

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANGELA MARIE HABERLE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45048

FILED

MAY 27 2005

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court dismissing appellant Angela Marie Haberle's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

On May 14, 2003, the district court convicted Haberle, pursuant to a guilty plea, of high-level trafficking in a controlled substance. The district court sentenced Haberle to serve a term of 120 to 300 months in the Nevada State Prison. The district court suspended Haberle's sentence and placed her on probation for a period not to exceed 60 months. Haberle did not appeal.

On July 14, 2004, the district court entered an order revoking Haberle's probation, executing the original sentence and amending the judgment of conviction to include 196 days' credit. Haberle did not appeal from the order revoking her probation.

On January 4, 2005, Haberle filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Haberle or to conduct an evidentiary hearing. On

March 18, 2005, the district court dismissed Haberle's petition. This appeal followed.

In her petition, Haberle first contended that her trial counsel was ineffective for failing to adequately inform her of the right to appeal. To the extent that Haberle claimed that her trial counsel was ineffective for failing to inform her of the right to appeal from the order revoking her probation, we conclude that this allegation is without merit.¹ "[T]here is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to pursue a direct appeal," unless the defendant inquires about a direct appeal or there exists a direct appeal claim that has a reasonable likelihood of success.² The burden is on the defendant to indicate to her attorney that she wishes to pursue an appeal.³ Here, Haberle did not allege that she asked her trial counsel to file an appeal from the order revoking her probation; nor did Haberle establish the existence of an issue that had a reasonable probability of success on appeal. Therefore, the district court did not err in denying Haberle relief on this claim.

¹We note that this court has recognized that an ineffective assistance of counsel claim will lie only where the defendant has a constitutional or statutory right to the appointment of counsel. See McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996). In the context of probation revocation proceedings, counsel is constitutionally required only under certain circumstances. See Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973); Fairchild v. Warden, 89 Nev. 524, 516 P.2d 106 (1973). Even assuming Haberle was entitled to the effective assistance of counsel at her probation revocation hearing, she failed to establish that her counsel was ineffective for the reasons discussed below.

²Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999).

³Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999).

To the extent that Haberle claimed that her trial counsel was ineffective for failing to inform her of the right to appeal from her original judgment of conviction, we note that this claim is untimely; Haberle filed her petition more than one year after entry of the original judgment of conviction.⁴ This court recently held, "untimely post-conviction claims that arise out of the proceedings involving the initial conviction . . . and that could have been raised before the judgment of conviction was amended are procedurally barred."⁵ Because Haberle did not demonstrate good cause for failing to raise this claim earlier,⁶ we conclude that it was procedurally barred. Moreover, as a separate and independent ground to deny relief, this contention is without merit.⁷ Therefore, we affirm the district court's denial of the claim.

Next, Haberle argued that her sentence violated the prohibition against cruel and unusual punishment. This claim is outside the scope of a post-conviction petition for a writ of habeas corpus when the conviction is the result of a guilty plea.⁸ Additionally, this claim is untimely and could have been raised before the original judgment of

⁴See NRS 34.726(1).

⁵Sullivan v. State, 120 Nev. ___, ___, 96 P.3d 761, 764 (2004).

⁶See Harris v. Warden, 114 Nev. 956, 964 P.2d 785 (1998) (appeal deprivation claim does not constitute good cause to overcome an untimely petition).

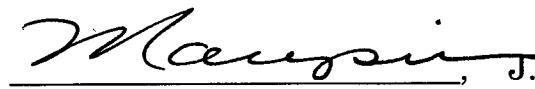
⁷See Thomas, 115 Nev. at 150, 979 P.2d at 223. We note that Haberle was informed of her limited right to appeal in both the written guilty plea agreement and the oral plea canvass.

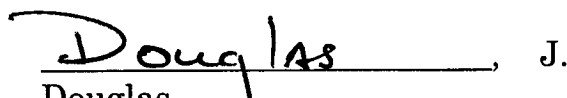
⁸See NRS 34.810(1)(a).

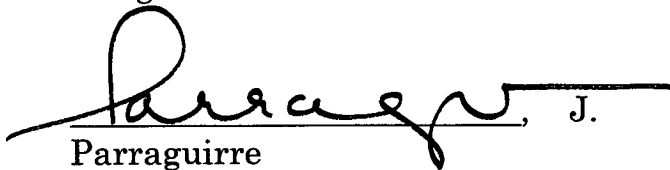
conviction was amended.⁹ We therefore conclude that the district court did not err in denying Haberle relief in this regard.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Haberle is not entitled to relief and that briefing and oral argument are unwarranted.¹⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Maupin


Douglas


Parraguirre

cc: Hon. Steven R. Kosach, District Judge
Angela Marie Haberle
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁹See NRS 34.726(1); Sullivan, 120 Nev. at ___, 96 P.3d at 764.

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