

IN THE SUPREME COURT OF THE STATE OF NEVADA

ARTHUR DEVINE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42875

FILED

OCT 07 2004

ORDER OF AFFIRMANCE

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

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; Sally L. Loehrer, Judge.

On August 29, 2001, the district court convicted appellant, pursuant to a guilty plea, of one count of robbery with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of 72 to 180 months in the Nevada State Prison. No direct appeal was taken.

On January 29, 2002, appellant filed a motion to withdraw his guilty plea in the district court. The district court entered an order denying appellant's motion to withdraw his guilty plea on March 28, 2002. On appeal from that order, this court affirmed.¹

On October 2, 2003, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court found good cause existed for

¹Devine v. State, Docket No. 39574 (Order of Affirmance, October 16, 2002).

the delay in the filing of the petition and conducted an evidentiary hearing.² Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. On March 11, 2004, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised two claims of ineffective assistance of counsel. 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.³ 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.⁴ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁵

First, appellant claimed that his counsel was ineffective because his counsel represented that if he accepted the plea agreement he would receive no more than 2 to 5 years for the robbery plus a concurrent term of no more than 2 to 5 years for the use of a deadly weapon. Appellant raised a substantially similar argument in his motion to withdraw his guilty plea filed with the district court and this court rejected this issue on appeal. Specifically, this court noted that at the

²See NRS 34.726(1); NRS 34.770(1),(3).

³See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁴See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁵See Strickland, 466 U.S. at 697.

waiver of the preliminary examination hearing, appellant was informed of the terms of the plea agreement, including that the State had retained the right to argue at sentencing, rather than recommend a particular sentence. Further, the plea agreement informed appellant that the district court had discretion to impose a sentence of between 2 to 15 years for the robbery count, as well as an equal and consecutive term for the use of a deadly weapon. Finally, in the plea agreement, appellant acknowledged that he had not been promised a particular sentence by anyone. Appellant's mere subjective belief as to a potential sentence is insufficient to invalidate his guilty plea as involuntary and unknowing.⁶ Appellant failed to demonstrate that his counsel's performance was deficient. Thus, the district court did not err in determining that this claim lacked merit.

Second, appellant claimed that his counsel was ineffective for failing to file a direct appeal. The district court did not consider this claim at the evidentiary hearing. Appellant's petition failed to set forth sufficient allegations to entitle him to an evidentiary hearing on this claim.⁷ Thus, the district court did not err in determining that an evidentiary hearing on this claim was not warranted and that this claim lacked merit.

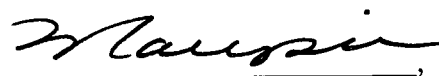
⁶See Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975).

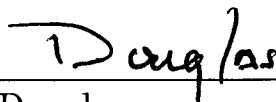
⁷See Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003); Mann v. State, 118 Nev. 351, 46 P.3d 1228 (2002); Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 _____, J.
Rose

 _____, J.
Maupin

 _____, J.
Douglas

cc: Hon. Sally L. Loehrer, District Judge
Arthur Devine
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁸See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).