

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES ALEX A/K/A CHARLES
EDWARD ALEX, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41977

FILED

AUG 23 2004

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

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. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On June 10, 2002, the district court convicted appellant, pursuant to a guilty plea, of two counts of larceny from the person and one count of larceny from the person of a victim over the age of sixty-five. The district court sentenced appellant to serve four consecutive terms of nineteen to forty-eight months in the Nevada State Prison. No direct appeal was taken.

On May 19, 2003, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On August 21, 2003, the district court denied appellant's petition. This appeal followed.

Appellant claimed that he received ineffective assistance of trial counsel and that the deficient assistance rendered his guilty plea

involuntary. A guilty plea is presumptively valid and it is the petitioner's burden to demonstrate that the plea was not entered knowingly and voluntarily.¹ 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, petitioner would not have pleaded guilty and would have insisted on going to trial.² The court need not consider both prongs if the petitioner makes an insufficient showing on either prong.³

First, appellant claimed that his trial counsel failed to conduct a proper and thorough investigation. Appellant claimed that his trial counsel only visited him once. Appellant further claimed that his trial counsel viewed a surveillance tape and that trial counsel told appellant that the surveillance tape showed that appellant was not engaging in criminal conduct. Appellant claimed that his trial counsel was aware that the victim's description of the suspect's height did not match his height. Appellant claimed that his trial counsel should not have advised appellant to enter a guilty plea under these facts.

We conclude that the district court did not err in determining that this claim lacked merit. Appellant failed to demonstrate that there is a reasonable probability that he would have gone to trial absent trial

¹Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

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

³Strickland v. Washington, 466 U.S. 668, 697 (1984).

counsel's failure to more thoroughly investigate. Appellant failed to indicate what exculpatory evidence a more thorough investigation would have uncovered. Appellant was originally charged with a number of offenses relating to pick pocketing crimes, including the crime of conspiracy. The record does not support appellant's claim that he was not shown on the surveillance tape at the Imperial Palace. Specifically, in response to a defense motion to release property, the State indicated that appellant was shown on the surveillance tape from the Imperial Palace removing the victim's wallet from her purse. Even assuming that the surveillance tape would not show appellant engaging in the pick pocketing crime at the Imperial Palace, the record indicates that the surveillance tape shows the suspects for the pick pocketing crime committed near the elevator walking to a car rented under appellant's name. The record indicates that appellant's co-defendant informed the police that appellant was the leader of the pick pocketing group and that appellant was the individual who lifted the victim's wallet at the Imperial Palace Casino. Appellant further failed to indicate how the lack of the videotape in the crime relating to Imperial Palace implicated the other criminal cases and charges. Trial counsel's candid advice about the strengths and weaknesses of the defense theory is not ineffective assistance of counsel. Therefore, we conclude that appellant failed to demonstrate that his trial counsel's performance was constitutionally deficient.

Second, appellant claimed that his trial counsel was ineffective for failing to file a motion to dismiss the charges based on the surveillance videotape and the inconsistencies in the suspect description. Appellant failed to demonstrate that a motion to dismiss the charges had a reasonable likelihood of success for the reasons discussed above.

Therefore, we conclude that appellant failed to demonstrate that his trial counsel's performance was constitutionally deficient.

Third, appellant claimed that his trial counsel failed to secure a more beneficial plea bargain for appellant. Appellant claimed that if he had been convicted after a trial of the three original charges in district court case number C183145 and adjudicated a habitual criminal that his maximum sentence would have only been eight to twenty years.⁴ Because he believed that this sentence was roughly equivalent to the sentence that he did receive, appellant claimed that there was no benefit to his plea bargain.

We conclude that the district court did not err in determining that this claim lacked merit. The premise behind appellant's claim is faulty—appellant faced more time than eight to twenty years if convicted after a trial and adjudicated a habitual criminal.⁵ Appellant's guilty plea was a plea package involving two additional district court cases. In exchange for his guilty plea in district court case number C183145, the district court dismissed the additional cases, the State agreed not to seek habitual criminal treatment, and the State agreed that there would be no additional charges sought. Thus, appellant's conclusion that he only faced

⁴Appellant was originally charged with burglary, larceny from the person and conspiracy to commit larceny in district court case number C183145.

⁵One of the fundamental flaws in appellant's logic is that he only faced one sentence if adjudicated a habitual criminal in district court case number C183145. However, each of the three offenses in district court case number C183145 would have been eligible for habitual criminal treatment. See NRS 207.010.

a potential trial on three offenses is in error.⁶ Because appellant faced a harsher penalty if he had gone to trial on all of the charges pending against him at the time, and charges that could have been added, appellant failed to demonstrate that there is a reasonable probability that he would have insisted on going to trial. Therefore, we conclude that appellant failed to demonstrate that his trial counsel's performance was constitutionally deficient.

Fourth, appellant claimed that his trial counsel was ineffective for informing him that he would receive one to five year terms and that all of the terms would run concurrently with the exception of the elder victim enhancement.

We conclude that the district court did not err in determining that this claim lacked merit. The written guilty plea agreement correctly informed appellant of the potential penalty for each offense. Appellant was informed in the written guilty plea agreement that the deadly weapon enhancement would result in an equal and consecutive term. Appellant was further informed that the sentences for his offenses could be imposed to run concurrently or consecutively and that the decision of whether the sentences were to run concurrently or consecutively was within the district court's discretion. Further, appellant acknowledged in the written guilty plea agreement that he was not promised a particular sentence. During the plea canvass, appellant affirmatively indicated that he had signed, read and understood the plea agreement. Appellant's mere subjective belief as to a potential sentence is insufficient to invalidate his

⁶It appears from the record that appellant faced four additional burglary and larceny from the person counts, as well as three additional conspiracy to commit larceny counts.

guilty plea as involuntary and unknowing.⁷ Therefore, we conclude that appellant failed to demonstrate that his trial counsel's performance was constitutionally deficient.

Fifth, appellant claimed that his trial counsel coerced his guilty plea. Appellant claimed that his trial counsel "bulldogged" him into waiving the preliminary hearing and accepting the State's plea offer despite the fact that trial counsel knew that appellant had not participated in the crimes. Appellant claimed that his trial counsel told him that he faced forty years if he went to trial. He further claimed that he felt like he had a loaded gun pointed at his head when trial counsel told him there was nothing to do to defend against the State's case. Finally, he claimed that he was forced to sign the plea agreement in open court without thoroughly reading the plea agreement and that his answers during the plea canvass were coached.

We conclude that the district court did not err in denying this claim. Trial counsel's candid assessment of the strengths and weaknesses of the case does not amount to coercion. Appellant further failed to demonstrate a reasonable probability that he would not have entered a guilty plea absent an opportunity to more thoroughly read the plea agreement. Appellant answered all of the questions during the plea canvass appropriately and there is nothing in the record to indicate that appellant's will was overborne or that he was forced into entering a guilty plea. As discussed earlier, appellant received a substantial benefit by entry of his guilty plea. Therefore, we conclude that appellant failed to

⁷See Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975).

demonstrate that his trial counsel's performance was constitutionally deficient.

Sixth, appellant claimed that his trial counsel was ineffective for failing to file a motion to withdraw the guilty plea. Appellant claimed that after sentencing he informed trial counsel's office that he wanted to withdraw his plea.

We conclude that the district court did not err in denying this claim. Appellant's trial counsel was not obligated to file a post-sentence motion to withdraw a guilty plea on appellant's behalf. Therefore, we conclude that appellant failed to demonstrate that trial counsel's performance was constitutionally deficient.

Finally, appellant claimed that his trial counsel was ineffective for failing to file an appeal on his behalf after appellant requested his counsel to file an appeal.⁸

It appeared from this court's preliminary review of the record on appeal that the district court may have erroneously denied the petition without holding an evidentiary hearing on this claim. Appellant was entitled to an evidentiary hearing if he raised claims that, if true, would have entitled him to relief and if his claims were not belied by the record.⁹ This court has held that if a criminal defendant expresses a desire to appeal, counsel is obligated to file a notice of appeal on defendant's

⁸Appellant asserted that he made the request after another inmate informed him of his right to appeal.

⁹See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

behalf.¹⁰ Prejudice is presumed where a defendant expresses a desire to appeal and counsel fails to file an appeal.¹¹ The record does not belie appellant's claim regarding his appeal deprivation claim. Thus, this court ordered the State to show cause why this matter should not be remanded for an evidentiary hearing on appellant's appeal deprivation claim. The State responded that it does not oppose an evidentiary hearing limited to the issue of appellant's appeal deprivation claim.

Accordingly, we reverse the district court's order, in part, and remand this matter to the district court to conduct an evidentiary hearing on the sole issue of whether appellant's trial counsel failed to file a notice of appeal after appellant requested that he do so. The district court may exercise its discretion as to whether to appoint post-conviction counsel to assist appellant at the evidentiary hearing.¹² If the district court determines that appellant was deprived of a direct appeal without his consent, the district court shall appoint counsel to represent appellant and shall permit appellant an opportunity to file a petition for a writ of habeas corpus raising issues appropriate for direct appeal.¹³

Having reviewed the record on appeal and for the reasons set forth above, we affirm the district court's order in part, and we reverse the

¹⁰Thomas v. State, 115 Nev. 148, 151, 979 P.2d 222, 224 (1999); Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999).

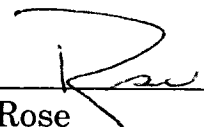
¹¹Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003).


¹²See NRS 34.750.

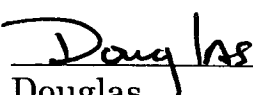
¹³See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

district court's order in part. Oral argument and further briefing are unwarranted in this matter.¹⁴ Accordingly, 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.¹⁵


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

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

¹⁴See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁵We have considered all proper person documents filed or received in this matter, and we conclude that appellant is only entitled to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.