

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN SCOTT FREESE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37793

FILED

AUG 21 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND

REMANDING

This is an appeal from a district court order denying Bryan Freese's post-conviction petition for a writ of habeas corpus.

The district court convicted Freese, pursuant to a guilty plea, of one count of sexual assault of a minor under sixteen years of age. Freese was sentenced to serve a term of life in prison with the possibility of parole in twenty years. Freese did not file a direct appeal.

On September 3, 1998, Freese filed a timely post-conviction petition for a writ of habeas corpus alleging ineffective assistance of counsel and challenging the sufficiency of the plea canvass. The district court concluded that although Freese knowingly and voluntarily entered his plea, the canvass was technically inadequate and granted his petition. This court reversed, holding that a guilty plea will not be invalidated as long as the totality of the circumstances demonstrate that it was knowingly and voluntarily entered and the defendant understood the nature of the offense and the consequences of the plea.¹ We remanded the matter because the district court did not consider Freese's ineffective

¹State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000).

assistance claims.² On remand, the district court denied the remainder of Freese's petition without conducting an evidentiary hearing. This appeal followed.

Freese contends that trial counsel provided constitutionally ineffective assistance. Claims of ineffective assistance are evaluated under the two-part test set forth in Strickland v. Washington.³ Under Strickland, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense.⁴ To establish prejudice when the petitioner pleaded guilty, he must show that, but for counsel's error, he would not have done so.⁵ If a petitioner's claims are supported by specific factual allegations not belied by the record that, if true, would entitle him to relief, he is entitled to an evidentiary hearing on those claims.⁶

Freese contends that trial counsel was ineffective for failing to discover and investigate several potential defense witnesses. In particular, Freese claims that the victim in this case falsely accused other members of his family and trial counsel should have contacted them. Freese claims that had he been advised of the potential impact of the victim's prior allegations, he would not have pleaded guilty.

Freese's claim that trial counsel failed to discover these witnesses is belied by the record. Before Freese pleaded guilty, trial counsel moved to have the victim evaluated by an independent

²Id. at 1108, 13 P.3d at 449.

³466 U.S. 668 (1984).

⁴Id. at 687.

⁵Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

⁶Mann v. State, 118 Nev. ___, ___, 46 P.3d 1228, 1230 (2002).

psychologist. Trial counsel based that motion in part on the victim's recent claims that she had been sexually abused by other members of Freese's family.

Moreover, it is unlikely that further investigation of these witnesses would have impacted Freese's decision to plead guilty. By pleading guilty to one count of sexual assault of a minor, Freese avoided going to trial on three additional counts of sexual assault and four counts of lewdness with a child under fourteen years of age. Additionally, Freese admitted that on two occasions he rubbed his penis on the victim's buttocks until he ejaculated. At the grand jury hearing, a witness testified that he saw Freese touch the victim's "private" with his hand and his penis. The witness then observed Freese place his penis in the victim's vagina or between her legs and then make a thrusting motion. When Freese stopped, he wiped something off the victim's buttocks and his penis. Finally, the victim testified about numerous instances of fondling, fellatio, and intercourse.

Second, Freese claims that his attorney failed to file an appeal after Freese requested that he do so. In Lozada v. State,⁷ we held that "an attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction." When an attorney fails to fulfill this duty, he denies the convicted defendant his right to an appeal.⁸ The convicted defendant need not show any additional prejudice. Thus, if Freese demonstrates that his counsel ignored his request for an appeal, Freese has established ineffective assistance. Because Freese has alleged specific facts that, if true, would entitle him to relief, he is entitled to an evidentiary hearing on this claim.

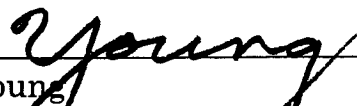
⁷110 Nev. 349, 354, 871 P.2d 944, 947 (1994).

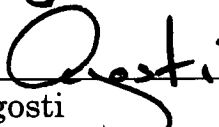
⁸Id. at 357, 871 P.2d at 949.


We therefore reverse the district court's order in part and remand the matter for an evidentiary hearing on the sole issue of whether Freese's trial counsel failed to file an appeal after Freese expressed a desire to appeal. If the district court determines that Freese was denied his right to a direct appeal, it shall appoint counsel to represent Freese and allow him to file a petition for a writ of habeas corpus raising issues appropriate for direct appeal. Conversely, if the district court determines that Freese's appeal-deprivation claim lacks merit, the district court shall enter a final order resolving the issue. The parties may appeal from any adverse final, appealable order.⁹

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.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General/Carson City
Clark County District Attorney
Carmine J. Colucci & Associates
Clark County Clerk

⁹See NRS 34.575.