

IN THE SUPREME COURT OF THE STATE OF NEVADA

CORTEZ GUILLORY, A/KA GUILLORY
CORTEZ, A/K/A CORTEZ ANTONIO
GUILLORY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45091

FILED

SEP 23 2005

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

ORDER OF AFFIRMANCE

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; Joseph T. Bonaventure, Judge.

On December 12, 2003, the district court convicted appellant, pursuant to a guilty plea, of one count of robbery with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of two to five years in the Nevada State Prison. No direct appeal was taken.

On November 22, 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, the district court declined to appoint counsel to represent appellant. On March 24, 2005, after conducting an evidentiary hearing, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of counsel. 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 there is a reasonable probability of a different outcome absent the alleged errors.¹ When a conviction is based upon a guilty plea, 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 The court need not consider both prongs if the petitioner makes an insufficient showing on either prong.³ A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.⁴

First, appellant claimed that his trial counsel was ineffective for allowing appellant to enter a guilty plea to an offense which included the deadly weapon enhancement. Appellant claimed that the deadly weapon enhancement was inapplicable because a BB gun is not a deadly weapon. Appellant further claimed that his trial counsel should have conducted further investigation into this issue.

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's guilty plea obviated any need for further investigation. NRS 193.165 (5)(c) includes as a definition of a deadly weapon a dangerous weapon described in NRS 202.265. NRS 202.265 defines a firearm to include, "[a]ny device

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).

³Strickland, 466 U.S. at 697.

⁴Means v. State, 120 Nev. ___, ___, 103 P.3d 25, 33 (2004).

from which a metallic projectile, including any ball bearing or pellet, may be expelled by means of spring, gas, air or other force."⁵ Thus, a BB gun may be used to enhance the primary offense in the instant case. Further, appellant failed to demonstrate that he would not have entered a guilty plea in the instant case absent the alleged deficient performance. Appellant avoided an additional charge of burglary while in possession of a deadly weapon by entry of his guilty plea and received the minimum penalty permissible for the crime of robbery with the use of a deadly weapon. During the plea canvass, appellant stated that he had problems with the deadly weapon enhancement because of his belief that a BB gun was not a deadly weapon. The district court informed appellant that he could either enter a guilty plea or go to trial, and appellant expressed that he was taking the deal because he was afraid of facing more time. Moreover, appellant's argument relies upon his statement to the police that he only brandished a BB gun; the police report indicates that the victim observed a semiautomatic handgun. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

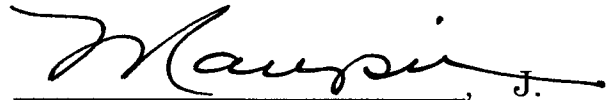
Second, appellant claimed that his trial counsel was ineffective for failing to perfect an appeal or file a notice of appeal on appellant's behalf. Appellant claimed that he had contacted his counsel and informed counsel that he wanted an appeal. Appellant failed to demonstrate that his trial counsel was ineffective. During the evidentiary hearing, appellant's trial counsel testified that he did not recall appellant asking for an appeal. Although, appellant's trial counsel acknowledged that appellant was unhappy prior to sentencing, the district court found

⁵See NRS 202.265(4)(a)(2).

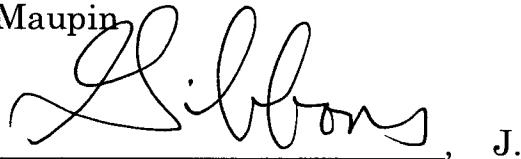
that appellant failed to demonstrate that he expressed a desire for an appeal after sentencing.⁶ The record supports the district court's finding. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

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.⁷ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

cc: Hon. Joseph T. Bonaventure, District Judge
Guillory Cortez
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁶See Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).

⁷See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).