

IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFRIE RAY GLOVER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53255

FILED

SEP 04 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

This is a proper person appeal of an order of the district court dismissing a post-conviction petition for a writ of habeas corpus. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

On August 15, 2007, the district court convicted appellant, pursuant to a guilty plea, of first-degree murder. The district court sentenced appellant to serve a term of life without the possibility of parole in the Nevada State Prison. No direct appeal was taken.

On July 28, 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 filed a motion to dismiss. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. On December 15, 2008, the district court held a hearing on the State's motion to dismiss where the district court heard argument from appellant and the State. On January 30, 2009, the district court dismissed appellant's petition. This appeal followed.

In his petition, appellant claimed his trial counsel was ineffective in regards to his plea. Further, appellant claimed that he received ineffective assistance of counsel at sentencing. Appellant also

claimed that all of the errors made by counsel taken together demonstrate that his plea was involuntary and unknowing and that his plea therefore, was invalid. Finally, appellant claimed that he was deprived of the right to a direct appeal because he asked trial counsel to file an appeal, but the appeal was never filed.

Ineffective Assistance of Trial Counsel

Appellant raised four claims of ineffective assistance of 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).

Insanity Defense

First, appellant claimed that trial counsel was ineffective for failing to investigate insanity as a possible defense. Appellant claimed that had trial counsel investigated this defense, appellant would not have pleaded guilty. Specifically, appellant claimed that he had been raised in an abusive environment and that ten years before the murder, appellant watched two of his children die in a house fire. Appellant claims that his traumatic past might have meant that he was insane at the time of the murder. Further, appellant claimed that had trial counsel investigated

this defense appellant could have proved that he was actually innocent as he lacked the requisite intent to commit first-degree murder.

Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. First, appellant's guilty plea relieved trial counsel's obligation to investigate or present evidence of actual innocence. Second, a defendant raising an insanity defense bears the burden of proving by a preponderance of the evidence that at the time of the alleged crime he suffered from delusions that rendered him incapable of determining the wrongfulness of his actions or understanding that his actions were not authorized by law. Finger v. State, 117 Nev. 548, 576, 27 P.3d 84-85 (2001); 2003 Nev. Stat., ch. 284, § 4, at 1457-58. Appellant failed to meet this standard. The evidence produced at the preliminary hearing demonstrated that appellant carefully planned the attack on his wife over the course of the weekend of the murder. On Friday, December 17, 2005, he told a co-worker that his weekend would be good when his wife was dead. On Saturday, December 18, 2005, appellant attempted to procure a .22 caliber rifle or handgun from a gun shop and from a friend.¹ On Sunday, December 19, 2005, the night of the murder, appellant attempted to establish an alibi: (1) at 7:41 p.m. appellant purchased food from Taco Bell and received a time and date stamped receipt; (2) at about 8:05 p.m., appellant arrived at his friend Justin Schell's house; (3) at 8:09 p.m., he called his ex-wife and left about twenty minutes later to meet her at Wal-Mart; and (4) at 8:46 p.m., appellant arrived at Wal-Mart and left at approximately 9:23 p.m. While the time in

¹The victim was shot nine times with a .22 caliber rifle.

between each of appellant's stops on those nights was not very long, according to the State, he still had enough time between his stop at Taco Bell and his stop at Schell's house to commit the murder.² Further, he had time after his trip to Wal-Mart to hide the gun.

Appellant further attempted to dispose of the weapon. After being arrested, appellant approached a fellow inmate, Robert Osborne, in jail and asked him to get rid of a gun for him. Appellant told Osborne where the gun was and that if he got rid of it, there would be an envelope of money waiting for him. Osborne was released, but before he could retrieve the gun, he ran into police officers, who apparently wanted to talk to him about stealing mail. He told them he knew the location of the weapon used in a murder. He directed them to the murder weapon. Osborne was in jail at the time of the murder.

Given the fact that appellant apparently began planning to kill his wife on Friday, spent all day Saturday trying to procure a weapon, and attempted to create a fairly elaborate alibi, appellant failed to demonstrate that he suffered from delusions that rendered him incapable of determining the wrongfulness of his actions or understanding that his actions were not authorized by law. Notably, in his claim, appellant did not allege that he was suffering under a delusion at the time of the murder. Rather, he only alleged that his past might have made him

²The police and the State believe that the victim was killed after appellant went to Taco Bell but before he went to Schell's house. This is based on phone calls that the victim's boyfriend had with the victim. He spoke with her around 7:45 p.m., and made plans for dinner at 8:00 p.m. The victim did not show up and the boyfriend could not get a hold of her on her phone.

insane at the time of the murder. These claims do not establish legal insanity. Therefore, trial counsel was not deficient for not investigating a possible insanity defense. Further, appellant failed to establish a reasonable probability of a different outcome had trial counsel investigated a possible insanity defense. Therefore, the district court did not err in denying this claim.

Competency

Second, appellant claimed that trial counsel was ineffective for failing to investigate whether appellant was competent to stand trial or to enter a plea. Specifically, appellant claimed that his traumatic past may have rendered him incompetent to stand trial. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. To demonstrate incompetency, it must be shown that "the person is not of sufficient mentality to be able to understand the nature of the criminal charges against him, and because of that insufficiency, is not able to aid and assist his counsel in the defense interposed upon trial or against the pronouncement of the judgment thereafter." 1995 Nev. Stat. ch. 637, § 23 at 2458. Appellant failed to allege facts, which if true, would entitle him to relief. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Further, the district court personally canvassed appellant, and appellant answered all questions put to him appropriately. The guilty plea canvass and sentencing proceedings do not provide any support for a claim that appellant was not able to assist counsel or understand the proceedings. Notably, in his claim, appellant did not allege that he was actually unable to understand the proceedings or assist his counsel, but rather appellant rested his incompetency allegations merely on his troubled childhood and the death of his children. These facts alone do not

establish incompetency or a doubt of competency. Therefore, we conclude that the district court did not err in denying this claim.

Coercion

Appellant claimed that trial counsel was ineffective for coercing appellant into pleading guilty. Specifically, appellant claimed that trial counsel told appellant to plead guilty because trial “would be too much time and trouble and much too expensive to conduct.” Appellant claimed that these statements coerced him into pleading guilty.

Appellant failed to demonstrate that trial counsel’s performance was deficient. Candid advice that it might be in appellant’s best interest to plead guilty is not evidence of a deficient performance. Appellant’s decision to forego trial, save the county money and the victim’s family the pain of enduring a trial was mitigation evidence that trial counsel could have and did use at sentencing. Further, appellant acknowledged in the guilty plea agreement that his guilty plea was voluntary, that he signed with the advice of counsel, and that his plea was not the result of any threats, coercion, or promises of leniency. At the plea canvass, appellant acknowledged that his plea was given freely and voluntarily, without threats or promises. Therefore, the district court did not err in denying this claim.

Failure to Pursue Pretrial Writ

Appellant claimed that trial counsel was ineffective for failing to pursue a pretrial petition for a writ of mandamus or prohibition regarding pretrial publicity and his right to a trial by jury. Specifically, appellant claimed that trial counsel’s failure to pursue this writ by appealing the district court’s denial of the writ abrogated his rights to an impartial jury and a speedy public trial which caused his plea to be

unknowingly or involuntarily entered. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that the writ had a reasonable probability of success on appeal because he failed to demonstrate that there was inflammatory pretrial publicity such that an impartial jury could not have been seated. Therefore, the district court did not err in denying this claim.

Ineffective Assistance of Trial Counsel at Sentencing

Appellant raised four claims of ineffective assistance of trial counsel at sentencing. In order to prevail on a claim that trial counsel was ineffective at sentencing, appellant 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, the outcome of the proceedings would have been different. 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, 466 U.S. at 697.

Appellant's Past

Appellant claimed that trial counsel was ineffective for failing to argue appellant's past childhood abuse and the death of his children as mitigation evidence at sentencing. Appellant failed to demonstrate that he was prejudiced. While trial counsel did not present any arguments at sentencing about appellant's past, appellant's PSI contained the information about his childhood and children. Further, appellant was given the opportunity to present this information after trial counsel spoke. Appellant declined to make a statement to the district court. Finally, trial counsel argued vigorously that appellant accepted responsibility for his

actions by confessing and pleading guilty thereby saving the county the expense of a trial and sparing the victim's family from having to sit through a trial. Appellant failed to demonstrate a reasonable probability of a different outcome at sentencing had trial counsel made the arguments about appellant's childhood and children. Appellant planned the murder of his wife, shot her nine times in the head, face, and neck, and created an alibi to cover up his involvement. Therefore, the district court did not err in denying this claim.

Counsel's Argument at Sentencing

Appellant claimed that trial counsel was ineffective for arguing at sentencing that because appellant pleaded guilty, he was saving the county the expense of a trial. Specifically, appellant claimed that trial counsel was in effect working for the State and abandoned his representation of appellant by trial counsel making this argument. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Trial counsel made this argument at sentencing in the context that appellant accepted responsibility for his actions. Because appellant accepted responsibility, counsel argued that this saved the county money and the victim's family the trauma of going through a trial. Further, trial counsel argued that this was a less heinous crime of murder and that appellant should receive a term of either 20 to 50 years imprisonment or life with the possibility of parole. Trial counsel also argued that the lesser punishments would be adequate to serve as future deterrence for appellant and generally for the population at large. Appellant failed to demonstrate that trial counsel was deficient in the arguments presented. Appellant also failed to demonstrate a reasonable probability of a different outcome at sentencing had trial counsel not made

this argument. Therefore, the district court did not err in denying this claim.

Cross-examination of Witnesses

Appellant claimed that trial counsel was ineffective for failing to cross-examine the victim's mother and sister at sentencing. Specifically appellant claimed that trial counsel should have questioned the victim's mother to "counter her characterization of [appellant]" as a murderer. Further, appellant claimed that trial counsel should have questioned the victim's sister about her statement that she "always knew [appellant] would hurt [her] sister from the first time she saw [appellant]." Specifically, appellant claimed that trial counsel should have asked questions such as "Did [appellant] possess obvious signs of mental stress or turmoil?" or "What steps did you take in order to save your little sister from what you felt was sure harm?" Appellant claimed that had trial counsel asked these questions the answers could have shed light on appellant's psychological problems and could have created a reasonable doubt as to his competence to stand trial.

Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. First, appellant failed to demonstrate how trial counsel could have countered the victim's mother's statement that appellant was a murderer. Appellant pleaded guilty to the murder of her daughter. Second, appellant failed to demonstrate how the victim's sister's answers would have demonstrated that he was incompetent or how his "psychological problems" might have demonstrated that he was insane at the time of the murder. Appellant failed to allege facts, which if true, would entitle him to relief. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. Nor did appellant demonstrate a

reasonable probability of a different outcome had trial counsel questioned the witnesses at sentencing. Therefore, the district court did not err in denying this claim.

Allocution

Appellant claimed that trial counsel was ineffective because he failed to call appellant to testify at the sentencing hearing. Appellant claimed that he would have testified about his difficult childhood, his children's death, and his dedication as a hardworking husband and father. Appellant's claim lacks merit. Appellant was given the opportunity by the district court to make a statement. The district court explained that appellant could inform the district court about his childhood, the incident or anything else. Further, the district court informed appellant he could give his own recommendation for what the sentence should be. Appellant declined. Because appellant was given the opportunity to make a statement to the district court on the very issues that he wanted trial counsel to call him to testify about, and appellant declined, he cannot now complain that trial counsel was ineffective for failing to call him to testify at sentencing. Therefore, the district court did not err in denying this claim.

Cumulative Error

Appellant claimed that cumulative error warrants reversal. Because appellant failed to demonstrate any error with regards to his plea or sentence, he necessarily failed to demonstrate cumulative error warranted reversal of his conviction and sentence. Appellant further failed to demonstrate that his guilty plea was invalid. See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986), limited by Smith v. State, 110

Nev. 1009, 1010 n.1, 879 P.2d 60, 61 n.1 (1994); State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000).

Appeal Deprivation

Finally, appellant claimed that he was deprived of a direct appeal. Specifically, appellant claimed that he requested trial counsel to file an appeal but the appeal was never filed.

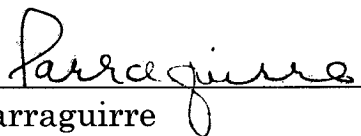
This court has held that if a defendant expresses a desire to appeal, counsel is obligated to file a notice of appeal on the defendant's behalf. See Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003); Thomas v. State, 115 Nev. 148, 151, 979 P.2d 222, 224 (1999); Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999); see also Roe v. Flores-Ortega, 528 U.S. 470, 477 (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). A petitioner is entitled to an evidentiary hearing on claims supported by specific facts, which if true, would entitle petitioner to relief. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

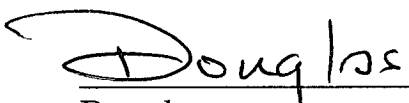
The record does not belie appellant's claim regarding his appeal deprivation claim. Accordingly, we reverse the district court's order to the extent that it denied appellant's appeal deprivation claim, and we remand this matter to the district court to conduct an evidentiary hearing on appellant's appeal deprivation claim. If the district court, after the evidentiary hearing, determines that appellant was deprived of his right to a direct appeal, the district court shall, in accordance with NRAP 4(c), enter a written order which includes specific findings of facts and conclusions of law that appellant was deprived of a direct appeal, an order appointing counsel if appellant is indigent, and an order directing the


district court clerk to prepare and file, within 5 days of the entry of the order, a notice of appeal from the judgment of conviction and sentence.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and further 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.³

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Hon. Robert W. Lane, District Judge
Jeffrie Ray Glover
Attorney General Catherine Cortez Masto/Carson City
Nye County District Attorney/Pahrump
Nye County Clerk

³The 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.