineffective for refusing to communicate with him. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. At

the evidentiary hearing, Mr. Knapp testified that he and appellant discussed the strengths and weaknesses of the evidence against him, that they discussed the plea offer and the risks of going to trial. Mr. Knapp also testified that he discussed the benefits and drawbacks of the plea offer versus having a preliminary hearing and going to trial. Mr. Knapp testified that he had numerous conversations with appellant and with appellant's mother throughout the proceedings. Appellant failed to demonstrate that the outcome of the proceedings would have been different had Mr. Knapp discussed these issues further with him. The district court determined that appellant failed to demonstrate that Mr. Knapp was ineffective for refusing to communicate with him and substantial evidence supports that determination. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that Mr. Knapp was ineffective for failing to investigate the facts of the case. Appellant claimed that Mr. Knapp should have investigated the witnesses' conflicting statements and sought the victim's medical records to ascertain whether the victim was actually injured. Appellant failed to demonstrate that Mr. Knapp's performance was deficient or that he was prejudiced. At the evidentiary hearing, Mr. Knapp testified that he reviewed the police reports and the witnesses' statements. He further testified that he did not seek the medical records of the victim because the police report and all the witnesses indicated that the victim was shot in the groin and that

substantial bodily injury was not an element of the original charge of attempted murder. A review of the police reports and the witness statements reveals substantial evidence of appellant's guilt, and in light of the strength of the evidence, appellant failed to demonstrate a reasonable probability that had Mr. Knapp performed such an investigation he would have not pleaded guilty and would have insisted on going to trial. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (citing Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1107 (1996)). The district court determined that appellant failed to demonstrate that Mr. Knapp was ineffective for failing to investigate the facts of the case and substantial evidence supports that determination. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that Mr. Knapp failed to explain his rights prior to his waiver of a preliminary hearing. Appellant failed to demonstrate that Mr. Knapp's performance was deficient or that he was prejudiced. At the evidentiary hearing, Mr. Knapp testified that he explained appellant's constitutional rights and discussed the benefits and consequences of accepting a plea deal and waiving his right to a preliminary hearing. Further, appellant stated at the waiver hearing that he understood his right to confront and cross-examine witnesses, the right to present evidence on his own behalf, the right to testify or not testify at the preliminary hearing and that he chose to waive his right to a preliminary hearing. The district court determined that appellant failed

to demonstrate that Mr. Knapp was ineffective for failing to explain his rights prior to his waiver of the preliminary hearing and substantial evidence supports that determination. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that Mr. Knapp was ineffective for refusing to send his case file to Thomas Ericsson after Mr. Knapp was discharged and Mr. Ericsson was hired. Appellant attached an affidavit from Mr. Ericsson which indicated that he did not receive a complete case file from Mr. Knapp until after sentencing. Appellant failed to demonstrate that Mr. Knapp's performance was deficient or that he was prejudiced. At the evidentiary hearing, Mr. Knapp testified that he sent to Mr. Ericsson all of the information about the case that he was in possession of when it was requested. Further, at the sentencing hearing, the district court asked appellant and Mr. Ericsson if they were ready to proceed and Mr. Ericsson responded that they were ready. In addition, appellant failed to identify what documents Mr. Knapp did not send to Mr. Ericsson or how those documents would have had a reasonable probability of altering the outcome of the proceedings. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). The district court determined that appellant failed to demonstrate that there was a reasonable probability of altering the outcome of the proceedings had Mr. Knapp sent additional documents to Mr. Ericsson and substantial evidence supports that

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

Sixth, appellant claimed that his trial counsel was ineffective for scheduling a trial for a separate marijuana possession charge and then failing to attend. Appellant failed to demonstrate that he was prejudiced. Appellant indicated that the marijuana possession charge was dismissed and that he was not serving a sentence based upon a conviction for that charge. As appellant is not in custody pursuant to a conviction for the marijuana charge, this claim is not cognizable in a post-conviction petition for a writ of habeas corpus. See NRS 34.724(1); see also Jackson v. State, 115 Nev. 21, 23, 973 P.2d 241, 242 (1999). Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that trial counsel Thomas Ericsson was ineffective for failing to file a direct appeal. Although appellant was informed of his limited right to a direct appeal in the written guilty plea agreement, see Davis v. State, 115 Nev. 17, 19, 974 P.2d 658, 659 (1999), appellant claimed that Mr. Ericsson did not file a direct appeal after a request to do so. The district court determined that appellant had waived his right to a direct appeal in the guilty plea agreement and that he failed to demonstrate that he had asked Mr. Knapp to file 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. See Thomas v. State, 115 Nev. 148, 151, 979 P.2d 222,




224 (1999). 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). See NRS 177.015(4); see also Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994); overruled on other grounds by Thomas, 115 Nev. 148, 979 P.2d 222. 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. See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

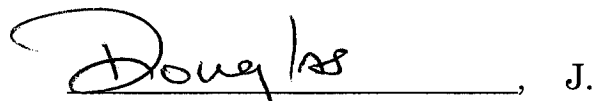
Based upon this court’s review of the record on appeal, we cannot affirm specifically the decision to deny this claim at this time. It is not a correct statement of law that a criminal defendant has no right to file a direct appeal from a judgment of conviction based upon a guilty plea. Further, Mr. Ericsson, appellant’s counsel at the time of sentencing, did not testify at the evidentiary hearing. There was not a meaningful hearing regarding this issue. An evidentiary hearing which examines evidence and testimony concerning appellant’s claim that he asked Mr. Ericsson to file a direct appeal is necessary. Therefore, we reverse the district court’s decision to deny this claim and remand for an evidentiary hearing on whether Mr. Ericsson was ineffective in regards to the availability of a direct appeal as discussed above.

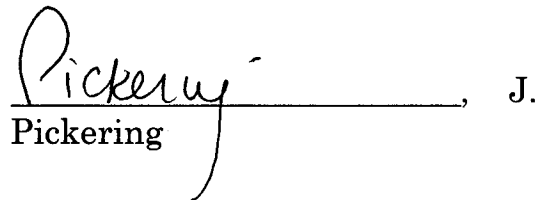
Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted

in this matter. 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>2</sup>

  
Parraguirre, J.

  
Douglas, J.

  
Pickering, J.

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<sup>2</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. The district court may consider whether to appoint counsel pursuant to NRS 34.750 to aid appellant with the evidentiary hearing. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

cc: Hon. David B. Barker, District Judge  
Solomon M. Brooks  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk