

Scholarly Commons @ UNLV Boyd Law

Nevada Supreme Court Summaries

Law Journals

12-29-2011

Summary of Toston v. State, 127 Nev. Adv. Op. 87

Kendra Kisling
Nevada Law Journal

Follow this and additional works at: <https://scholars.law.unlv.edu/nvscs>



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Kisling, Kendra, "Summary of Toston v. State, 127 Nev. Adv. Op. 87" (2011). *Nevada Supreme Court Summaries*. 203.

<https://scholars.law.unlv.edu/nvscs/203>

This Case Summary is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

Toston v. Nevada, 127 Nev. Adv. Op. 87 (December 29, 2011)¹
CRIMINAL LAW AND PROCEDURE - WRIT OF HABEAS CORPUS

Summary

The Court considered an appeal of a district court order denying a writ of habeas corpus.

Disposition/Outcome

The Court reversed the district court's order that denied Toston's claim of ineffective assistance of counsel and remanded that portion of the petition to the district court to hold an evidentiary hearing. The Court affirmed all other aspects of the district court's order.

Factual & Procedural History

Anthony Toston "Toston" brought a petition for a writ of habeas corpus before the court alleging that his trial counsel provided ineffective assistance at trial and that counsel provided misinformation regarding Toston's right to appeal his criminal sentence.

In the underlying criminal case, Toston pled guilty to first-degree kidnapping and robbery. Toston's counsel reached a plea agreement where Toston pled guilty in exchange for a five to fifteen year sentence for kidnapping and a consecutive two to five year sentence for robbery. The parties provided Toston with a written guilty plea agreement that noted the potential maximum penalties for his crimes, his limited right of appeal to the conviction resulting from a guilty plea, and that the district court was not obligated to accept the stipulated sentence.

Toston signed the agreement. On the day of sentencing, however, he requested that the district court permit him to withdraw his guilty plea and that the court dismiss Toston's appointed counsel. The court denied Toston's requests. Upon sentencing, the State argued that the court increase Toston's sentence from the stipulated punishment because Toston committed a violent crime against his cellmate while awaiting sentencing. Although both Toston and his counsel argued that the court should impose the stipulated sentence, the court sentenced Toston to "life with the possibility of parole after five years for kidnapping and a consecutive sentence of two to ten years for robbery."² Toston objected to the sentence and the court advised Toston's counsel to "make the appropriate decision on whether you seek to withdraw the plea formally . . . or file an appeal."³

Neither Toston, nor his counsel, filed a direct appeal. Toston's counsel did not file any post-conviction motions on Toston's behalf. Toston filed a post-conviction petition for a writ of habeas corpus, which the district court denied without holding an evidentiary hearing. Toston appealed the district court's denial of his petition.

Toston's claimed that ineffective assistance of counsel deprived him of his right to a direct appeal. Toston argued that he had expressed dissatisfaction with both his sentence and his conviction, and that his trial counsel misinformed him regarding his right to appeal. Further, Toston argued that his trial counsel should have filed an appeal, but instead counsel informed

¹ By Kendra Kisling

² *Toston v. State*, 127 Nev. Adv. Op. 87, 4 (2011).

³ *Id.* at 5.

Toston that he was not permitted to file a direct appeal because his conviction stemmed from a guilty plea. A “defendant who has pleaded guilty has a right to appeal from a judgment of conviction, unless he knowingly and voluntarily waives that right.”⁴

Discussion

Justices Douglas, Hardesty and Parraguirre issued this per curiam opinion without hearing oral arguments.

Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, a petitioner must show (1) deficient counsel performance that fell below an objective standard of reasonableness and (2) prejudice resulting from the deficient performance where a proceedings’ outcome would have been different without counsel’s mistakes.⁵ Although both elements generally must be met, in certain circumstances, the second element (prejudice) may be presumed. One such circumstance is when the petitioner is deprived the right to an appeal due to deficient counsel performance.⁶

Duty to Accurately Inform About the Right to Appeal

Trial counsel is not constitutionally mandated to provide a defendant with information about the right to appeal when the defendant’s conviction stems from a guilty plea.⁷ However, trial counsel does have a duty not to provide misinformation to a defendant about the availability of direct appeal.⁸ Further, counsel has a duty to inform a defendant of his right to appeal in the guilty-plea context when the defendant inquired about the right or the defendant may benefit from receiving advice about the right to a direct appeal (especially when the direct appeal is likely to succeed).⁹ “[C]ounsel’s failure to do so is deficient performance for purposes of proving an ineffective assistance of counsel claim.”¹⁰

Toston claimed that his trial counsel informed him that because his conviction stemmed from a guilty plea, he was not eligible to file a direct appeal. This advice was inaccurate. Affirmative misinformation of this sort falls below an objective standard of reasonableness thus making counsel’s performance deficient and effectively denied the client his right to an appeal. The Court could not affirm the district court’s order denying Toston’s petition without an evidentiary hearing because Toston’s allegations were not disputed in the record.

Duty to File an Appeal

Counsel has a constitutional duty to file a direct appeal when (1) requested to file or (2) the defendant expresses dissatisfaction with his conviction.¹¹ Because Nevada case law failed to

⁴ *Id.* at 7 (citing NEV. REV. STAT. 177.015(4)).

⁵ *Strickland v. Washington*, 466 U.S. 668, 687(1984).

⁶ *Lozada v. State*, 110 Nev. 349, 357, 871 P.2d 944, 949 (1994).

⁷ *Thomas v. State*, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999).

⁸ *Toston*, 127 Nev. Adv. Op. at 2.

⁹ *Thomas*, 115 Nev. at 150, 979 P.2d 222, 223.

¹⁰ *Toston*, 127 Nev. Adv. Op. at 7 (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 479-80 (2000)).

¹¹ *Lozada*, 110 Nev. at 354-57, 871 P.2d 944, 947-49.

provide adequate guidance to practitioners to fulfill their duties with the second requirement, the Supreme Court held that “trial counsel has a duty to file a direct appeal when the client’s desire to challenge the conviction or sentence can reasonably inferred from the totality of the circumstances, focusing on the information that counsel knew or should have known at the time.”¹²

Toston exhibited his desire to challenge his sentence and change his plea in court. The trial court even instructed Toston’s counsel to consider appealing the decision. Thus considering the totality of the circumstances, Toston’s counsel should have reasonably inferred that Toston wanted to appeal his sentence. Accordingly, the Court decided that it could not affirm the district court’s decision to deny this claim without an evidentiary hearing.¹³

Conclusion

Trial counsel is not constitutionally mandated to provide a defendant with information about the right to appeal when the defendant’s conviction stems from a guilty plea, though counsel has a duty not to provide misinformation to a defendant about the availability of direct appeal. Counsel also has a duty to inform a defendant of his right to appeal in the guilty-plea context when the defendant inquired about the right or the defendant may benefit from receiving advice about the right to a direct appeal (especially when the direct appeal is likely to succeed). Failure in these duties constitutes deficient performance for purposes of proving an ineffective assistance of counsel claim.

Trial counsel has a constitutional duty to file a direct appeal when requested when the defendant expresses dissatisfaction with his conviction. Trial counsel has a duty to file a direct appeal when the client’s desire to challenge the conviction or sentence can reasonably inferred from the totality of the circumstances, focusing on the information that counsel knew or should have known at the time.

¹² *Toston*, 127 Nev. Adv. Op. at 9.

¹³ *Id.* at 11.