

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN LANIER LACY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 53050

**FILED**

NOV 13 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; Sally L. Loehrer, Judge.

On October 16, 2007, the district court convicted appellant, pursuant to a guilty plea, of attempted murder with the use of a deadly weapon (count one) and discharging a firearm at or into a structure, vehicle, aircraft, or watercraft (count two). The district court sentenced appellant to serve a term in the Nevada State Prison of 36 to 180 months, plus an equal and consecutive term for the deadly weapon enhancement for count one and a term of 12 to 36 months for count two. The counts were to be served concurrently. No direct appeal was taken.

On October 9, 2007, appellant filed a proper person post-conviction petition in the district court. The State opposed the petition. 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 December 30, 2008, the district court denied the petition. This appeal followed.

Appellant raised twelve 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 in the absence of counsel's errors, the results of the proceedings would have been different. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). 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, 474 U.S. at 58-59; Kirksey, 112 Nev. at 988, 923 P.2d at 1107. 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).

### Identification

First, appellant claimed that his trial counsel was ineffective for failing to conduct adequate pretrial investigation into the identification of him by Christian Garcia. Appellant claimed that Garcia stated that he recognized appellant from middle school, but appellant claimed that he did not attend middle school with Christian Garcia. Appellant failed to demonstrate that he was prejudiced. According to the preliminary hearing testimony, neighbors of the victims informed police where appellant resided. The police then took Christian and Javier Garcia to view appellant, and they both identified appellant as the shooter. Further,

appellant admitted to shooting at the Garcias' car. Thus, appellant failed to demonstrate that there was a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial had his trial counsel investigated Christian Garcia's statement that he recognized appellant from middle school. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to adequately cross-examine witnesses at the preliminary hearing on their identification of him as the shooter. Appellant failed to demonstrate that he was prejudiced. At the preliminary hearing, appellant's trial counsel questioned the witness concerning their recollection and their identification of appellant. Appellant does not state what further questioning should have been performed. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Further, appellant admitted to shooting at the Garcia family's car. Accordingly, appellant failed to demonstrate that he would not have pleaded guilty and would have insisted on going to trial had his trial counsel questioned the witnesses further concerning their identification of appellant as the shooter. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel should have sought an expert witness to testify that eyewitness identification is unreliable. Appellant failed to demonstrate that he was prejudiced. Appellant failed to identify any expert witness that would have testified to this information. Id. Further, given that appellant admitted to shooting at the Garcias' car, he failed to demonstrate that he would not have pleaded guilty and would have insisted on going to trial had his counsel

investigated expert witness testimony of this nature. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to file a motion to suppress the eyewitness identifications of him as the shooter due to poor lighting and their statements that they could not identify the shooter due to the shooter's race. Appellant failed to demonstrate that he was prejudiced. A review of the record reveals that Christian Garcia stated that he was positive that appellant was the gunman and did not state that he could not identify the gunman due to lighting or the gunman's race. Javier Garcia stated that he had initial hesitation to identify the gunman because he was afraid of retaliation for aiding police, but that he was sure that appellant was the gunman. Given the strong identifications of appellant as the gunman, appellant failed to demonstrate that a motion to suppress the eyewitness identifications had a reasonable likelihood of success. Kirksey, 112 Nev. at 990, 923 P.2d at 1109. Therefore, the district court did not err in denying this claim.

#### Gunshot Residue Test

Fifth, appellant claimed that his trial counsel was ineffective for failing to investigate fact that the barium residue which showed up during the gunshot residue test came from his employment at a pawn shop. Appellant fails to demonstrate that he was prejudiced. Appellant informed the police that he may have gunshot residue on his hands due to handling guns at the pawn shop. Appellant failed to identify what further information an investigation into the gunshot residue would have revealed. Further, as there were multiple witnesses who identified appellant as the gunman and appellant admitted to shooting at the Garcia family's car, appellant failed to demonstrate a reasonable probability that

he would not have pleaded guilty and would have insisted on going to trial had counsel performed further investigation into this type of information. Therefore, the district court did not err in denying this claim.

Deadly Weapon Enhancement

Sixth, appellant claimed that his trial counsel was ineffective for failing to argue that the deadly weapon enhancement was improperly charged in the information. Specifically, appellant claimed that as the deadly weapon enhancement is not an offense, listing it in the information should invalidate the information. Appellant also claimed that NRS 173.035 and 173.075 are unconstitutionally vague because they do not specify what is properly included in an information. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Listing the deadly weapon enhancement in the information provides essential facts of what is charged and also lists the citation of the statute appellant was alleged to have violated. See NRS 173.075(1), (3). Accordingly, listing the deadly weapon enhancement in the information was proper and appellant failed to demonstrate that NRS 173.035 and NRS 173.075 are unconstitutionally vague. Appellant failed to demonstrate that he would not have pleaded guilty and would have insisted on going to trial had his trial counsel argued the deadly weapon enhancement was improperly included in the information. Therefore, the district court did not err in denying this claim.<sup>1</sup>

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<sup>1</sup>Appellant also claimed that the deadly weapon enhancement was illegally alleged in the information because it violated NRS 173.035(1) and NRS 175.075(1). This claim is beyond the scope of a post-conviction petition for a writ of habeas corpus based upon a guilty plea. NRS  
*continued on next page . . .*

Eighth, appellant claimed that his trial counsel was ineffective for failing to object to the imposition of the deadly weapon enhancement by the district court. Appellant claimed that the imposition of the deadly weapon enhancement violated double jeopardy because it extended the sentence of the primary offense. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. This court has held that the deadly weapon enhancement does not violate double jeopardy. Woofter v. O'Donnell, 91 Nev. 756, 761-62, 542 P.2d 1396, 1399-400 (1975); Nevada Dep't Prisons v. Bowen, 103 Nev. 477, 479-81, 745 P.2d 697, 698-99 (1987). Further, appellant agreed to the imposition of the deadly weapon enhancement in the guilty plea agreement. Appellant received the sentence that he bargained for and failed to demonstrate that there was a reasonable probability that the proceedings would have been different had his trial counsel made this objection. Therefore, the district court did not err in denying this claim.

#### Statements to Police

Ninth, appellant claimed that his trial counsel was ineffective for failing to allow him to view transcripts of his statements to police. Appellant failed to demonstrate that he was prejudiced. As appellant was a party to the conversation, he was aware of what he told the police. As appellant was aware of what he had told the police, appellant failed to demonstrate that he would not have pleaded guilty and would have

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*... continued*

35.810(1)(a). Therefore, the district court did not err in denying this claim.

insisted on going to trial had he viewed the transcripts of the interview. Therefore, the district court did not err in denying this claim.

Tenth, appellant claimed that his trial counsel was ineffective for failing to investigate that he was under the influence of alcohol and marijuana when he made statements to the police. Appellant claimed that his statements should have been suppressed because he was intoxicated. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant claimed that he did not inform the police during the interrogation that he was under the influence of alcohol and marijuana because he was afraid of being charged with additional offenses. Appellant did not allege and the record does not reveal that he informed his trial counsel about his alleged intoxication during the interview with police. If counsel was not made aware of appellant's intoxication, counsel cannot have reasonably been expected to investigate the possibility of suppressing appellant's statements due to intoxication. Further, appellant made only bare and naked allegations that he was under the influence of alcohol and marijuana during the interrogation. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. Thus, he failed to demonstrate that there was a reasonable probability that a motion to suppress his statements to police would have had a reasonable probability of success. Kirksey, 112 Nev. at 990, 923 P.2d at 1109. Therefore, the district court did not err in denying this claim.

#### Cumulative Error

Eleventh, appellant claimed that the above errors amount to cumulative error. Appellant failed to demonstrate that he was prejudiced. As appellant failed to demonstrate that he was prejudiced by any of the above claims, he failed to demonstrate that the cumulative effect of the

above claims amounted to ineffective assistance of counsel. Therefore, the district court did not err in denying this claim.

#### Failure to File Direct Appeal

Twelfth, appellant claimed that his trial counsel was ineffective for failing to file a direct appeal. Appellant claimed that he asked his trial counsel to file a direct appeal if the district court imposed a sentence for the deadly weapon enhancement. The district court denied this claim by determining that appellant was informed in the guilty plea agreement of his limited right to appeal following a guilty plea.

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.

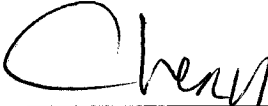
Based upon this court’s review of the record on appeal, we cannot affirm the decision to deny this claim at this time. Appellant raised a claim that, if true, would entitle him to relief and his claim was not belied by the record. An evidentiary hearing which examines evidence and testimony concerning appellant’s claim that he asked his trial counsel to file a direct appeal is necessary. Therefore, we reverse the district




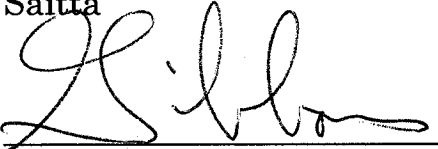
court's decision to deny this claim and remand for an evidentiary hearing on whether appellant's trial was ineffective in regards to the filing of a direct appeal.

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.

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

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

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

cc: Eighth Judicial District Court Dept. 15, District Judge  
Justin Lanier Lacy  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk