

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL R. JENKINS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 45197

**FILED**

OCT 18 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
*J. Richards*  
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; Joseph T. Bonaventure, Judge.

On August 12, 2004, the district court convicted appellant, pursuant to a guilty plea, of one count of possession of a controlled substance. The district court sentenced appellant to serve a term of nineteen to forty-eight months in the Nevada State Prison. No direct appeal was taken.

On February 2, 2005, 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 April 25, 2005, 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.<sup>1</sup> 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.<sup>2</sup> The court need not consider both prongs if the petitioner makes an insufficient showing on either prong.<sup>3</sup>

First, appellant claimed that his trial counsel virtually guaranteed that he would be sentenced to drug court and receive a twelve to thirty-six month period of probation. 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, which he acknowledged reading, signing and understanding, that he faced a potential sentence of one to four years. Appellant was further informed that it was within the district court's discretion not to give him probation if he had more than two prior felony convictions—the presentence report indicates that appellant had at least five prior felony convictions. Appellant acknowledged in the written guilty plea agreement that he was not promised any particular sentence in exchange for his plea. Appellant's mere subjective belief as to a potential sentence is insufficient to invalidate his guilty plea as involuntary and unknowing.<sup>4</sup> Therefore, we

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

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

<sup>3</sup>Strickland, 466 U.S. at 697.

<sup>4</sup>See Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975).

conclude that the district court did not err in determining that this claim lacked merit.

Second, appellant claimed that his trial counsel was ineffective at sentencing for failing to present appellant's desire for drug counseling and failing to ask the court for the Department of Parole and Probation's recommended sentence of twelve to thirty-four months. Appellant requested that his sentence be reduced. Appellant failed to demonstrate that he was prejudiced. Appellant's trial counsel asked that the district court impose the minimum sentence possible. Appellant failed to demonstrate a reasonable probability of a different sentence if trial counsel had presented the district court with information about appellant's desire for drug counseling. Appellant's criminal record included at least five prior felony convictions. The record further reveals that appellant failed to appear for the original sentencing hearing and a bench warrant was issued at that time. Appellant failed to demonstrate that the district court was presented with palpable or highly suspect evidence during the sentencing hearing, and thus, he failed to indicate that his trial counsel was ineffective in this regard.<sup>5</sup> Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Next, appellant claimed that the district court and district attorney determined the mitigating circumstances in violation of Apprendi v. New Jersey.<sup>6</sup> This claim fell outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment

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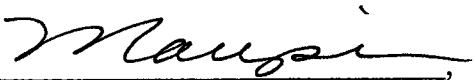
<sup>5</sup>See Silks v. State, 92 Nev. 91, 545 P.2d 1159 (1976).

<sup>6</sup>530 U.S. 466 (2000).

of conviction based upon a guilty plea.<sup>7</sup> Moreover, appellant did not provide any specific facts in support of this claim.<sup>8</sup> Therefore, we conclude that the district court did not err in denying this claim.

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.<sup>9</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

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

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<sup>7</sup>See NRS 34.810(1)(a).

<sup>8</sup>See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

<sup>9</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).