

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant/Cross-Respondent,
vs.
HEATH ROBERT GRABE,
Respondent/Cross-Appellant.

No. 53588

FILED

APR 07 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Ingenda*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from a district court order granting in part Heath Robert Grabe's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

The State contends that the district court erred by ordering a new sentencing hearing based on the ineffective assistance of defense counsel. When reviewing the district court's resolution of an ineffective-assistance claim, we give deference to the court's factual findings if they are supported by substantial evidence and not clearly erroneous, but review the court's application of the law to those facts de novo. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). Here, the district court found that counsel's tactical decision to voluntarily submit the psychosexual evaluation for consideration was unreasonable and worked to Grabe's detriment at sentencing; therefore, he was entitled to a new sentencing hearing. See Strickland v. Washington, 466 U.S. 668, 687 (1984) (establishing two-part test for ineffective assistance of counsel). The district court's findings are supported by substantial evidence and are

not clearly wrong, and the State has not demonstrated that the district court erred as a matter of law.

Grabe contends in his cross-appeal that the district court erred by finding that counsel was not ineffective for failing to (1) move to dismiss the information based on a speedy trial right violation and (2) file a direct appeal to challenge one of the conditions of parole and the violation of his right to a speedy trial.

The district court found that Grabe's counsel was not deficient for failing to move to dismiss the information based on a speedy trial right violation. See id. The district court's findings are supported by substantial evidence and are not clearly wrong, and Grabe has failed to demonstrate that the district court erred as a matter of law.

The district court also found that Grabe's appeal-deprivation claim was rendered moot by the ordering of a new sentencing hearing. Our review of the record on appeal, however, reveals that Grabe was improperly denied his right to a direct appeal in violation of Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999), and the district court therefore erred in denying the claim as moot. Pursuant to NRAP 4(c), we will consider his direct appeal claims on the merits. First, Grabe's desire to challenge a condition of his parole is rendered moot by the ordering of a new sentencing hearing. Second, Grabe waived his right to challenge the alleged speedy trial right violation by entering a guilty plea and there is no indication in the record that he expressly preserved this issue for review on appeal. See NRS 174.035(3); Bates v. State, 84 Nev. 43, 47, 436

P.2d 27, 29 (1968) (“when the appellant entered his plea of guilty . . . he waived whatever right he had to a speedy trial”). Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

cc: Hon. Janet J. Berry, District Judge
Attorney General/Carson City
Washoe County District Attorney
Karla K. Butko
Heath Robert Grabe
Washoe District Court Clerk

¹Because Grabe is represented by counsel in this matter, we decline to grant him permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, this court shall take no action on the proper person document Grabe has submitted in this matter.