

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 41693

FILED

APR 08 2004

ORDER OF AFFIRMANCE

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

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

On August 17, 2001, the district court convicted appellant, pursuant to a guilty plea, of one count of first degree murder. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after twenty years had been served. This court dismissed appellant's untimely appeal from his judgment of conviction for lack of jurisdiction.¹

On February 15, 2002, appellant filed a post-conviction petition for a writ of habeas corpus. In his petition, appellant claimed that he had been deprived of a direct appeal due to the ineffective assistance of counsel and that the district court improperly denied appellant's presentence motion to withdraw a guilty plea.² The State opposed the

¹Webber v. State, Docket No. 38534 (Order Dismissing Appeal, November 5, 2001).

²In his presentence motion to withdraw a guilty plea, appellant claimed: (1) he was rushed into making a decision to plead guilty; (2) he did not intelligently enter his plea because his reading and comprehension

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petition. The district court denied the petition. On appeal, this court concluded that appellant was deprived of a direct appeal due to ineffective assistance of counsel. This court treated appellant's habeas corpus petition as a Lozada³ petition because he filed the petition with the assistance of counsel and because he raised a direct appeal issue—whether the district court erred in denying appellant's presentence motion to withdraw a guilty plea. This court concluded that the totality of the circumstances supported the district court's determination that appellant's guilty plea was voluntarily and knowingly entered. Thus, this court affirmed the order of the district court.⁴ The remittitur issued December 3, 2002.

On March 20, 2003, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent

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skills are deficient; (3) he did not fully understand the consequences of the plea, including the waiver of his rights; and (4) he believed that if he went to trial that he stood a good chance of being convicted of manslaughter and not first degree murder. During the sentencing hearing, appellant elaborated that he felt that he did not have enough time with his trial counsel to discuss the plea agreement, that he did not know the consequences of his plea when he signed the plea agreement, and that he did not understand that he would have to serve a minimum of twenty years.

³Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994).

⁴Webber v. State, Docket No. 39624 (Order of Affirmance, November 5, 2002).

appellant or to conduct an evidentiary hearing. On June 17, 2003, the district court denied appellant's petition. This appeal followed.

The district court concluded that appellant's petition was untimely filed and successive.⁵ However, this conclusion was in error. To remedy the loss of his direct appeal, appellant's Lozada petition was the substitute for appellant's direct appeal. Thus, the remittitur issued by this court from the appeal involving the Lozada petition controls for the purposes of determining the timeliness of the petition.⁶ Appellant's March 20, 2003 habeas corpus petition was timely because it was filed within a year of the remittitur from the appeal involving the Lozada petition. Further, because the Lozada petition was the substitute for appellant's direct appeal, the successive procedural bar is similarly inapplicable under in the instant case.⁷

⁵See NRS 34.726(1); NRS 34.810(2).

⁶See NRS 34.726(1); see generally Dickerson v. State, 114 Nev. 1084, 967 P.2d 1132 (1998).

⁷Appellant's first petition did nothing more than raise his appeal deprivation claim and set forth the direct appeal claim that he would have raised. Because this petition was construed to be the Lozada petition, the substitute for the direct appeal, the second petition was not subject to the successive procedural bar. See, e.g., In re Olabode, 325 F.3d 166 (3d Cir. 2003) (holding that a motion is not successive when the first motion merely sought reinstatement of the right to a direct appeal); In re Goddard, 170 F.3d 435 (4th Cir. 1999) (holding that when a motion is granted to reenter a judgment to permit a delayed direct appeal a subsequent motion is not successive); Shepeck v. United States, 150 F.3d 800 (7th Cir. 1998) (holding that granting a petition to resentence a prisoner resets the counter of collateral attacks to zero); United States v. Scott, 124 F.3d 1328 (10th Cir. 1997) (holding that when the granting of a prior motion merely reinstated the right to a direct appeal, the first subsequent motion is not a successive motion).

In his petition, appellant raised a number of claims challenging the adequacy of the Lozada remedy.⁸ The Lozada remedy was the remedy sought by appellant in his first petition. Appellant cannot now be heard to complain that he received the remedy that he sought. Thus, we conclude that appellant cannot demonstrate that he is entitled to any relief on the basis of this claim.

Next, appellant claimed that his trial counsel was ineffective during the plea process. Appellant claimed: (1) his trial counsel was ineffective for advising him to plead guilty without properly litigating the manslaughter issue; (2) his trial counsel failed to make the district court aware of appellant's mental slowness and learning disability; (3) his trial counsel gave him false information about the minimum amount of time that he would have to serve in prison; (4) his trial counsel failed to explain the consequences of his plea and the constitutional rights that he gave up; (5) his trial counsel failed to review the plea agreement with appellant before it was signed; and (6) his trial counsel failed to spend enough time with appellant. 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 his counsel's performance fell below an objective standard of reasonableness. Further, a petitioner must demonstrate a reasonable probability that, but for counsel's errors,

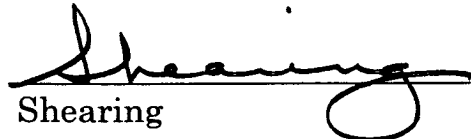
⁸Appellant also claimed that his trial counsel was ineffective for failing to file a direct appeal. This court considered this claim in the first post-conviction proceeding. This claim was determined to have merit and appellant was provided a remedy. Appellant may not relitigate this claim. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

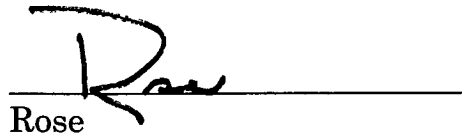
petitioner would not have pleaded guilty and would have insisted on going to trial.⁹


The underlying issues raised in appellant's claims are essentially identical to those raised in appellant's presentence motion to withdraw a guilty plea. This court considered and rejected these issues on the merits in the proceedings on the Lozada petition. Consequently, appellant cannot demonstrate that he was prejudiced by trial counsel's allegedly deficient performance as none of the underlying claims rendered appellant's guilty plea unknowingly or involuntarily entered. Thus, we conclude that appellant cannot demonstrate that his trial counsel was ineffective in this regard.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.¹⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Shearing C.J.


Rose J.


Maupin J.

⁹See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

¹⁰See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Joseph T. Bonaventure, District Judge
Jason Darryl Webber
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk