

IN THE SUPREME COURT OF THE STATE OF NEVADA

BARTLEY DAMIAN LEE,
Appellant,
vs.
DIRECTOR, NEVADA DEPARTMENT
OF CORRECTIONS AND THE STATE
OF NEVADA,
Respondents.

No. 52145

FILED

SEP 25 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Bartley Damian Lee's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

Procedural History

On December 16, 2005, the district court convicted Lee, pursuant to a guilty plea, of one count of attempted murder with the use of a deadly weapon. The district court sentenced Lee to serve two consecutive prison terms of 32 to 144 months.

On May 8, 2006, Lee filed a proper person post-conviction petition for a writ of habeas corpus in the district court. In his petition, Lee raised competency issues and claimed that he was deprived of an appeal. The district court appointed counsel to represent Lee and counsel filed a supplemental petition. Before the district court resolved the petition, the parties became aware of an inmate request form in which Lee had requested an appeal from his judgment of conviction. The parties stipulated that Lee's inmate request form was timely filed and Lee should

be allowed to proceed with a direct appeal, and Lee filed a direct appeal in this court pursuant to the parties' stipulation.

On August 8, 2007, we ordered Lee to provide us with a copy of the inmate request form that was the basis for the stipulation and to file a written response addressing whether the inmate request form was submitted to the district court or prison officials. Lee responded that the inmate request form was never submitted to the district court or delivered to prison officials. We concluded that Lee's notice of appeal was untimely and we ordered it dismissed for lack of jurisdiction. Lee v. State, Docket No. 49880 (Order Dismissing Appeal, November 16, 2007).

On January 23, 2008, the district court directed the parties to set a hearing on Lee's petition for a writ of habeas corpus. An evidentiary hearing followed, during which the district court heard testimony from Lee and his defense counsel and received Lee's inmate request form into evidence. The district court found that the competency and appeal deprivation claims raised in Lee's petition were without merit and that the invalid guilty plea claim presented orally during the hearing was belied by the record. This appeal followed.

Notice of Appeal

Lee contends that the district court erred as a matter of law by concluding that the issue of whether his notice of appeal was timely filed had already been decided by this court.

The doctrine of the law of the case provides that "[t]he law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quotation marks and citation omitted). We have held that this doctrine "cannot be avoided by a more detailed and precisely

focused argument subsequently made after reflection upon the previous proceedings.” Id. at 316, 535 P.2d at 799.

During the pendency of Lee’s direct appeal, we concluded that the inmate request form that constituted Lee’s notice of appeal was untimely filed. See Lee v. State, Docket No. 49880 (Order Dismissing Appeal, November 16, 2007), at 2-3. Because our conclusion constitutes the law of the case, the district court did not err in determining that this issue had already been decided.

Validity of Guilty Plea

Lee contends that the district court erred by concluding that the issue of whether his guilty plea was validly entered was not properly raised on post-conviction. Lee asserts that he “raised the issue of his competence to enter a guilty plea in a petition that was timely filed in the correct court.”¹

The district court found that “Lee also orally raised a claim that his plea was not knowing and voluntary. This issue was not raised in the Petition. However, the claim that the plea was not voluntary is belied by the record, including the transcripts and the Plea Agreement.” It is evident from this finding that the district court considered Lee’s issue on the merits and determined that it was belied by the record.

Our review of the record on appeal reveals that the district court’s finding is supported by substantial evidence and is not clearly

¹In his proper person petition, Lee claimed: “14th, 8th & 6th Amendments USCA violated where serious doubt of competency was before the court and required competency process also dictated by NRS 178.405 which rises to 14 Amendment level, punishing incompetent persons as does NRS 178.400, due process also violated.”

wrong. We further note that defense counsel testified that both he and the public defender initially assigned to the case considered Lee's competency and determined that he understood what was happening with regard to the guilty plea agreement and the sentencing proceeding. And we conclude from these circumstances that Lee has not demonstrated that the district court erred.

Appeal Deprivation

Lee contends that the district court abused its discretion by concluding that he was not deprived of his right to an appeal. Lee claims that he advised defense counsel that he wanted to appeal his sentence and conviction and defense counsel failed to perfect an appeal.

A claim that counsel failed to perfect an appeal is a claim of ineffective assistance of counsel. "[A]n attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction." Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994). When an attorney does not fulfill this duty, he provides ineffective assistance that prejudices his client by depriving him of the right to an appeal. Id. at 354-57, 871 P.2d at 947-49; see also Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003) (prejudice is presumed if a petitioner demonstrates that counsel ignored his request for an appeal).

Here, after receiving the evidence submitted at the hearing, the district court found that the alleged failure to appeal was without merit. We note that defense counsel testified that Lee did not ask him to file a direct appeal on the day they were in court and Lee did not ask him to file a direct appeal in the letter he sent after sentencing. Further, Lee testified that he did not "make clear in no uncertain terms that [he]

wished [defense counsel] would pursue an appeal” and that is why he filed the inmate request form seeking an appeal. We conclude that the district court’s finding is supported by substantial evidence and that Lee has failed to demonstrate that the district court abused its discretion in this regard.

Evidentiary Hearing

Lee contends that the district court abused its discretion by denying his petition without conducting an evidentiary hearing on all of the issues that he raised in his petition.

“A post-conviction habeas petitioner is entitled to an evidentiary hearing only if he supports his claims with specific factual allegations that if true would entitle him to relief. However, if the record belies the petitioner’s factual allegations, the petitioner is not entitled to an evidentiary hearing.” Means v. State, 120 Nev. 1001, 1016, 103 P.3d 25, 35 (2004) (internal quotation marks and footnotes omitted).

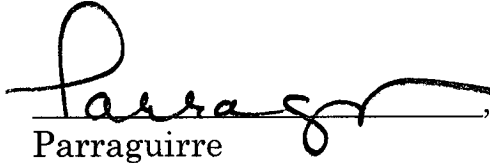
Here, the record on appeal clearly establishes that the district court conducted an evidentiary hearing on Lee’s habeas petition. Lee has not identified any issues that the district court refused to consider during the hearing and we conclude that this contention is without merit.

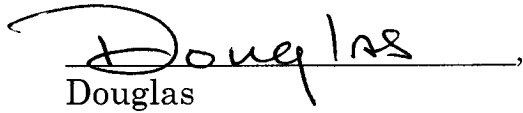
Lozada Remedy

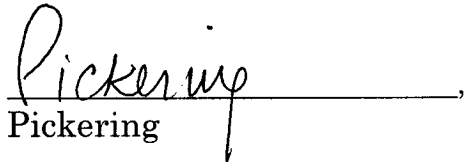
Lee contends that the Lozada remedy is inadequate. In Lozada v. State, we held the appropriate remedy for a defendant who was denied his right of appeal is to allow him the opportunity to raise his appellate issues in a petition for a writ of habeas corpus. 110 Nev. at 359, 871 P.2d at 950. Because Lee is not entitled to a Lozada remedy, we decline to address the remedy’s adequacy.

Having considered Lee's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Hon. Robert H. Perry, District Judge
Karla K. Butko
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk