

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROGER RAPHAEL BROWN,
Appellant,
vs.
JO GENTRY, WARDEN OF S.D.C.C.,
Respondent.

No. 78001-COA

FILED

JAN 14 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

Roger Raphael Brown appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on June 28, 2018, and supplemental petitions filed on August 24, 2018, and September 10, 2018. Second Judicial District Court, Washoe County; Egan K. Walker, Judge.

Brown was charged by information with sex trafficking of a child under the age of 18 years. He was initially represented by Jay Slocum. Shortly after the case was bound over to the district court, the district court granted Mr. Slocum's motion to withdraw and appointed Troy Jordan, who represented Brown through his direct appeal. Brown, proceeding in pro se, filed the instant postconviction petition. The district court summarily dismissed most of Brown's claims as outside the scope of claims permissible but determined an evidentiary hearing was warranted on the claims that Mr. Jordan provided ineffective assistance of counsel at the trial level. Noting that the district court expelled Brown from the evidentiary hearing partway through the testimony of the first witness, this court ordered the State to respond and address, in addition to any claims raised by Brown, whether the district court violated Brown's rights by excluding him from

the evidentiary hearing. The State filed a response. Brown did not file a reply.

At the start of the evidentiary hearing, Brown indicated his surprise that postconviction counsel had not been appointed to represent him, and he requested a continuance of the hearing. The district court pointed out Brown had not requested and was not entitled to the appointment of counsel. It then denied Brown's oral request for a continuance, and the evidentiary hearing proceeded with the State calling Mr. Jordan to the stand. Midway through Mr. Jordan's testimony, Brown interjected, "He's lying." The district court admonished Brown, and a brief back-and-forth exchange ensued in which Brown expressed his displeasure at counsel's "lies" and the district court threatened to remove Brown and continue the hearing. Brown continued to accuse counsel of lying, he was removed from the courtroom, and the hearing continued. He was returned to the courtroom to testify himself, but only after all other testimony had concluded. We note Brown repeatedly stated he needed discovery.

"NRS chapter 34 require[s] the presence of the petitioner at any evidentiary hearing conducted on the merits of the claims asserted in a post-conviction petition for a writ of habeas corpus." *Gebbers v. State*, 118 Nev. 500, 504, 50 P.3d 1092, 1094 (2002). If present, a petitioner may be able to bolster his claims by presenting evidence and testimony and/or by cross-examining and impeaching the testimony of other witnesses. *See id.* at 504, 50 P.3d at 1094-95. Nothing in the record before this court suggests Brown was given any opportunity to hear the remainder of Mr. Jordan's testimony or the testimony of the next witness, the defense investigator. Further, Brown was not given any opportunity to cross-examine the witnesses. Finally, we note the district court was quick to expel Brown and failed to

consider any less onerous consequence for Brown's outburst, such as a recess, allowing Brown to view the testimony remotely, allowing Brown to submit written questions for cross-examination, or even appointing postconviction counsel. *Cf. Collins v. State*, 133 Nev. 717, 720, 405 P.3d 657, 661 (2017) (deciding whether to remove a disruptive defendant from a trial requires considering, among other things, whether a lesser measure will suffice, and the prejudice to the defendant).

In its response, the State argues the district court followed the procedure outlined in *Collins* and thus properly excluded Brown from the remainder of the evidentiary hearing. In *Collins*, the Nevada Supreme Court considered whether a trial court abused its discretion by excluding a criminal defendant for two hours of voir dire. The supreme court set minimum standards that must be met to remove a defendant and identified four actions a district court should take before removing a criminal defendant from trial proceedings. *Id.* The fourth necessary action is "bring[ing] the defendant back to court periodically to advise that he or she may return if the defendant credibly promises to desist from the disruptive conduct." *Id.*

Collins is distinguishable from the instant case. First, the defendant in *Collins* was represented by counsel such that the defense was present even if the defendant himself was removed. In contrast, Brown was proceeding in pro se such that, once he was removed, the proceedings continued *ex parte*. And nothing in the record before this court suggests the district court brought Brown back to court prior to the close of testimony to

advise him he may return if he credibly promised to desist from the disruptive conduct. The requirements of *Collins* were thus not met.¹

For the foregoing reasons, we conclude the district court abused its discretion by ejecting Brown from the proceedings. We further conclude the district court erred by denying Brown's claims alleging ineffective assistance by Mr. Jordan because neither Brown nor a representative for Brown was given an opportunity to hear the entirety of the witnesses' testimony or cross-examine the witnesses at the evidentiary hearing. Accordingly, we reverse the district court's order and remand this matter to the district court for a new evidentiary hearing.

Next, Brown contends the district court erred by summarily dismissing several of his claims as outside the scope of claims allowed in a postconviction habeas petition challenging a judgment of conviction resulting from a guilty plea. NRS 34.810(1)(a) limits such claims to "an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel."

Brown's petition first challenged (1) the voluntariness, accuracy, and admissibility of the victim's statement to police; (2) the continuance of the preliminary hearing; (3) the validity of the arrest warrant; (4) the issuance of a material witness warrant; (5) the impartiality of the justice of the peace; and (6) the amount of bail imposed. These claims

¹We are also troubled that the district court left it to the marshal's discretion whether or not Brown would be brought back into the courtroom to testify on his own behalf. The district court abuses its discretion when it fails to exercise it. *Cf. Clark v. State*, 109 Nev. 426, 428-29, 851 P.2d 426, 427-28 (1993) (holding resentencing was warranted where district court did not exercise its discretion as to whether to adjudicate a defendant a habitual criminal).

implicate neither the validity of Brown's guilty plea nor the effective assistance of counsel. We therefore conclude the district court did not err by summarily dismissing these claims.

Brown also claimed that Mr. Slocum rendered ineffective assistance of counsel. Brown never claimed that Mr. Slocum's alleged errors rendered Brown's plea involuntary or unknowing. Further, he never claimed that Mr. Slocum's alleged ineffectiveness affected Brown's decision to enter the guilty plea. We therefore cannot conclude the district court erred by denying Brown's claims as outside the scope of a postconviction habeas petition. And because Brown never alleged that Mr. Slocum's actions or inactions affected his decision to enter the guilty plea, he would not have been entitled to relief even if his claims were within the scope. See *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985) (requiring a successful petitioner to show that, but for counsel's errors, there is a reasonable probability the petitioner would not have pleaded guilty and would have insisted on going to trial).

Finally, Brown contends the district court judge erred by continuing to rule on petitions and motions despite Brown filing four affidavits alleging the judge was biased and moving for the judge's recusal. Brown did not file requests for submission on the first two affidavits, which were filed on October 17, 2016, and November 13, 2017. Because those pleadings were not properly submitted for consideration, we cannot conclude the district court judge erred by failing to address them or by continuing to make rulings in the case. See WDCR Rule 12(4) (requiring submission of matters for decision).

On August 24, 2018, Brown filed a third affidavit of prejudice and a request for submission thereof. The district court judge being

challenged denied the motion on the ground that it did not comply with NRS 1.235. However, Brown's affidavit did not indicate he was seeking relief pursuant to NRS chapter 1. Rather, he argued that a judge's official conduct should be free from impropriety and the appearance thereof. See Revised Nevada Code of Judicial Conduct, Preamble & Canon 1.² In such a situation, the request for recusal must be referred to another judge for decision and cannot be decided by the judge against whom bias is alleged. See *Towbin Dodge, LLC v. Eighth Judicial Dist. Court*, 121 Nev. 251, 260, 112 P.3d 1063, 1069 (2005). We therefore conclude it was error for the district court judge who was being challenged to deny the motion and continue to rule in this matter. We also note Brown filed a fourth affidavit of judicial bias and an attendant request for submission on October 18, 2018. The record before this court indicates that pleading is still pending. Both pleadings must be properly resolved before the district court can take any further action in this case.

For the foregoing reasons, 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.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

²Brown erroneously attributed this admonition to Supreme Court Rule 209.

cc: Chief Judge, Second Judicial District
Hon. Egan K. Walker, District Judge
Roger Raphael Brown
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk