IN THE SUPREME COURT OF THE STATE OF NEVADA

MARTESE DANDRE SLACK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53270

FILED

MAY 10 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
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 appellant's post-conviction petition for writ of habeas corpus.[1] Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

In his petition, filed September 4, 2008, appellant claimed that he was denied effective assistance of counsel. To prove a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate (a) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness and (b) resulting prejudice in that there is a reasonable

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[1]This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

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probability that, but for counsel's errors, the outcome would have been different. Strickland v. Washington, 466 U.S. 668, 687, 694 (1984). Both components of the inquiry must be shown. Id. at 697.

First, appellant claimed that trial counsel was ineffective for failing to file pretrial motions, to investigate or prepare a defense, or to investigate and obtain mitigating evidence for sentencing. Appellant failed to demonstrate deficiency or prejudice. Appellant failed to provide any factual support for these bare, naked claims, and there is no support for them in the record. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Further, appellant failed to identify what the fruits of any investigation would be or to demonstrate a reasonable probability of a different outcome. We therefore conclude the district court did not err in denying these claims without an evidentiary hearing.

Second, appellant claimed that trial counsel was ineffective because he coerced appellant into pleading guilty by telling him he would get 20 to 30 years if he went to trial. Appellant failed to demonstrate deficiency or prejudice. Candid advice about the possible outcome of trial is not evidence of a deficient performance. Further, appellant acknowledged in the guilty plea agreement that his plea was voluntary and not the result of any duress or coercion, and he again acknowledged at the plea canvass that he was pleading freely and voluntarily and that he had read and understood the plea agreement. We therefore conclude the district court did not err in denying this claim without an evidentiary hearing.

Third, appellant claimed that trial counsel was ineffective for failing to argue for a lesser sentence. Appellant failed to demonstrate deficiency. Appellant's claim is belied by the record, which reveals that counsel argued for the statutory minimum at the sentencing hearing. See id. at 503, 686 P.2d at 225. We therefore conclude the district court did not err in denying this claim without an evidentiary hearing.

Fourth, appellant claimed that his appointed trial counsel was ineffective for tricking or coercing him into waiving his preliminary hearing by failing to tell him the purpose of the hearing and by stating that it was only necessary for those going to trial. Appellant failed to demonstrate deficiency or prejudice. The case against appellant was strong as he was caught in the stolen vehicle, and the record shows that appellant unconditionally waived his preliminary hearing as part of a plea agreement. Further, appellant received a significant benefit from the plea agreement as he was convicted of only three of eight counts, with sentences for all counts running concurrent to one another. In light of this benefit, appellant failed to demonstrate a reasonable probability that he would not have entered a guilty plea absent counsel's advice regarding the preliminary hearing. We therefore conclude the district court did not err in denying this claim without an evidentiary hearing.

Finally, appellant claimed that trial counsel failed to file an appeal despite appellant's request that he do so. If a client expresses a desire to appeal, counsel is obligated to file a notice of appeal on the client's behalf. See Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003); Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999);

Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 659-60 (1999); see also Roe v. Flores-Ortega, 528 U.S. 470, 477-78 (2000). If counsel fails to file that appeal, he is deficient and prejudice is presumed. Lozada v. State, 110 Nev. 349, 356, 871 P.2d 944, 948-49 (1994). A petitioner has the burden of establishing by a preponderance of the evidence that he requested counsel file the appeal. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). This court defers to the district court's factual findings if supported by substantial evidence and not clearly erroneous. See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

The district court rejected the appeal-deprivation claim, finding that if appellant had requested that trial counsel file a direct appeal, counsel would have done so. We are not convinced that the district court's finding is supported by substantial evidence. Appellant asserted at the evidentiary hearing that he was dissatisfied with his sentence and specifically requested that trial counsel file an appeal on that basis. Trial counsel testified that there were no appealable issues and that had appellant asked him to appeal, he "just would not do it." While testifying repeatedly that he could not recall whether appellant had requested that he file an appeal, trial counsel also testified that he "would probably have noted the file" if appellant had so requested but that his file contained no such notes. When pressed by the district court, counsel first testified that had appellant insisted on an appeal, he would only have moved to withdraw the plea because there were no appealable issues. Upon further inquiry, trial counsel stated that if a client "want[s] an appeal that bad," he would "file the Notice of Appeal within 30 days, no problem," adding

that he would move to withdraw from the case because he would not take the appeal. Trial counsel's testimony was equivocal at best, and, at worst, it demonstrated a lack of understanding regarding counsel's duty to file a direct appeal when a client requests an appeal or expresses dissatisfaction with the outcome.[2]

That testimony was not sufficient to support a finding that trial counsel would have filed an appeal if appellant had asked him to do so. Based on this record, appellant demonstrated by a preponderance of the evidence that he requested that trial counsel file an appeal and that counsel failed to do so. Accordingly, we reverse the denial of this claim, and we remand this matter to the district court. On remand, the district court shall enter a written order that includes specific findings of facts and conclusions of law that appellant is entitled to, but 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. See NRAP 4(c). Accordingly, we

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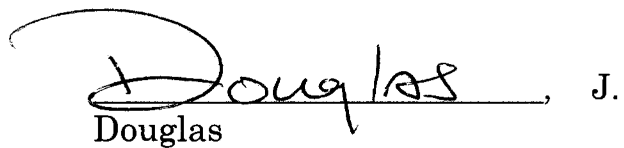
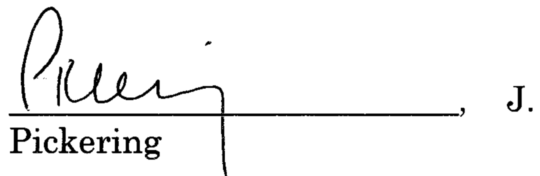
[2]The State conceded that the record was not clear as to whether appellant requested an appeal and went so far as to remind the court of the procedure should it grant relief on this ground.

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.[3]

_______________________, J.
Hardesty



_______________________, J.
Douglas



_______________________, J.
Pickering

cc: Hon. Valorie Vega, District Judge
Martese Dandre Slack
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[3]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.