

IN THE SUPREME COURT OF THE STATE OF NEVADA

JESUS BENITEZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 45545

**FILED**

**APR 10 2006**

ORDER OF AFFIRMANCE

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

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

Appellant Jesus Benitez pleaded guilty on September 19, 2003 to seven counts of robbery with use of a deadly weapon. On all seven counts, Benitez was sentenced to prison terms of 50-156 months, plus equal and consecutive terms for use of a deadly weapon. Six of the seven counts in this case were ordered to run consecutive to one another.

Prior to sentencing, Benitez filed a motion to withdraw his guilty plea alleging ineffective assistance of counsel, which was denied on February 5, 2004. Benitez filed a timely habeas petition on March 29, 2005. On June 2, 2005, the district court denied the petition without conducting an evidentiary hearing.

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. 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.<sup>1</sup>

Benitez first contends counsel was ineffective at sentencing for failing to present mitigating evidence. The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.<sup>2</sup> Benitez failed to show how or what mitigating evidence would have changed the outcome of his sentencing. Further, Benitez has not established any prejudice from his counsel's alleged errors. Therefore, this claim is without merit.

Second, Benitez claims counsel was ineffective during plea negotiations. He asserts counsel did not fully explain the ramifications of his plea and thus he believed he was eligible for probation. This claim is belied by the record.<sup>3</sup> Benitez's signed plea agreement indicated probation was not available and that he potentially faced a minimum of 40 years in prison. During the plea colloquy, Benitez indicated he had read the plea agreement. Benitez's mere subjective belief as to a potential sentence is insufficient to invalidate his guilty plea.<sup>4</sup> Additionally, Benitez received the benefit of numerous dismissals of charges against him in exchange for his guilty plea.

The remainder of Benitez claims are barred by NRS 34.810. because they are not based upon assertions his plea was involuntary or

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<sup>1</sup>See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

<sup>2</sup>Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

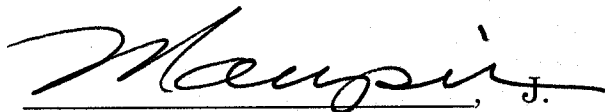
<sup>3</sup>See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

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

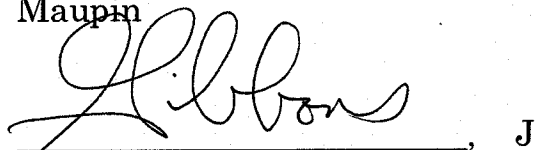
unknowingly entered or without effective assistance of counsel. Benitez could have raised these issues in a direct appeal and his failure to do so constitutes a waiver pursuant to NRS 34.810(1)(a).

Therefore we,

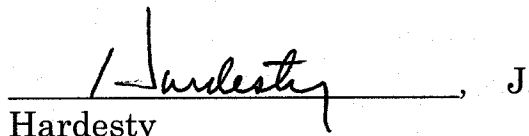
ORDER the judgment of the district court AFFIRMED.



Maupin



Gibbons



Hardesty

cc: Hon. Valorie Vega, District Judge  
Xavier Gonzales  
Law Office of John J. Momot  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk