

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONIO COCA A/K/A ANTHONY
ALVARAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44572

FILED

APR 05 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
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; David Wall, Judge.

On December 8, 2003, the district court convicted appellant, pursuant to a guilty plea, of one count of burglary. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve a term of ten to twenty-five years in the Nevada State Prison. No direct appeal was taken.

On December 11, 2003, appellant filed a proper person motion to withdraw his guilty plea. On January 13, 2004, the district court denied the motion. No appeal was taken.

On October 15, 2004, 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 December 22, 2004, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that he received ineffective assistance of trial counsel.¹ 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.² Further, a petitioner must demonstrate a reasonable probability that, but for counsel's errors, the results of the proceedings would have been different.³ The court need not consider both prongs if the petitioner makes an insufficient showing on either prong.⁴

Appellant claimed that his trial counsel was ineffective for failing to challenge the district court's usurpation of his right to a jury trial to decide the issue of habitual criminality. Appellant argued that pursuant to Apprendi v. New Jersey,⁵ a jury was required to decide the issue of whether it was just and proper to adjudicate appellant a habitual criminal. Appellant appeared to acknowledge that Apprendi specifically excluded the fact of a prior conviction from the factual issues that must be

¹To the extent appellant asserted claims independent from his allegations of ineffective assistance of counsel, he waived these claims and failed to demonstrate good cause for his failure to raise them earlier. 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).

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

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

⁴Strickland, 466 U.S. at 697.

⁵30 U.S. 466 (2000).

resolved by a jury, but he argued that whatever other facts were considered by the district court to determine that it was just and proper to adjudicate appellant a habitual criminal must be submitted to a jury for decision.

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant was informed in the written guilty plea agreement and during the plea canvass of the State's intention to seek habitual criminal adjudication, and the potential maximum penalty he faced if he was adjudicated a habitual criminal. Appellant was also informed in the written guilty plea agreement that he waived his right to a jury trial and that the district court determined the sentence within the limits prescribed by statute. This court has specifically held that the right to a jury trial does not extend to a habitual criminal proceeding.⁶ Rather, the decision of whether to adjudicate a defendant a habitual criminal is left to the discretion of the district court and all that is required is that the district court actually exercise its discretion.⁷ In the instant case, the record as a whole reveals that the district court exercised its discretion to adjudicate appellant a habitual criminal. Apprendi expressly excludes the fact of a prior conviction from its holding, and there is nothing in Apprendi suggesting that a jury is required to participate in any facet of the habitual criminal

⁶See Howard v. State, 83 Nev. 53, 422 P.2d 548 (1967).

⁷See NRS 207.010; Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893 (2000); compare to Walker v. Deeds, 50 F.3d 670 (9th Cir. 1995).

decision.⁸ Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Appellant appeared to further claim that his trial counsel was ineffective for conceding to "the last three priors," and failing to challenge the State's motion to amend the information. We conclude that appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel did not concede to "the last three priors"; rather, appellant's trial counsel conceded that appellant had at least three prior felony convictions. The record contains proof of more than three prior felony convictions—a sufficient number for large habitual criminal treatment.⁹ A challenge to the motion to amend would have failed as the State was updating the specific information relating to the priors to have them conform with the actual judgments of convictions presented to the district court for consideration.¹⁰ Therefore, the district court did not err in determining that these claims lacked merit.

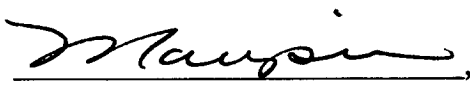
⁸See 530 U.S. at 490. In fact, appellant's apparent argument to the contrary is patently absurd because it would require the jury to make a decision of habitual criminality without being presented with the facts relating to the prior convictions. Appellant failed to identify the additional facts that he believed were required to be presented to the jury in order for a just and proper determination. Notably, NRS 207.010 does not specify as predicate factors any factors in addition to the required number of convictions for habitual criminal adjudication.

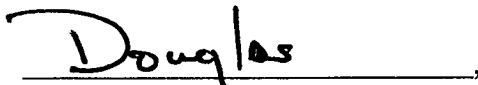
⁹See NRS 207.010(1)(b).

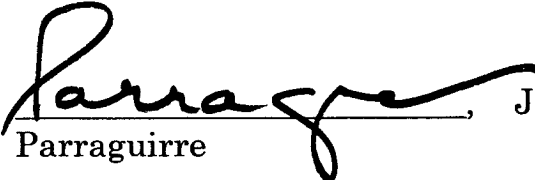
¹⁰See NRS 173.095(1).

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.¹¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Maupin

 J.
Douglas

 J.
Parraguirre

cc: Hon. David Wall, District Judge
Antonio Coca
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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