

IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY D. CANTRELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44695

FILED

JUN 14 2005

ORDER OF AFFIRMANCE

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

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

On November 26, 2003, the district court convicted appellant, pursuant to a guilty plea, of two counts of robbery with the use of a deadly weapon. The district court sentenced appellant to serve terms totaling 48 to 120 months in the Nevada State Prison. Appellant did not file a direct appeal.

On November 10, 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 February 2, 2005, the district court denied appellant's petition. This appeal followed.

Appellant asserted several 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.¹ 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.² An entry of a guilty plea waives any right to appeal regarding events that occurred prior to the entry of the plea.³

First, appellant claimed that his counsel was ineffective in not informing appellant of grand jury proceedings until the day of his arraignment. Appellant claimed that because he was not given notice, he was denied the right to testify, cross-examine witnesses and admit evidence. Appellant had the opportunity to exercise these rights by proceeding to trial. Appellant failed to demonstrate how knowledge of the grand jury proceedings would have made a difference to his case, that counsel's performance was deficient, or that but for counsel's errors, appellant would not have pleaded guilty and would have proceeded to trial. Accordingly, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his counsel was ineffective for failing to file a pretrial habeas corpus petition based upon the State's failure to notice appellant of the grand jury proceedings.⁴ Appellant failed

¹See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

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

³See Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975).

⁴See Sheriff v. Marcum, 105 Nev. 824, 783 P.2d 1389 (1989); NRS 172.241(2).

to explain how the filing of this petition would have changed the course of events, how he was prejudiced by the failure to file such a petition, how counsel's performance was deficient or whether such filing would have persuaded appellant to proceed to trial and not plead guilty. Accordingly, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for coercing appellant into pleading guilty with threats of a harsher sentence. Appellant also claimed his attorney only allowed appellant a few minutes to read the plea memorandum. Appellant's claim is belied by the record.⁵ Our review of the record reveals that the plea memorandum was signed and dated on November 6, 2003, and yet, appellant did not enter his guilty plea in court until November 13, 2003. Appellant stated in court that he had thoroughly read and fully understood all of the contents of the plea agreement, that his attorney had been available to assist him and answer all of his questions, that he believed the agreement was in his best interest and that he was pleading freely and voluntarily. Appellant benefited by his plea agreement by avoiding additional charges that would have potentially increased his penalty.⁶ Counsel's candid advice about the potential outcome of a trial is not deficient. Accordingly, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his attorney was ineffective for failing to have the indictment against him dismissed. Appellant argued that the State improperly consolidated more than one offense into a single

⁵See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

⁶In exchange for his guilty plea, two additional charges of burglary while in possession of a deadly weapon were dismissed.

count. This claim is belied by the record.⁷ Our review of the record on appeal reveals that the indictment properly charged appellant with two separate counts of burglary while in possession of a deadly weapon and two separate counts of robbery with the use of a deadly weapon. To the extent that appellant argued that the deadly weapon enhancement should have been charged as a separate count, this claim lacked merit. The use of a deadly weapon is an enhancement to the underlying offense, and does not constitute a separate offense that must be charged by a separate count.⁸ Thus, appellant failed to demonstrate that his counsel was deficient. Accordingly, we conclude that the district court did not err in denying this claim.

Last, appellant claimed that the State failed to give him notice of the grand jury proceedings pursuant to Marcum,⁹ that he was therefore maliciously prosecuted by the failure to issue that notice, that his indictment was duplicitous, and that the district court lacked jurisdiction to apply the dangerous weapon enhancement. These claims are outside the scope of claims permissible in a habeas corpus petition challenging a conviction based on a guilty plea.¹⁰ Therefore, we conclude that the district court did not err in denying these claims.

⁷See Hargrove, 100 Nev. at 503, 686 P.2d at 225.


⁸NRS 193.165.


⁹105 Nev. 824, 783 P.2d 1389.

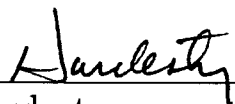
¹⁰See NRS 34.810(1)(a).

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.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

cc: Hon. Valorie Vega, District Judge
Barry D. Cantrell
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).