

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELMER WINIFRED DYER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41377

FILED

FEB 25 2004

ORDER OF AFFIRMANCE

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

This is a proper person appeal from a district court order denying appellant Elmer Dyer's post-conviction petition for a writ of habeas corpus and motion for the appointment of counsel.

On January 5, 2001, the district court convicted Dyer, pursuant to a guilty plea, of one count of battery constituting domestic violence (third offense), and one count of burglary while in possession of a firearm. The district court sentenced Dyer to serve terms totaling twenty years in the Nevada State Prison with the possibility of parole in four years. No direct appeal was taken.

On September 10, 2001, Dyer filed a proper person post-conviction petition for a writ of habeas corpus and motion for the appointment of counsel in the district court. The State opposed the petition and motion. Dyer filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Dyer or to conduct an evidentiary hearing. On December 14, 2001, the district court issued an order summarily denying Dyer's petition and motion. On January 8, 2002, the district court issued another order containing specific findings of fact and conclusions of law denying Dyer's petition.

On appeal, this court affirmed in part and reversed in part, and remanded the decision of the district court.¹ Specifically, this court reversed in part and remanded Dyer's appeal to the district court to conduct an evidentiary hearing on Dyer's allegation that his counsel was ineffective and improperly deprived him of a direct appeal. This court noted that the decision to appoint counsel to represent Dyer at the evidentiary hearing was within the discretion of the district court.

The district court declined to appoint counsel to represent Dyer.² On March 21, 2003, the district court conducted an evidentiary hearing with both Dyer, and his former counsel, James Buchanan, present. On April 7, 2003, the district court issued an order specifically denying Dyer's allegation that his counsel was ineffective and improperly deprived him of a direct appeal. This appeal followed.

A post-conviction habeas corpus petition based on a judgment of conviction entered pursuant to a guilty plea may only allege that the plea was entered without the effective assistance of counsel, or was entered unknowingly and involuntarily.³ To state a claim of ineffective assistance of counsel sufficient to invalidate a guilty plea, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness.⁴ A petitioner must further show "a

¹Dyer v. State, Docket No. 39026 (Order Affirming In Part, Reversing In Part And Remanding, December 12, 2002).

²We conclude that the district court did not abuse its discretion in denying Dyer's motion for the appointment of counsel.

³See NRS 34.810(1)(a).

⁴See Hill v. Lockhart, 474 U.S. 52, 57 (1985); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."⁵ Additionally, when a defendant is convicted pursuant to a guilty plea, counsel has no duty to inform the defendant about the right to file a direct appeal, unless the defendant inquires about an appeal or the defendant's case raises issues that would have a reasonable likelihood of success on appeal.⁶

Our review of the evidentiary hearing reveals that Dyer testified that he discussed the possibility of filing a direct appeal from his judgment of conviction with his former counsel, Buchanan. Yet, Dyer also testified that Buchanan was privately retained, and that he never made arrangements to pay Buchanan to file an appeal. Dyer testified further that Buchanan never said that he would file an appeal on Dyer's behalf. Rather, Dyer indicated in his testimony that he assumed that Buchanan would file the appeal.

Buchanan, however, testified that he did not recall ever discussing the possibility of filing a direct appeal with Dyer. Buchanan also testified that he would have filed an appeal on Dyer's behalf if Dyer had requested him to file an appeal, regardless of whether Dyer was able to pay him. Buchanan testified further that he did not recall that Dyer's case presented any appealable issues.

In its order denying Dyer's petition, the district court found that Buchanan "did not file a notice of appeal on behalf of the Defendant,

⁵Kirksey, 112 Nev. at 988, 923 P.2d at 1107 (quoting Hill, 474 U.S. at 59).

⁶See Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999); Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999).

and does not believe he was asked to do so." The district court also found that Buchanan would have filed "a notice of appeal if he was requested to do so," regardless of whether he planned to undertake pursuit of the appeal. The district court concluded that Dyer "was not denied his right of a direct appeal." Although much of the testimony of Dyer contradicted that of Buchanan, it appears that the district court found Buchanan to be the more credible witness. The factual findings of the district court were supported by the record and not clearly wrong.⁷ Thus, the district court's factual findings will not be disturbed by this court on appeal.⁸ Therefore, we conclude that the district court properly concluded that Dyer was not entitled to relief on this allegation.

We note that in this court's order remanding Dyer's petition in part for an evidentiary hearing, this court reserved reviewing two allegations in Dyer's petition pending the district court's findings after the evidentiary hearing. Given that the district court found that Dyer was not improperly deprived of a direct appeal, we will now reach the merits of the district court's denial of these remaining two allegations.

In his petition, Dyer contended that his criminal complaint and information were defective because they violated various constitutional provisions and, therefore, the charges against him were illegal. Dyer also contended that his conviction was illegal because it constituted cruel and unusual punishment. Dyer's allegations, however, fell outside the permissible scope of issues that may be raised in a post-

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

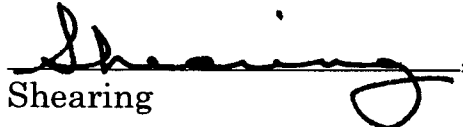
⁸See id.

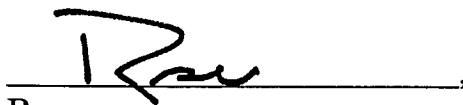
conviction petition for a writ of habeas corpus based on a judgment of conviction entered pursuant to a guilty plea.⁹

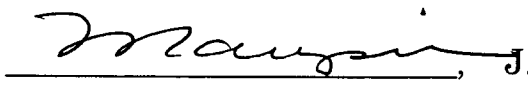
Even if these allegations were properly raised in his petition, Dyer failed to support these allegations with any specific facts showing that he was entitled to relief.¹⁰ For example, Dyer failed to offer any detailed explanation in his petition as to why his criminal complaint and information were defective, or how his conviction constituted cruel and unusual punishment. Therefore, we conclude that the district court properly denied these allegations in Dyer's petition.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Dyer is not entitled to relief and that briefing and oral argument are unwarranted.¹¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹²


Shearing, C.J.


Rose, J.


Maupin, J.

⁹See NRS 34.810(1)(a).

¹⁰See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

¹¹See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹²We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

cc: Hon. Jackie Glass, District Judge
Elmer Winifred Dyer
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk