IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON DARRYL WEBBER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39624

FILED

NOV 05 2002

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

ORDER OF AFFIRMANCE

This is an appeal from the district court's denial of appellant's post-conviction petition for a writ of habeas corpus.

The district court convicted appellant, pursuant to a guilty plea, of first degree murder. On July 25, 2001, before he was sentenced, appellant filed a motion to withdraw a guilty plea. The district court denied appellant's motion and sentenced appellant to a term of life with the possibility of parole after 20 years. This court dismissed appellant's untimely direct appeal for lack of jurisdiction.[1]

On February 15, 2002, appellant, through his appellate counsel, filed a post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a reply. On April 11, 2002, the district court denied appellant's petition. This appeal followed.

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[1]See Webber v. State, Docket No. 38534 (Order Dismissing Appeal, November 15, 2001).

It is clear from the record on appeal that appellant desired to have a direct appeal filed on his behalf. Counsel, however, failed to file a timely notice of appeal. We conclude that appellant was deprived of a direct appeal because of appellate counsel's deficient performance in failing to file a timely notice of appeal after appellant expressed a desire to appeal.[2] This court has determined that an appropriate remedy to cure the deprivation of the right to appeal is to allow petitioner an opportunity to raise in a habeas corpus petition, with the assistance of counsel, any issues that he could have raised on direct appeal.[3] In his present petition, with the assistance of counsel, appellant raises one direct appeal issue. He claims that the district court erred in denying his pre-sentence motion to withdraw his guilty plea. Thus, we construe appellant's petition as his Lozada petition.

Appellant argues that his guilty plea was involuntarily and unknowingly entered because he has low level reading and comprehension skills which prevented him from fully understanding the nature and consequences of his guilty plea, he did not realize that he would not be eligible for parole for twenty years, he was rushed into pleading guilty, he

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[2]See Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994). Ordinarily, we would not allow counsel, who denied appellant his direct appeal, to represent appellant in his post-conviction petition for a writ of habeas corpus; however, in this case, appellate counsel concedes that he was ineffective for failing to file a timely notice of appeal. Thus, appellant suffers no prejudice by having his appellate counsel represent him in his petition.

[3]See id. at 359, 871 P.2d at 950.

did not have sufficient time to discuss his decision to plead guilty with his attorney, and if the matter went to trial he believed he would be convicted of manslaughter instead of murder.

A pre-sentence motion to withdraw a guilty plea should be granted "where for any substantive reason the granting of the privilege seems 'fair and just.'"[4] To determine whether a defendant advanced a substantial, fair, and just reason to withdraw his guilty plea, the district court must consider the totality of the circumstances to determine whether the defendant entered the plea voluntarily, knowingly, and intelligently.[5] On appeal from the district court's determination, we will presume that the lower court correctly assessed the validity of the plea, and we will not reverse the lower court's determination absent a clear showing of an abuse of discretion.[6] The burden is on the defendant to demonstrate that his guilty plea was not entered knowingly and intelligently.[7]

We conclude that the district court did not abuse its discretion in denying appellant's pre-sentence motion to withdraw his guilty plea. After considering the totality of the circumstances, the district court properly determined that appellant's guilty plea was voluntarily and

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[4]See State v. District Court, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969).

[5]See Crawford v. State, 117 Nev. 718, 721-22, 30 P.3d 1123, 1125-26 (2001).

[6]See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

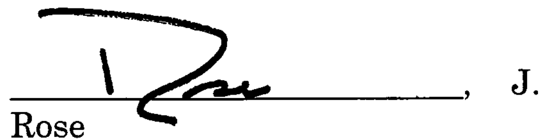
[7]See id.

knowingly entered. First, in accepting the plea, the district court conducted an adequate canvass. During his plea canvass, appellant stated that he was entering his plea freely and voluntarily and that no one threatened or made any promises to him to plead guilty. He was specifically advised by the district court that, pursuant to the plea agreement, the State agreed not to oppose the sentence of life with the possibility of parole after 20 years. Appellant stated that that was his understanding of the plea agreement. Appellant then stated that he understood that he was being convicted of first-degree murder. He also stated that he read and wrote the English language, and that he signed, read, and understood the guilty plea agreement which listed, among other things, the possible sentences that he might receive. In addition, he stated that he discussed the guilty plea agreement with his trial counsel and also discussed what the State would have had to do to convict him as well as any defenses he might have had in the case. He was then asked whether he understood his constitutional rights listed in the guilty plea agreement. Appellant stated that he did and that he waived those rights. The district court then asked appellant if it was true that he willfully, feloniously, with premeditation and deliberation, and with malice aforethought killed the victim by shooting at and into the victim's body. Appellant responded in the affirmative. Second, there is no indication in the record that appellant did not understand the nature and consequences of his guilty plea. Third, it is clear from the record on appeal that appellant was not rushed into entering his plea. In fact, the district judge continued the original hearing to allow appellant extra time to determine whether he wanted to accept the negotiations and plead guilty. Lastly,

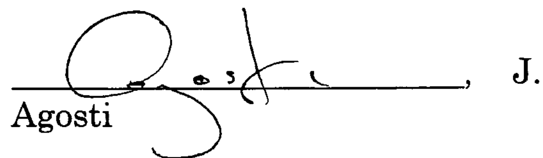
appellant fails to present any facts to support his apparent claim of factual innocence.[8]

We conclude that appellant failed to demonstrate that his guilty plea was involuntarily or unknowingly entered and that there was a fair and just reason to allow him to withdraw his guilty plea. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_______________, J.
Rose

_______________, J.
Young


_______________, J.
Agosti

cc: Hon. Joseph T. Bonaventure, District Judge
Attorney General/Carson City
Clark County District Attorney
J. Chip Siegel, Chtd.
Clark County Clerk

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[8] See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).