

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES SCHNEIDER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39277

FILED

JUL 12 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is a proper person appeal from an order denying appellant James Schneider's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

On August 1, 2000, the district court convicted Schneider, pursuant to a guilty plea, of one count of burglary and one count of robbery of a victim over 65 years of age. The district court sentenced Schneider to serve one term of 22 to 96 months and two consecutive terms of 35 to 156 months in the Nevada State Prison. The latter terms were imposed to run concurrently with the former term. No direct appeal was taken.

On July 23, 2001, Schneider filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to

conduct an evidentiary hearing. On December 19, 2001, the district court denied Schneider's petition. This appeal followed.

In his petition, Schneider raised several claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient, and that the petitioner was prejudiced by counsel's performance.¹ To show prejudice, a petitioner who has entered a guilty plea must demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."² The court need not consider both prongs of this test if the petitioner makes an insufficient showing on either prong.³

Schneider claimed that trial counsel was ineffective for failing to visit him in the jail, investigate the facts of the crime, and interview witnesses. Schneider further asserted that trial counsel only discussed the possibility of pleading guilty. We conclude that the district court did not err in denying these claims. Schneider failed to support these claims with specific factual allegations that, if true, would have entitled him to

¹Kirksey v. State, 122 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1987)).

²Id. at 988, 923 P.2d at 1107 (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

³See Strickland, 466 U.S. at 697.

relief.⁴ Thus, Schneider failed to demonstrate that trial counsel was ineffective. We affirm the district court's order to the extent it denied these claims.

Schneider also claimed that his trial counsel was ineffective for failing to file an appeal on his behalf. In his petition, Schneider stated that "[i]mmediately after sentencing, Petitioner specifically requested of his attorney to file a notice of appeal. Counsel stated that he would file the notice, however he never did so." This court's preliminary review of the record on appeal revealed that the district court may have erroneously denied Schneider's petition without conducting an evidentiary hearing on this claim. Schneider was entitled to an evidentiary hearing if he raised claims that, if true, would have entitled him to relief and if his claims were not belied by the record.⁵ This court has previously held that if a criminal defendant expresses a desire to appeal, counsel is obligated to file a notice of appeal on defendant's behalf,⁶ and that prejudice is presumed where a defendant expresses a desire to appeal and counsel fails to file an appeal.⁷ Here, Schneider's claim was not belied by the record on appeal, and Schneider's claim, if true, may entitle him to an evidentiary hearing.

⁴Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

⁵Id.

⁶Thomas 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).

⁷Hathaway v. State, 119 Nev. ___, ___, 71 P.3d 503, 507 (2003).

This court ordered the State to show cause why this appeal should not be remanded to the district court for an evidentiary hearing to determine whether counsel's performance fell below an objective standard of reasonableness.⁸ The State has responded to this court's order and states that it does not oppose an order of remand for an evidentiary hearing on the issue of whether Schneider was deprived of a direct appeal due to the ineffective assistance of counsel.

Accordingly, we reverse the order of the district court in part, and we remand this case to the district court to conduct an evidentiary hearing to determine whether Schneider's counsel failed to file a direct appeal after Schneider requested a direct appeal. The district court may exercise its discretion as to whether to appoint post-conviction counsel to assist appellant at the evidentiary hearing.⁹ If the district court determines that Schneider was denied his right to a direct appeal, the district court shall appoint counsel to represent Schneider and shall permit Schneider to file a petition for a writ of habeas corpus raising issues appropriate for direct appeal.¹⁰

Having considered Schneider's contentions, we affirm the district court's order in part and reverse the order with regard to Schneider's claim that trial counsel failed to file a direct appeal, and

⁸See Strickland, 466 U.S. 668.

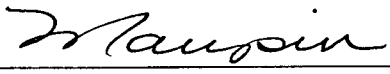
⁹See NRS 34.750.


¹⁰See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

remand this matter to the district court for resolution of this claim. 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.¹¹


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

cc: Hon. Michael A. Cherry, District Judge
James Schneider
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹¹This order constitutes our final disposition of this appeal. Any subsequent appeal from an order of the district court regarding Schneider's appeal deprivation claim shall be docketed as a new matter.