

IN THE SUPREME COURT OF THE STATE OF NEVADA


JASON M. MARCHESE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 43366

**FILED**

NOV 04 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

On May 9, 2003, the district court convicted appellant, pursuant to an Alford<sup>1</sup> plea, of one count of robbery. The district court sentenced appellant to serve a term of twenty-four to sixty months in the Nevada State Prison. This court dismissed appellant's untimely appeal for lack of jurisdiction.<sup>2</sup>

On February 24, 2004, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant requested the district court appoint counsel and conduct further investigation and an evidentiary hearing. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On

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<sup>1</sup>North Carolina v. Alford, 400 U.S. 25 (1970).

<sup>2</sup>Marchese v. State, Docket No. 41727 (Order Dismissing Appeal, October 27, 2003).

April 20, 2004, the district court denied appellant's petition. This appeal followed.<sup>3</sup>

In his petition, appellant contended that he received ineffective assistance of trial counsel.<sup>4</sup> 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 and that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.<sup>5</sup> The court need not consider both prongs of the test if the petitioner makes an insufficient showing on either prong.<sup>6</sup>

First, appellant claimed that his trial counsel was ineffective for failing to file a pretrial petition for a writ of habeas corpus. Appellant claimed that his trial counsel should have challenged the sufficiency of the evidence to bind him over to the district court. Appellant claimed that

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<sup>3</sup>Appellant attempted to reply to the State's opposition on April 15, 2004. However, because the reply was filed after the district court's oral decision denying the petition, this court declines to consider the reply. See generally NRS 34.750(5) (providing that no further pleadings are permitted except by permission of the district court).

<sup>4</sup>To the extent appellant asserted claims independent from his allegations of ineffective assistance of counsel, he waived these claims. See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

<sup>5</sup>See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

<sup>6</sup>See Strickland v. Washington, 466 U.S. 668, 697 (1984).

there was not any evidence that he participated in or planned the crime. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Probable cause to support a criminal charge "may be based on slight, even 'marginal' evidence, because it does not involve a determination of the guilt or innocence of an accused."<sup>7</sup> "Although the [S]tate's burden at the preliminary examination is slight, it remains incumbent upon the [S]tate to produce some evidence that the offense charged was committed by the accused."<sup>8</sup> Some evidence was presented at the preliminary hearing that appellant committed the charged offenses. Specifically, Officer Dana Alley testified that appellant told him that he was in the apartment during the robbery, that he ordered the pizza the victim was delivering to the apartment, that he grabbed the victim and told him to get in the bathroom after the victim was beaten and threatened by the co-defendants, and that he grabbed the victim's car keys, unlocked the vehicle and took cigarettes from the victim's vehicle. The victim also testified that appellant was standing in front of the doorway when the victim was attempting to escape and that the victim felt that this was meant to prevent the victim from leaving. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Second, appellant claimed that his trial counsel was ineffective for pressuring him into entering a guilty plea. Appellant claimed that he was promised that if he entered a guilty plea that he

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<sup>7</sup>Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) (citations omitted).

<sup>8</sup>Woodall v. Sheriff, 95 Nev. 218, 220, 591 P.2d 1144, 1144-45 (1979).

would be released from jail and would not receive any prison time. The record belies appellant's claim, and therefore, he failed to demonstrate that his trial counsel was ineffective. Appellant was informed in the written plea agreement and during the plea canvass that he faced a potential sentence of two to fifteen years. He acknowledged during the plea canvass that he was informed that the sentencing decision was left in the discretion of the district court. He further informed the court during the plea canvass that no one was forcing him into entering a plea and that his plea was of his own free will. Appellant's mere subjective belief as to a potential sentence is insufficient to invalidate his guilty plea as involuntary and unknowing.<sup>9</sup> Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Third, appellant claimed that his trial counsel was ineffective for failing to object to the facts presented by the State in support of the Alford plea. Appellant claimed that he did not participate in or plan the crime. Appellant failed to demonstrate that his trial counsel's performance was deficient. The State's presentation of facts agreed with the testimony presented at the preliminary hearing, and thus, there was no basis for trial counsel to object to the presentation of facts. Appellant further failed to demonstrate that counsel's failure to object altered his decision to enter an Alford plea in the instant case; appellant always maintained his innocence, however, in pleading pursuant to Alford he acknowledged that it was in his best interests to enter the plea and that the State would be able to present sufficient evidence of guilt at trial.

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<sup>9</sup>See Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975).

Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Fourth, appellant claimed that his trial counsel was ineffective for failing to interview the co-defendants. Appellant claimed that the co-defendants would have stated that appellant did not participate in the crime. Appellant failed to demonstrate that counsel's performance was deficient. At sentencing, appellant's trial counsel explained that appellant accepted the plea negotiations after he was informed that one of his co-defendants had accepted plea negotiations and would testify against appellant. Appellant faced a harsher penalty if he went to trial on the original charges—robbery with the use of a deadly weapon and first degree kidnapping. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Fifth, appellant claimed that his trial counsel was ineffective because he did not permit appellant to review the presentence investigation report, did not discuss the report with appellant and failed to object to factual inaccuracies in the presentence investigation report. Appellant claimed that the presentence investigation report falsely stated that one of appellant's co-defendants implicated appellant as a participant and falsely stated the victim identified appellant. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The record does not support this claim. Appellant's trial counsel did point out the alleged factual inaccuracies at sentencing. Appellant failed to demonstrate how a further review of the presentence investigation report or a discussion about its contents would have altered the outcome of the proceedings. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Sixth, appellant claimed that his trial counsel failed to object to the fact that he was denied his right of allocution at sentencing. Appellant claimed that he would have received a different sentence or the plea would have been set aside if he had been permitted to speak. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. There is no indication in the record that appellant requested that he be allowed to speak and that he was prevented from speaking. Appellant further failed to demonstrate that any statement in allocution would have had a reasonable probability of altering the outcome of the proceedings. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Seventh, appellant claimed that his trial counsel was ineffective for failing to initiate any action to determine the severity of appellant's mental health problems and present this evidence at sentencing. Appellant failed to demonstrate that his mental health problems were such that trial counsel should have requested that appellant be examined in order to determine competency.<sup>10</sup> The information about appellant's mental health history was set forth in the presentence investigation report, and appellant failed to demonstrate that trial counsel's failure to argue this information at sentencing had a reasonable probability of altering the outcome of the proceedings. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.


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<sup>10</sup>NRS 178.400.

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.<sup>11</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Becker

  
\_\_\_\_\_, J.  
Agosti

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Kathy A. Hardcastle, District Judge  
Jason M. Marchese  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>11</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).