

IN THE SUPREME COURT OF THE STATE OF NEVADA

VICTOR ANTHONY ONO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45324

FILED

JUL 29 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 denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On September 1, 2004, the district court convicted appellant, pursuant to a guilty plea, of one count of grand larceny and one count of burglary. The district court sentenced appellant to serve consecutive terms totaling fifty-seven to one hundred and forty-four months in the Nevada State Prison. No direct appeal was taken.

On February 10, 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 May 10, 2005, the district court denied appellant's petition. This appeal followed.¹

¹On April 19, 2005, appellant filed a motion to continue to respond to the State's opposition. However, the district court had orally denied the petition on April 18, 2005. We conclude that the district court did not err in determining that this motion was moot.

In his petition, appellant contended that he received ineffective assistance of counsel.² 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 and a reasonable probability that, but for counsel's errors, the results of the proceedings would have been different.³ In a conviction involving a guilty plea, a petitioner must demonstrate that he would not have pleaded guilty and would have insisted on going to trial absent any errors.⁴ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁵

First, appellant claimed that his trial counsel was ineffective for advising him to enter a guilty plea to avoid habitual criminal adjudication. Appellant complained that four of the prior convictions were over ten years old. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. NRS 207.010

²To the extent that appellant raised any of the following issues independently from his ineffective assistance of counsel claims, we conclude that the district court properly determined that they are waived and outside the scope of a petition challenging a conviction based on a guilty plea. See NRS 34.810(1)(a); 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).

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

⁴Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁵Strickland, 466 U.S. at 697.

"makes no special allowance for non-violent crimes or for the remoteness of [prior] convictions; instead, these are considerations within the discretion of the district court."⁶ Nine prior convictions were set forth in the State's information, including three felony convictions within ten years from the date of his offense. In exchange for his guilty plea, the State agreed not to seek habitual criminal adjudication. Appellant faced a substantially greater penalty if he were to be adjudicated a habitual criminal. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to seek dismissal of either the grand larceny or burglary count. Appellant claimed that he could not be convicted of both grand larceny and burglary. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. A criminal defendant may be convicted of both grand larceny and burglary because each offense requires proof of an additional and different element and the gravamen of the offenses is not the same.⁷ Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to present any mitigating facts at sentencing. The record does not support this claim. Trial counsel prepared a sentencing memorandum setting forth that appellant was gainfully employed, had the support of his family, was addicted to drugs at the time of the offense, participated in

⁶Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992).

⁷Salazar v. State, 119 Nev. 224, 70 P.3d 749 (2003); see also NRS 205.060; NRS 205.220.

rehabilitation and counseling, and the instant offense was non-violent. The sentencing memorandum contained a number of positive letters in support of appellant. Appellant failed to indicate what further argument should have been presented that would have had a reasonable probability of altering the outcome of the proceedings. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to advise him of the right to appeal. We conclude that appellant failed to demonstrate that his trial counsel's performance was deficient. The record on appeal reveals that appellant was advised of his limited right to appeal in the written guilty plea agreement. Specifically, appellant was advised that by entry of his plea he waived his "right to appeal the conviction . . . unless the appeal is based upon reasonable constitutional jurisdictional or other grounds that challenge the legality of the proceedings" Thus, appellant's contention that he was not advised of his limited right to appeal is belied by the record on appeal.⁸ Moreover, there is no constitutional requirement that counsel must always inform the defendant who pleads guilty of the right to pursue a direct appeal unless the defendant inquires about an appeal or there exists a direct appeal claim that has a reasonable likelihood of success.⁹ Appellant does not allege that he asked counsel to file a direct appeal and nothing in the record suggests that a direct appeal in appellant's case had a


⁸See Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).

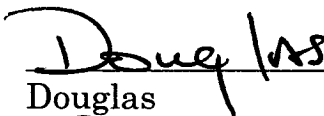
⁹See Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999); see also Roe v. Flores-Ortega, 528 U.S. 470 (2000); Davis, 115 Nev. at 20, 974 P.2d at 660.

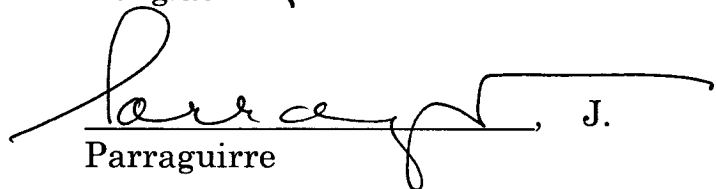
reasonable likelihood of success. Therefore, we conclude that the district court did not err in denying this claim.

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.¹⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

cc: Hon. Donald M. Mosley, District Judge
Victor Anthony Ono
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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