

IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRY PHILLIPS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43792

FILED

MAR 04 2005

ORDER OF AFFIRMANCE

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

This is an 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; Jackie Glass, Judge.

Appellant was originally convicted, pursuant to a guilty plea, of possession of a controlled substance with intent to sell (count I), and possession of a firearm by an ex-felon (count II). The district court sentenced appellant to serve a term of 16 to 48 months in the Nevada State Prison for count I, and a consecutive term of 28 to 72 months for count II. No direct appeal was taken.

On October 31, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. 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 January 28, 2003, the district court denied appellant's petition.

On appeal, this court concluded that appellant's claim that his counsel did not file a direct appeal after appellant conveyed an interest in a direct appeal was not belied by the record and would, if true, entitle him

to relief.¹ This court therefore remanded the case to the district court to hold an evidentiary hearing to resolve the issue.²

On remand, the district court appointed counsel, and conducted an evidentiary hearing on August 6, 2004. At the evidentiary hearing, trial counsel testified that appellant expressed no interest in filing a direct appeal. On August 17, 2004, the district court denied appellant's petition, finding that appellant did not ask trial counsel to file an appeal.

The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.³ Appellant has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. We therefore conclude that the district court did not err by denying this claim.

Appellant also contends that the district court erred by denying his claim that counsel was ineffective for failing to object to a purported breach of the plea agreement at sentencing. The district court addressed this issue in its order of January 28, 2003. This court previously declined to consider the merits of the issue until the district court finally resolved appellant's petition. Having now reviewed the

¹See Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994) ("[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").

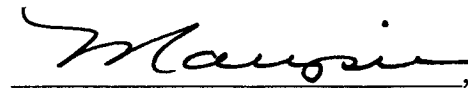
²Phillips v. State, Docket No. 40840 (Order of Reversal and Remand, February 10, 2004).


³See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

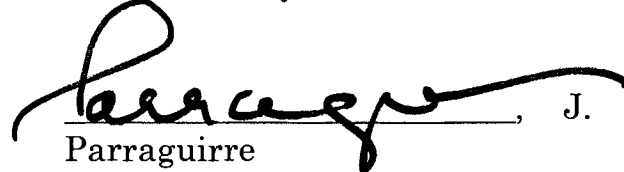
record, we conclude that the district court's finding that there was no breach of the plea agreement is supported by the record. The district court therefore did not err in finding that counsel was not ineffective.⁴

Having considered appellant's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

cc: Hon. Jackie Glass, District Judge
Law Office of Betsy Allen
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁴See Strickland v. Washington, 466 U.S. 668, 687 (1984); accord Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984) (to state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced the defense).