

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT BROME JENNINGS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42790

FILED

NOV 24 2004

ORDER OF AFFIRMANCE

JANEITE M. BLOOM
CLERK OF SUPREME COURT
BY *R. Richards*
CHIEF DEPUTY CLERK

This is an appeal from an order of the district court denying in part and granting in part appellant Robert Jennings' post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On August 7, 1997, the district court convicted Jennings, pursuant to a guilty plea, of one count of first-degree kidnapping with the use of a deadly weapon (count I), and two counts of sexual assault on a minor under fourteen (counts II and III). The district court sentenced Jennings to serve two terms of life in the Nevada State Prison with the possibility of parole after five years for count I, and terms of life with the possibility of parole after ten years for counts II and III. All sentences were imposed to run consecutively.¹ Jennings did not file a direct appeal.

On July 24, 1998, Jennings filed a proper person post-conviction petition for a writ of habeas corpus in the district court, in which he raised several claims concerning his competence to enter a guilty plea. Jennings also noted that he was not aware of his right to file a direct

¹An amended judgment of conviction was entered on March 18, 2004.

appeal. The State opposed the petition. On September 25, 1998, the district court denied Jennings' petition. On appeal, this court affirmed the order of the district court.²

On December 11, 2002, Jennings, with the assistance of counsel, filed a post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss, arguing that Jennings' petition was untimely and successive. The district court concluded that Jennings provided good cause to excuse his procedural defects and subsequently conducted an evidentiary hearing. On February 10, 2004, the district court granted Jennings' request for a new sentencing hearing due to the ineffective assistance of counsel,³ but denied the remainder of his petition. This appeal followed.

Jennings raises the following five claims on appeal: (1) the district court erred in failing to conduct a competency hearing; (2) his trial counsel was ineffective for allowing him to plead guilty prior to a competency hearing; (3) his trial counsel was ineffective for neglecting to discuss his right to a direct appeal and for failing to file a notice of appeal; (4) his trial counsel was ineffective for failing to develop a voluntary intoxication defense to his first-degree kidnapping charge; and (5) his due process rights were violated by the State's failure to comply with standard procedures in evaluating evidence.

²Jennings v. State, Docket No. 33117 (Order of Affirmance, February 2, 2001).

³A new sentencing hearing was conducted on March 15, 2004; the district court imposed an identical sentence.

Preliminarily, we note that Jennings filed the instant petition more than five years after entry of his judgment of conviction; thus, his petition was untimely filed.⁴ Moreover, his petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.⁵ Jennings' petition was procedurally barred absent a demonstration of good cause and prejudice.⁶ This court will not disturb the district court's discretion in determining the existence of good cause in the absence of a clear case of abuse.⁷

In an attempt to demonstrate good cause for filing a successive and untimely petition, Jennings argued in the district court that his first post-conviction petition was inappropriately denied. Specifically, Jennings contended that the district court erroneously allowed an expansion of the record with a psychiatrist's report, although an evidentiary hearing was never conducted.⁸ We conclude that the district court did not abuse its discretion in finding that Jennings demonstrated good cause to re-raise claims that were denied in his first habeas petition—that is, claims concerning his competency and his trial counsel's failure to inform him of his right to a direct appeal. However, Jennings failed to demonstrate how the improper disposition of the claims raised in his first habeas petition

⁴See NRS 34.726(1).

⁵See NRS 34.810(2).

⁶See NRS 34.726(1); NRS 34.810(3).

⁷Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).

⁸See Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002) (providing that expansion of the record is not permissible unless the district court orders an evidentiary hearing); NRS 34.790.

provided good cause to raise entirely unrelated claims in the instant petition.⁹ Jennings did not establish that he was unable to raise these claims in his first timely petition, and his new claims are therefore procedurally barred. Consequently, the district court abused its discretion in addressing the merits of Jennings' claim that his trial counsel was ineffective for failing to develop a voluntary intoxication defense, as well as Jennings' claim that his due process rights were violated by the State's failure to comply with standard procedures in evaluating evidence.

Because Jennings demonstrated good cause to excuse his procedural defects with respect to claims concerning his competency and his lack of a direct appeal, we will address the merits of those contentions. First, he argues that his trial counsel was ineffective for allowing him to plead guilty prior to a hearing on his competency. To state a claim of ineffective assistance of trial counsel sufficient to invalidate a guilty plea, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.¹⁰ A petitioner must further establish "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."¹¹ The court can dispose of a claim if the petitioner makes an insufficient showing

⁹See Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994) (providing that improper disposition of claim in a prior post-conviction petition constitutes good cause to raise the same claim in a successive petition).

¹⁰See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

¹¹Hill v. Lockhart, 474 U.S. 52, 59 (1985); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

on either prong.¹² The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.¹³

A defendant is competent to stand trial if he has sufficient ability to consult with his lawyer with a reasonable degree of understanding, and comprehends the proceedings against him.¹⁴ The record reveals that at the request of Jennings' trial counsel, the district court ordered an examination of Jennings by two psychiatrists in order to determine whether he was competent to stand trial.¹⁵ Only one psychiatrist examined Jennings, however, and a competency hearing was never conducted in the district court prior to the entry of Jennings' guilty plea.

We conclude that Jennings failed to demonstrate that his trial counsel was ineffective for allowing him to plead guilty prior to a hearing on his competency. Dr. Master, the psychiatrist who examined Jennings prior to the entry of his plea, concluded that he was competent to stand trial.¹⁶ Further, Dr. Schmidt, a psychologist who testified during the evidentiary hearing, stated that he did not disagree with Dr. Master's

¹²Strickland, 466 U.S. at 697.

¹³Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

¹⁴Melchor-Gloria v. State, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983); NRS 178.400(2).

¹⁵See NRS 178.415.

¹⁶The level of competency required to enter a guilty plea is the same as that required to stand trial. See Godinez v. Moran, 509 U.S. 389 (1993).

conclusion. Moreover, the record reveals that Jennings acted in an exceptionally rational and coherent manner during the proceedings against him. Therefore, Jennings did not demonstrate that his counsel acted unreasonably in permitting him to enter his guilty plea; nor did Jennings establish that he was prejudiced by his counsel's allegedly deficient performance, as he failed to demonstrate a reasonable probability that he would have been found incompetent if a hearing had been conducted. As such, the district court did not err in denying Jennings relief on this claim.

Jennings also argues that he was denied the right to a fair trial when the district court failed to conduct a competency hearing after appointing two psychiatrists to examine him. However, this claim is outside the scope of a post-conviction petition for a writ of habeas corpus when the conviction is the result of a guilty plea.¹⁷ Therefore, the district court did not err in denying this claim.

Lastly, Jennings claims that his trial counsel was ineffective for neglecting to discuss his right to a direct appeal and for failing to file a notice of appeal on his behalf. "[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.¹⁸ The burden is on the defendant to indicate to his attorney that he wishes to pursue an appeal.¹⁹ Jennings does not allege

¹⁷See NRS 34.810(1)(a).


¹⁸Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999).


¹⁹Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999).


that he asked his trial counsel to file an appeal on his behalf. Further, Jennings does not establish the existence of an issue that had a reasonable probability of success on appeal.²⁰ Therefore, Jennings failed to 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 Jennings is not entitled to relief and that briefing and oral argument are unwarranted.²¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. Lee A. Gates, District Judge
Federal Public Defender
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

²⁰To the extent that Jennings argues that an appeal of the district court's failure to conduct a competency hearing would have likely been successful, we reject this contention. See Bishop v. Warden, 94 Nev. 410, 411, 581 P.2d 4, 5 (1978) (providing that, "[t]he court need not follow NRS 178.415 to determine sanity in the absence of a reasonable doubt as to the defendant's competency").

²¹See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).