

IN THE SUPREME COURT OF THE STATE OF NEVADA

TRAVIS REMAUL DEAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52767

FILED

JUN 26 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie K. Lindeman*
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; Stewart L. Bell, Judge.

On January 11, 2008, the district court convicted appellant, by a guilty plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), of one count of burglary while in possession of a deadly weapon, one count of child abuse and neglect, and one count of coercion. The district court sentenced appellant to serve concurrent terms of 72 to 180 months for burglary while in possession of a deadly weapon, 28 to 72 months for child abuse and neglect, and 28 to 72 months for coercion in the Nevada State Prison. No direct appeal was taken.

On August 5, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On October 27, 2008, the district court denied appellant's petition. This appeal followed.

Appellant claimed that his 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.

First, appellant claimed that his plea was invalid because the district court did not ensure appellant understood the possible range of punishments. Appellant failed to demonstrate that his plea was invalid. Appellant, by signing the guilty plea agreement, acknowledged that he understood the possible sentences he faced. Further, at the plea canvass, the district court informed appellant of the sentencing range and appellant stated that he understood the penalty range. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his plea was invalid because the district court failed to determine if he was competent to enter a guilty plea. Appellant claimed that the presentence investigation report informed the district court that appellant was taking medication for mental health purposes and that he had attempted suicide. Appellant claimed that these facts demonstrated that he was incompetent, but that the district court chose to ignore the report. Appellant failed to demonstrate that his plea was invalid. This court has held that the test for determining competency is "whether [the defendant] has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." Melchor-Gloria v. State, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983) (quoting Dusky v. United

States, 362 U.S. 402, 402 (1960) (alteration in original)). The presentence report indicated that appellant took medication for depression and had attempted suicide approximately 20 years prior to the instant offense. Appellant failed to demonstrate that either of those issues would cause him not to have a rational understanding of the proceedings or render him unable to consult with his attorney. Id. As such, appellant failed to demonstrate he was incompetent at the time of his plea. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that he received 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 based on a guilty plea, a petitioner must demonstrate that counsel’s performance fell below an objective standard of reasonableness, see Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the test set forth in Strickland), and that, but for counsel’s errors, the petitioner would not have pleaded guilty and would have insisted on going to trial. See Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). The court can dispose of a claim if the petitioner makes an insufficient showing on either prong. Strickland, 466 U.S. at 697.

First, appellant claimed that his trial counsel was ineffective for coercing his plea by informing him he would get a lesser sentence than what he received. Appellant claimed that his trial counsel informed him he would receive a lesser sentence due to a letter from the victim and testimony from appellant’s mother. Appellant failed to demonstrate that

he was prejudiced. A defendant's mere subjective belief as to a potential sentence is insufficient to invalidate the guilty plea as involuntary and unknowing. Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975). Appellant was informed in the guilty plea agreement, which appellant signed acknowledging he read and understood its contents, of the possible sentences he faced by pleading guilty. Appellant, by signing the guilty plea agreement, acknowledged that he was not acting under any promises of leniency, had not been promised or guaranteed any particular sentence, and that his sentence was to be determined by the district court. Further, during the plea canvass, appellant stated that he understood the penalties he faced and that he was not promised probation, leniency, or any special treatment. In addition, appellant received a substantial benefit with his plea, as charges of first-degree kidnapping with the use of a deadly weapon, attempted sexual assault with a minor under 14 years of age, and lewdness with a child under the age of 14 were dismissed. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to present the district court with a letter from the victim that was in counsel's possession or to call appellant's mother to testify at the sentencing hearing. Appellant claimed that the district court would have sentenced him to serve a lesser term if either had been performed. Appellant failed to demonstrate that he was prejudiced. Appellant failed to include the letter from the victim, indicate the nature of the letter, or how the letter would have affected his sentence. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Further, appellant failed to indicate what his mother would have testified to or how her potential testimony would have affected his sentence. Id. Thus, appellant failed to demonstrate that there would have been a reasonable probability of a different outcome at sentencing had the victim's letter been

introduced or his mother testified. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to present evidence that appellant took drugs for mental health purposes. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. As stated above, the presentence report informed the district court that appellant was taking medication for depression. Thus, appellant failed to demonstrate that he was prejudiced by any failure of his trial counsel to inform the district court of that fact. Therefore, the district court did not err in denying this claim.

Fourth, appellant appeared to claim that his trial counsel was ineffective for failing to object when the State insinuated that the district court should not follow the sentence recommendation in the presentence investigation report. Appellant failed to demonstrate that he was prejudiced. Appellant was informed in the guilty plea agreement, which appellant signed acknowledging he read and understood its contents, that the State retained the right to argue at sentencing. Appellant, by signing the guilty plea agreement, acknowledged that the sentence was to be determined by the district court. Thus, appellant failed to demonstrate that there would have been a reasonable probability of a different outcome at the sentencing hearing had his trial counsel objected to the State's insinuation that the district court should not follow the presentence report's recommendation. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to file a direct appeal. Appellant claimed that his trial counsel told him that he had no right to a direct appeal following an Alford plea

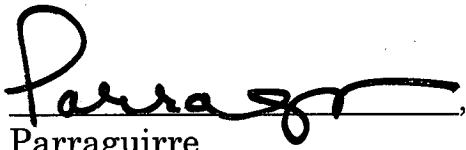
and that, even though appellant asked his trial counsel to do so, his trial counsel failed to file a notice of appeal.

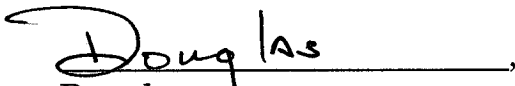
Based upon this court's review of the record on appeal, we conclude that the district court erred in failing to conduct an evidentiary hearing on this claim. Appellant is entitled to an evidentiary hearing if he raised claims that, if true, would entitle him to relief and if his claims were not belied by the record. See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. 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. Rather, 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 v. State, 115 Nev. 148, 979 P.2d 222 (1999). 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, 974 P.2d 658 (1999), appellant claimed that trial counsel informed him that he did not have a right to a direct appeal. Misinformation about the availability of the right to a direct appeal may have the effect of deterring a criminal defendant from requesting 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, 115 Nev. at 151, 979 P.2d at 224. Without an evidentiary hearing on the underlying factual allegations supporting this claim, this court is unable to affirm the decision of the district court denying this claim. Therefore, we reverse the district court's decision to deny this claim and remand for an evidentiary hearing on

whether trial counsel was ineffective in regards to the availability of a direct appeal.

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.¹

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Eighth Judicial District Court Dept. 7, District Judge
Travis R. Dean
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

¹The 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.