IN THE SUPREME COURT OF THE STATE OF NEVADA

JAD JOSEPH FRICKE,
Appellant,
Vs.
THE STATE OF NEVADA,
Respondent.

No. 39373

FILED

AUG 0 2 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court order denying appellant Jad Joseph Fricke's post-conviction petition for a writ of habeas corpus.

On February 24, 1999, in case number CR98-2264, Fricke was convicted, pursuant to a guilty plea, of one count of unlawful sale of a controlled substance to a minor. The district court sentenced Fricke to serve a prison term of 20 to 60 months to run consecutively to a sentence imposed in an unrelated case. Fricke did not file a direct appeal.

On December 7, 1999, in case number CR98-2062, Fricke was convicted, pursuant to a guilty plea, of attempted murder with the use of a firearm (count I), burglary (count II), and being an ex-felon in possession of a firearm (count III). The district court sentenced Fricke to serve two consecutive prison terms of 96 to 240 months for count I, a concurrent prison term of 48 to 120 months for count II, and a consecutive prison term of 28 to 72 months for count III, to run consecutively to case number CR98-2264. Fricke did not file a direct appeal.

On December 5, 2000, Fricke filed a proper person post-conviction petition for a writ of habeas corpus in case number CR98-2062. The district court appointed counsel who supplemented the petition on April 11, 2001. In the supplement to the petition, among other issues, Fricke claimed that he should be allowed to withdraw his guilty plea in

case number CR98-2264, despite the fact that his petition was untimely, because his counsel was ineffective and he was actually innocent of the crime of unlawful sale of a controlled substance to a minor. The State opposed the petition. After conducting an evidentiary hearing, the district court denied the petition, finding that Fricke had failed to establish actual innocence to overcome his procedural default in case number CR98-2264. Additionally, the district court found that counsel was not ineffective and that Fricke's guilty plea was knowing in case number CR98-2062. Fricke filed the instant appeal.

Case Number CR98-2264.

Fricke contends that the district erred in ruling that his claims of ineffective assistance of counsel were procedurally barred. In particular, Fricke contends that the district court should have considered the merits of the claims presented in the untimely petition because he is actually innocent of the crime of unlawful sale of a controlled substance to a minor. We conclude that the district court did not err in ruling that Fricke's claims raised in case number CR98-2294 were procedurally barred.

On April 11, 2001, in the supplement to a petition filed in case number CR98-2062, Fricke challenged the validity of his conviction in case number CR98-2264, alleging actual innocence. Because Fricke filed his petition more than one year after entry of the judgment of conviction, which was filed on December 7, 1999, the claims challenging that conviction were procedurally barred absent a showing of good cause and prejudice, or a fundamental miscarriage of justice.[1]

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[1]See NRS 34.726(1); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

This court has recognized that even if a petitioner has procedurally defaulted and cannot demonstrate cause and prejudice, judicial review of the petitioner's claims would nevertheless be required if the petitioner demonstrates that failure to consider them would result in a "fundamental miscarriage of justice."[2] A "fundamental miscarriage of justice" typically involves a claim that a constitutional error has resulted in the conviction of someone who is actually innocent.[3]

Here, Fricke pleaded guilty, acknowledging that he had sold controlled substances to a minor. Additionally, prior to Fricke's entry of plea, the State presented evidence to the grand jury that Fricke sold two minors psychedelic mushrooms. Fricke has not made any allegations that support a credible claim of actual innocence or presented any exculpatory evidence.[4] Accordingly, we conclude that the district court did not err in ruling that the claims raised in case number CR98-2264 were procedurally barred because Fricke failed to show a fundamental miscarriage of justice.

Case Number CR98-2062

Fricke first contends that his counsel Calvin Dunlap was ineffective because he had an actual conflict of interest. In particular, Fricke contends that Dunlap violated Fricke's right to conflict-free counsel because he previously represented J.C. Carmella, who was one of the complaining witnesses in case number CR98-2264.

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[2]Mazzan, 112 Nev. at 842, 921 P.2d at 922.

[3]See Coleman v. Thompson, 501 U.S. 722, 748-50 (1991); Murray v. Carrier, 477 U.S. 478, 496 (1986).

[4]We reject Fricke's contention that this court's holding in Washington v. State, 117 Nev. ____, 30 P.3d 1134 (2001), compels a conclusion that Fricke is actually innocent. We conclude that case is inapposite.

"The Sixth Amendment guarantees a criminal defendant the right to conflict-free representation."[5] "To establish a Sixth Amendment violation of defendant's right to the effective assistance of counsel based on an attorney's conflict of interest, 'a defendant must show: (1) his attorney actively represented conflicting interests, and (2) an actual conflict of interest affected his attorney's performance.'"[6]

Here, the district court found that there was no evidence that Dunlap represented conflicting interests. The district court's finding is supported by substantial evidence.[7] Particularly, at the evidentiary hearing on the petition, Dunlap testified that, although he had previously represented a person with the last name of Carmella, he was not sure whether her first name was J.C. Further, Dunlap testified that, before accepting a case, he checks for conflicts, thereby ensuring that he has not previously represented anyone who is going to be involved in an adverse capacity. Finally, Dunlap testified that J.C. Carmella was not a complaining witness in case number CR98-2062, the attempted murder case. Although Dunlap further testified that J.C. Carmella was involved in case number CR98-2264, Dunlap did not represent Fricke in that case. Accordingly, the district court did not err in finding that Dunlap had no conflict of interest.

Second, Fricke contends that Dunlap was ineffective in advising him to plead guilty to unlawful sale of a controlled substance in

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[5]Coleman v. State, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993); see Clark v. State, 108 Nev. 324, 831 P.2d 1374 (1992).

[6]Quintero v. United States, 33 F.3d 1133, 1135 (9th Cir. 1994) (quoting Fitzpatrick v. McCormick, 869 F.2d 1247, 1251 (9th Cir. 1989)).

[7]See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

case number CR98-2264. In particular, Fricke contends that Dunlap advised him to plead guilty in that case, despite the fact that he was not counsel of record and did not review the evidence in the case. We conclude that Fricke's contention lacks merit.

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial.[8] Here, the record reveals that Dunlap did not advise Fricke to plead guilty to the charge in case number CR98-2264. In fact, Dunlap testified he neither advised Fricke nor Maizie Pusich, Fricke's trial counsel appointed in the drug case, that Fricke should enter a guilty plea. Further, Pusich testified that she advised Fricke to plead guilty to unlawful sale because the State promised not to seek habitual criminal adjudication in case number CR98-2062, which was also pending at the time. Accordingly, the district court did not err in rejecting Fricke's contention that Dunlap was ineffective in advising Fricke with regard to case number CR98-2264.

Third, Fricke contends that the district court erred in rejecting his claim that his guilty plea was coerced by his counsel. Fricke contends that Dunlap coerced him into pleading guilty by withdrawing from representation when Fricke insisted on going to trial, and then resuming representation only when Fricke agreed to plead guilty.[9] The district

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[8]Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

[9]We note that the district court did not err in granting Dunlap's motion to withdraw because the record reveals that Fricke was not adversely affected, and Fricke insisted upon a trial strategy and handling

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court found that Dunlap did not coerce Fricke into pleading guilty, and that Fricke's guilty plea was knowing, voluntary, and intelligent. The district court's finding is supported by the record.

A guilty plea is presumptively valid, and an appellant carries the burden of establishing that the plea was not entered knowingly and intelligently.[10] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[11] Here, the district court's finding that Fricke's guilty plea was a knowing and voluntary plea is supported by the record. In particular, at the plea canvass and in the plea agreement, Fricke was advised of the constitutional rights he was waiving, the nature of the charges against him, and the direct consequences of pleading guilty. Fricke both acknowledged in the plea agreement and advised the district court that he: (1) was pleading guilty because he committed the charged offense; (2) was satisfied with the representation provided by Dunlap; and (3) had not been threatened or promised anything aside from what was mentioned in the plea agreement. Accordingly, the district court did not err in rejecting Fricke's claim that his guilty plea was the product of coercion.

. . . *continued*
of the case that Dunlap considered imprudent. See SCR 166(2)(c). Particularly, Dunlap believed a trial was imprudent in light of the State's evidence that he believed would "curl the blood of the jury," namely, the tape of the 911 call the victim made, which memorialized the shooting and showed that Fricke did not shoot the victim until she attempted to summon police.

[10]Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

[11]See Hubbard, 110 Nev. at 675, 877 P. 2d at 521.

Finally, Fricke contends that his counsel was ineffective in failing to file a notice of appeal on his behalf.[12] Fricke claims that he has been deprived of a direct appeal without his consent because Dunlap failed to file an appeal on his behalf despite Fricke's request that he do so. We agree.

The transcripts of the evidentiary hearing reveal that Fricke told Dunlap he wanted to file an appeal, and that Dunlap told him that he "did not do appeals; that he would have to contact another lawyer immediately." Dunlap further advised Fricke that "he needed to get other counsel to advise him on that as to all the in's and out's and remedies that he might have should the sentencing not go properly." Because Fricke failed to retain an appellate attorney, the district court found that Fricke had abandoned his right to appeal. We disagree.

In construing a defendant's Sixth Amendment right to effective assistance of counsel, this court has held that trial counsel must file a notice of appeal when a client requests an appeal.[13] Because Fricke told counsel he wanted to appeal in case number CR98-2062, Dunlap had a duty to file a notice of appeal in order to preserve Fricke's right to appeal. Accordingly, we conclude that this appeal must be remanded to

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[12]Fricke also claims that the district court abused its discretion at sentencing in case number CR98-2264. As discussed previously, Fricke's claims in that case are procedurally barred, and therefore this court need not consider them. Likewise, for the first time on appeal, Fricke claims in case number CV98-2062 that the sentences constitute double jeopardy. Because that claim was not raised below or considered by the district court, we need not consider it. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (claim cannot be raised in the first instance on appeal from denial of habeas petition).

[13]Thomas v. State, 115 Nev. 148, 151, 979 P.2d 222, 224 (1999).

allow Fricke to file a post-conviction petition for a writ of habeas corpus raising issues appropriate for direct appeal in case number CR 98-2062.[14]

In so doing, we note, despite the fact that the district court did not provide Fricke with a Lozada remedy, it did consider the merits of an issue that should have been raised on direct appeal: whether the trial court abused its discretion at sentencing in case number CR98-2264. The district court ruled that the trial court did not abuse its discretion at sentencing. Fricke contends that ruling is erroneous. We disagree.

The district court did not err in rejecting Fricke's claim that the district court abused its discretion at sentencing. The record reveals that: (1) the district court did not rely on impalpable evidence; (2) the relevant statutes are constitutional; and (3) the sentences imposed were within the parameters provided by the relevant statutes.[15] Accordingly, we conclude that the district court did not err in ruling that the sentences imposed did not constitute cruel and unusual punishment.

Although it was improper for the district court to consider an issue appropriate for direct appeal outside the context of a Lozada proceeding, we have reviewed the district court's ruling on the issue in order to further the goal of judicial economy. While we remand this matter for a Lozada proceeding, we note that the district court may consider all issues that could have been raised on direct appeal in case number CR98-2062, except for whether the district court abused its

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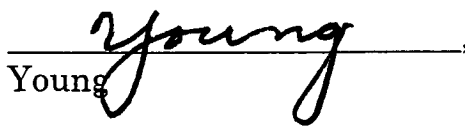
[14]See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

[15]See Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987); Silks v. State, 92 Nev. 91, 545 P.2d 1159 (1976); see also NRS 176.035, NRS 200.010; NRS 193.330(a)(1); NRS 205.060(1); NRS 202.360(3).

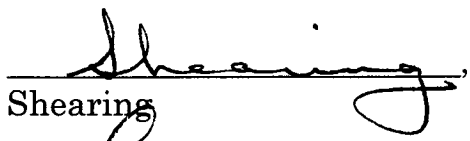
discretion at sentencing, as that issue has already been considered on the merits.[16]

Based on the foregoing analysis, 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.
Shearing

_____, J.
Leavitt

cc: Hon. Jerome Polaha, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

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[16]See Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969) ("'The law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same.'")