

IN THE SUPREME COURT OF THE STATE OF NEVADA

BYRON ELROY CRUTCHER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42355

FILED

SEP 20 2005

ORDER OF AFFIRMANCE

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

This is an appeal from an order of the district court denying appellant Byron Crutcher's post-conviction petition for a writ of habeas corpus filed pursuant to Lozada v. State.¹ Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.

On January 23, 1997, the district court convicted Crutcher, pursuant to a guilty plea, of robbery of a victim sixty-five years of age or older. The district court adjudicated Crutcher a habitual criminal and sentenced him to serve a term of life in the Nevada State Prison with the possibility of parole after ten years. Crutcher filed an untimely appeal, which this court dismissed for lack of jurisdiction.² Crutcher then filed a proper person post-conviction petition for a writ of habeas corpus in the district court. He claimed that he had been deprived of a direct appeal without his consent. The district court denied Crutcher's petition. On appeal, this court concluded that Crutcher was deprived of his right to a direct appeal, reversed the district court's order and remanded, directing

¹110 Nev. 349, 871 P.2d 944 (1994).

²Crutcher v. State, Docket No. 30361 (Order Dismissing Appeal, May 27, 1997).

the district court to appoint counsel to represent and assist Crutcher in filing a petition for a writ of habeas corpus raising any issues that Crutcher could have raised on direct appeal pursuant to Lozada.³ Crutcher's counsel filed a supplemental brief in support of Crutcher's petition for a writ of habeas corpus on May 1, 2003. The district court conducted an evidentiary hearing and, on October 30, 2003, denied Crutcher's petition. This appeal followed.

Crutcher challenges the Lozada remedy and claims that it violates state law and is inadequate. First, Crutcher claims that the Lozada remedy violates state law because a petitioner challenging a guilty plea may only raise claims challenging the effective assistance of counsel or whether the plea was voluntarily entered.⁴ Lozada provides a remedy for an unconstitutional deprivation of the right to appeal and, therefore it is not limited to issues challenging the effective assistance of counsel or the voluntarily and knowing nature of the plea.⁵ Lozada permits a petitioner who has been deprived of the right to appeal to raise, with the assistance of counsel, any issues that could have been asserted in a direct appeal. Accordingly, we conclude that this claim lacks merit.

³See Lozada, 110 Nev. at 359, 871 P.2d at 950.

⁴See NRS 34.720 to NRS 34.830, inclusive.

⁵See NRS 34.722 ("As used in NRS 34.720 to NRS 34.830, inclusive, unless the context otherwise requires, 'petition' means a postconviction petition for habeas corpus filed pursuant to NRS 34.724."); NRS 34.724(2)(a) (a post-conviction habeas petition "is not a substitute for and does not affect any remedies which are incident to the proceedings in the trial court or the remedy of direct review of the sentence of conviction").

Second, Crutcher claims that the Lozada remedy violates state law because habeas corpus cannot substitute for a direct appeal. Although this court has held that a writ of habeas corpus cannot be used to perform the functions of an appeal,⁶ those rulings did not involve a post-conviction petition for habeas corpus alleging the unconstitutional deprivation of the right to appeal. In each of the cases where this court held that habeas corpus cannot perform the function of an appeal, the petitioner had an opportunity to appeal and had exhausted the right to appeal. The Lozada remedy is distinguishable from these cases because it addresses the deprivation of a direct appeal and is designed as a substitute for a direct appeal. Further, "habeas corpus relief is available 'to allow the presentation of questions of law that cannot otherwise be reviewed, or that are so important as to render ordinary procedure inadequate and justify the extraordinary remedy.'"⁷ Because jurisdictional limitations prevent this court from entertaining an untimely appeal,⁸ this court concluded in Lozada that when a defendant is denied his right to an appeal, a habeas petition is the proper procedure for raising direct appeal issues that would

⁶See Ex Parte Foquette, 68 Nev. 362, 233 P.2d 859 (1951); Ex Parte Sheply, 66 Nev. 33, 202 P.2d 882 (1949); Ex Parte McKay, 63 Nev. 262, 168 P.2d 315 (1946); Ex Parte Ohl, 59 Nev. 309, 92 P.2d 976 (1939).

⁷Director, Dep't Prisons v. Arndt, 98 Nev. 84, 85, 640 P.2d 1318, 1319 (1982) (quoting State ex rel. Orsborn v. Fogliani, 82 Nev. 300, 302, 417 P.2d 148, 149 (1966)).

⁸Lozada, 110 Nev. at 352, 871 P.2d at 946; see also NRAP 4(b); NRAP 26(b).

not otherwise be reviewed.⁹ Accordingly, we conclude that this claim lacks merit.

Third, Crutcher claims that the Lozada remedy is inadequate because it does not have the finality of a direct appeal. Crutcher argues that the State may appeal to this court from a grant of relief by the district court, and he would then be forced to "stew" in prison until the appeal was decided. We reject this contention.

Although the State may appeal from an order granting relief¹⁰ and the remedy entails some additional delay in obtaining this court's final review of direct appeal claims, we conclude that the prejudice to the petitioner is minimal in light of the unconstitutional deprivation of rights the remedy is designed to address. Moreover, NRS 178.4873 permits a petitioner's release on bail pending appeal if the State appeals an order granting relief.

Fourth, Crutcher claims that the Lozada remedy is inadequate because it does not require counsel who assists a petitioner in raising direct appeal claims to provide effective assistance of counsel. Crutcher is incorrect. The Lozada remedy requires the appointment of counsel to assist a petitioner in raising direct appeal issues.¹¹ Because Crutcher is

⁹See Evitts v. Lucey, 469 U.S. 387, 399 (1985) (expressing approval of a state court's use of a "post-conviction attack on the trial judgment as 'the appropriate remedy for frustrated right of appeal'" (quoting Hammershoy v. Commonwealth, 398 S.W.2d 883 (Ky. 1966))).

¹⁰See NRS 34.575(2).

¹¹Lozada, 110 Nev. at 359, 871 P.2d at 950.

entitled to the appointment of counsel, he is entitled to the effective assistance of counsel.¹²

Fifth, Crutcher claims that the Lozada remedy is inadequate because it deprives the petitioner of one of his appellate remedies. Specifically, Crutcher argues that the remedy merges his direct appeal and statutory post-conviction petition rights.

In Nevada, a petitioner who has a valid appeal deprivation claim may file a post-conviction habeas corpus petition raising that claim and any other claims that are appropriate in such a petition, such as ineffective assistance of counsel claims and claims asserting an involuntary and unknowing plea. If the petitioner demonstrates that he was deprived of a direct appeal, under Lozada the district court must appoint counsel to assist the petitioner in raising all direct appeal claims. The district court must then resolve all of the direct appeal claims, as well as any other post-conviction claims. Upon the district court's final decision resolving all post-conviction and direct appeal claims, if aggrieved, the petitioner may appeal the district court's final decision to this court. Any claims alleging the ineffective assistance of counsel during the prosecution and resolution of the direct appeal issues in either the district court, or this court, may then be raised in a subsequent post-conviction petition. Upon the demonstration of good cause and actual prejudice, a petitioner could also be permitted to raise post-conviction claims that were not raised in the first post-conviction habeas corpus

¹²See Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997); McKague v. Warden, 112 Nev. 159, 165 n.5, 912 P.2d 255, 258 n.5 (1996).

petition.¹³ Because this procedure permits a petitioner to raise all direct appeal claims, as well as all post-conviction claims, we conclude that it does not deprive the petitioner of any remedies, but instead provides an appropriate remedy for the resolution of direct appeal claims that would not otherwise be reviewable. Accordingly, we reject this contention.

Crutcher also raises several claims relating to his preliminary hearing. Crutcher claims that he was denied his constitutional right to counsel at his preliminary hearing, he did not knowingly and intelligently waive his right to counsel at his preliminary hearing, and his Faretta¹⁴ canvass was faulty for failing to assure that he understood all of the elements of the crime of robbery. By pleading guilty, Crutcher waived all errors, including the deprivation of constitutional rights that occurred prior to entry of his guilty plea.¹⁵

Crutcher's claims in this respect are also without merit. "A defendant has the constitutional right to refuse the service of counsel, so long as he does so knowingly and intelligently. Denial of that right is per se harmful."¹⁶ Although the judge has discretion to deny an untimely motion for self-representation, the district court should accommodate such a request when it can be done without undue delay or disruption.¹⁷ Further, "[w]hile Faretta requires that the accused understand the

¹³See NRS 34.810(3).

¹⁴Faretta v. California, 422 U.S. 806 (1975).

¹⁵Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975).

¹⁶Harris v. State, 113 Nev. 799, 803, 942 P.2d 151, 154 (1997) (citations omitted).

¹⁷See Lyons v. State, 106 Nev. 438, 446, 796 P.2d 210, 215 (1990).

dangers and disadvantages of self-representation, it does not require the trial court to explain the elements of the charged offense or possible defenses."¹⁸ "The exercise of the right to self-representation necessarily requires a waiver of the accused's right to the assistance of counsel."¹⁹

The record reveals that the justice court conducted an extensive and proper Faretta canvass. Crutcher demonstrated that he was aware of the charges and penalty he was facing and the risks attendant to self-representation. The record discloses that his waiver of the right to counsel was knowing and intelligent and the justice court did not err in granting Crutcher's motion for self-representation.

Crutcher also claims that he was not properly adjudicated a habitual criminal because the State failed to file certified copies of his prior convictions and the amended information with the district court. This claim lacks merit.

Pursuant to NRS 207.016(1), if a count for habitual criminal status is included in an information charging the primary offense, each previous conviction must be alleged in the accusatory pleading. On October 8, 1996, an amended information was filed in the district court that contained a count seeking habitual criminal adjudication and alleged each of Crutcher's prior convictions.

NRS 207.016 also requires the State to produce and the district court to review the evidence of a prior conviction prior to the imposition of sentence. The record reveals that the State filed certified

¹⁸Arajakis v. State, 108 Nev. 976, 980, 843 P.2d 800, 802 (1992); see also Graves v. State, 112 Nev. 118, 125, 912 P.2d 234, 238 (1996).

¹⁹Wayne v. State, 100 Nev. 582, 584, 691 P.2d 414, 415 (1984).

copies of Crutcher's prior convictions with the district court during the plea canvass and had them marked as Exhibit 1. The record further reveals that although the certified copies of the prior convictions were inadvertently left in the evidence vault during the sentencing hearing, the judge reviewed the certified copies at the plea canvass, both the State and Crutcher's counsel had uncertified copies of the prior convictions with them at the sentencing hearing and the judge had access to them. Finally, Crutcher's counsel informed the judge that she did not have any objection to the prior convictions. Accordingly, we conclude that Crutcher was properly adjudicated a habitual criminal.

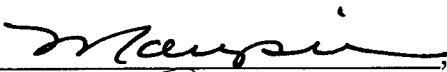
To the extent that Crutcher claims that his habitual criminal adjudication was improper because the district court did not address his objection to the prior convictions, this claim also lacks merit. At the sentencing hearing, Crutcher made the following objection to his prior convictions: "from looking at the prior conviction myself, I don't think they are constitutionally valid to view habitual criminal proceedings." Crutcher did not deny his prior convictions, rather he stated a non-specific, general challenge to the constitutional validity of the prior convictions. Pursuant to NRS 207.016(5), a certified copy of a prior felony conviction is prima facie evidence of the prior conviction. The State filed and the district court reviewed certified copies of Crutcher's prior convictions at the plea canvass, and Crutcher did not present any persuasive, specific argument attacking the prima facie validity of the convictions. Under these circumstances, the district court did not err by not addressing his objection to his prior convictions.

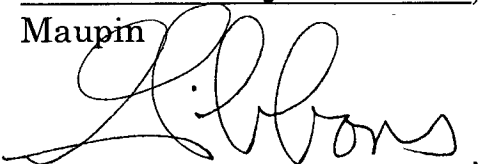
Finally, Crutcher claims that the denial of his right to a direct appeal conclusively proves ineffective assistance of counsel and requires

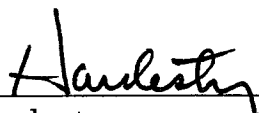
the reversal of his conviction. This court has already addressed this argument and provided Crutcher with the remedy of filing a Lozada petition. It is the denial of that petition that is currently on appeal. Crutcher is barred by the doctrine of the law of the case from again raising this issue.²⁰

Having considered Crutcher's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Maupin


_____, J.
Gibbons


_____, J.
Hardesty

cc: Hon. Nancy M. Saitta, District Judge
Goodman Brown & Premsrirut
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

²⁰See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).