IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN ROBERT BLASHOCK, IV,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44099

FILED

DEC 0 6 2005

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is a proper person appeal from an order of the district court denying appellant John Blashock, IV's post-conviction petition for a writ of habeas corpus and motion for sentence modification. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

On March 21, 2003, the district court convicted Blashock, pursuant to a guilty plea, of one count each of coercion and battery with the use of a deadly weapon. The district court sentenced Blashock to serve two consecutive terms of twenty-four to seventy-two months in the Nevada State Prison. Blashock did not file a direct appeal.

On March 22, 2004, Blashock filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On August 6, 2004, Blashock filed a proper person motion for sentence modification. The State filed an opposition. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent Blashock. On August 26, 2004, the district court conducted an evidentiary hearing and

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subsequently denied Blashock's petition and motion. This appeal followed.[1]

In his petition, Blashock raised several allegations of ineffective assistance of trial counsel. To state a claim of ineffective assistance of trial counsel sufficient to invalidate a guilty plea, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.[2] A petitioner must further establish "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[3] The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.[4] The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.[5]

First, Blashock claimed that his trial counsel was ineffective for failing to examine photographs of the victim's injuries that the State presented to the district court during his sentencing hearing. This claim

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[1]We conclude that the district court did not err in denying Blashock's motion for sentence modification, as the claims he raised were presented in his petition for a writ of habeas corpus. Further, the claims were outside the scope of a motion to modify a sentence. See Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

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

[3]Hill v. Lockhart, 474 U.S. 52, 59 (1985); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

[4]Strickland, 466 U.S. at 697.

[5]Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

is without merit. Even assuming his counsel did not inspect the photographs, Blashock failed to articulate how his counsel's allegedly deficient performance prejudiced his sentencing hearing.[6] As such, the district court did not err in denying this claim.

Second, Blashock claimed that his trial counsel was ineffective for failing to have the plea agreement amended to reflect a verbal agreement between the district court and Blashock.[7] Specifically, Blashock contended that he and the district court entered into an off-the-record negotiation prior to the entry of his plea in which the district court agreed to sentence him to serve two concurrent terms of two to six years, suspend the sentence, and place him on probation for a period of three years.

A review of the record reveals that during the entry of his guilty plea, Blashock acknowledged that he could receive a maximum sentence of six years on the coercion count, and a maximum sentence of ten years on the battery count. Blashock also affirmatively indicated that he had read, understood, and signed the guilty plea agreement. The plea agreement provided that, "if more than one sentence of imprisonment is imposed and I am eligible to serve the sentences concurrently, the

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[6]See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (a petitioner is not entitled to an evidentiary hearing on claims that are unsupported by specific factual allegations that, if true, would entitle him to relief).

[7]To the extent that Blashock contended that his guilty plea was unknowingly entered based on the following allegation, we conclude that appellant failed to carry his burden of demonstrating that his guilty plea was invalid. See State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

sentencing judge has the discretion to order the sentences served concurrently or consecutively." The plea agreement also stated that Blashock was not "promised or guaranteed any particular sentence by anyone." Further, Blashock's counsel testified at the evidentiary hearing that nothing other than what is present in the record was said in open court. Because Blashock's allegation is not supported by the record, we conclude the district court did not err in denying this claim.

Third, Blashock claimed that his trial counsel was ineffective for failing to inform the district court of an error in his pre-sentence investigation report (PSI). Blashock alleged that although the PSI stated that Blashock removed the victim's clothes prior to cutting her with a knife, the victim actually removed her own clothing. Blashock failed to demonstrate that the results of his sentencing hearing would have been different if his counsel had informed the court of this alleged inaccuracy. As such, Blashock did not establish that his trial counsel was ineffective in this regard. Accordingly, we conclude the district court did not err in denying this claim.

Fourth, Blashock alleged that his trial counsel was ineffective for informing the district court that Blashock was charged with a drug offense while on house arrest. Blashock contended that his counsel should have informed the court that the charge related to possession of an imitation controlled substance.[8]

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[8]Blashock additionally alleged that his sentence was "based on materially untrue foundation" based on his third and fourth claims. To the extent that Blashock's habeas petition can also be construed as a motion to modify a sentence, these claims are outside the scope of such a motion. See Edwards, 112 Nev. at 708, 918 P.2d at 324.

Blashock did not establish that his counsel's performance was deficient, or that he was prejudiced by his counsel's actions. The record reveals that trial counsel informed the district court of the drug offense in support of his argument that Blashock should be granted probation and ordered to attend drug court. This was a reasonable tactical choice, and as such, was entitled to deference.[9] Further, we note that the PSI informed the district court that Blashock was arrested for possession of an imitation controlled substance. We therefore conclude that the district court did not err in denying Blashock relief on this claim.

Finally, Blashock contended that his trial counsel was ineffective for failing to file an appeal, despite his request to do so. The district court conducted the evidentiary hearing to determine whether appellant had requested an appeal from counsel. Because our review of the record on appeal revealed that Blashock's trial counsel never provided any testimony regarding whether Blashock requested an appeal, on October 18, 2005, we ordered the State to show cause why this appeal should not be remanded for the limited purpose of conducting an evidentiary hearing on Blashock's appeal deprivation claim. The State filed a response in which it stated that it "does not oppose a remand to the district court for an evidentiary hearing on that limited issue."

Because it remains to be determined whether Blashock requested an appeal from his counsel, we conclude that the district court erred in denying this claim. Accordingly, we reverse the district court's denial of this claim and remand this appeal for an evidentiary hearing on this claim.

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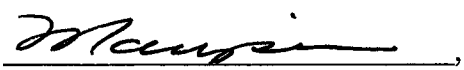
[9]See Riley, 110 Nev. at 653, 878 P.2d at 281-82.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Blashock is only entitled to the relief granted herein, and that briefing and oral argument are unwarranted.[10] Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for an evidentiary hearing on Blashock's appeal deprivation claim.[11]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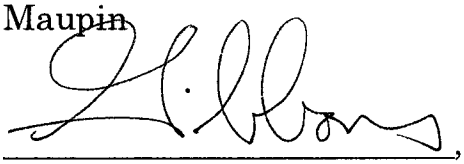
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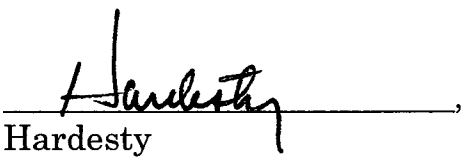
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cc: Hon. John S. McGroarty, District Judge
John Robert Blashock IV
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[10]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[11]This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.