IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 41092

FILED

MAR 0 5 2004

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

ORDER OF AFFIRMANCE

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

On September 5, 1997, the district court convicted Freese, pursuant to a guilty plea, of one count of sexual assault of a minor under sixteen years of age. The district court sentenced Freese to serve a term of life in the Nevada State Prison with the possibility of parole in twenty years. No direct appeal was taken.

On September 3, 1998, Freese filed a 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 demonstrates that it was knowingly and voluntarily entered and the defendant understood the nature of the offense and the consequences of the plea.[1] This court

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

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remanded the matter because the district court did not consider Freese's ineffective assistance of counsel claims.[2]

On remand, the district court denied the remainder of Freese's petition without conducting an evidentiary hearing. On appeal, this court affirmed the district court's order in part and remanded the matter to the district court 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.[3]

On January 24, 2003, the district court conducted an evidentiary hearing on Freese's appeal deprivation claim. Freese was represented by counsel at the hearing. Freese testified that he attempted to reach his attorney, Steven Wolfson, several times by telephone from the county jail after he was sentenced, in order to discuss a possible appeal. Freese was never able to speak with Wolfson, however. Freese further testified that because he was unable to reach Wolfson, Freese never asked him to file an appeal.

Wolfson also testified at the evidentiary hearing. He stated that he did not remember any discussions with Freese concerning an appeal. Wolfson testified that if Freese had asked him to file an appeal, he would not have ignored the request and done nothing.

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[2]Id. at 1108, 13 P.3d at 449.

[3]Freese v. State, Docket No. 37793 (Order Affirming in Part, Reversing in Part and Remanding, August 21, 2002).

On February 4, 2003, the district court denied Freese's petition, finding that Freese did not ask Wolfson to file an appeal, and Wolfson had no duty to do so. This appeal followed.[4]

"[T]here is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to pursue a direct appeal" unless the defendant inquires about a direct appeal or there exists a direct appeal claim that has a reasonable likelihood of success.[5] In Lozada v. State, this court recognized 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."[6] The burden is on the defendant to indicate to his attorney that he wishes to pursue an appeal.[7] Prejudice is presumed if a petitioner demonstrates that counsel ignored his request for an appeal.[8]

Freese asserts that he and his family clearly relayed his dissatisfaction with his conviction to his attorney, and therefore the district court erred in denying his claim. This court will generally defer to factual findings of the district court.[9] We conclude that the district court's determination is supported by substantial evidence, and is not clearly

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[4]We note that Freese is represented by counsel in this appeal.

[5]Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999).

[6]110 Nev. 349, 354, 871 P.2d 944, 947 (1994).

[7]See Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).

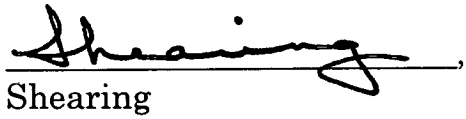
[8]See Hathaway v. State, 119 Nev. ___, ___, 71 P.3d 503, 507 (2003); Mann v. State, 118 Nev. ___, ___, 46 P.3d 1228, 1229-30 (2002); Lozada, 110 Nev. at 357, 871 P.2d at 949.

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

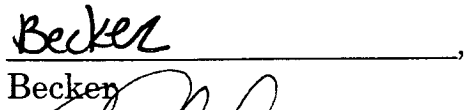
wrong.[10] The district court weighed the credibility of Freese and Wolfson, and determined that Freese did not meet his burden of proving that his counsel was ineffective for depriving him of a direct appeal without his consent.[11]

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Freese is not entitled to relief and that briefing and oral argument are unwarranted.[12] Accordingly, we

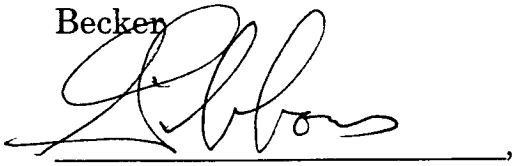
ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Shearing



_____, J.
Becker



_____, J.
Gibbons

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

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[10]Id.

[11]Id.

[12]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).