

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 45563

FILED

APR 10 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
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 was originally convicted, pursuant to a guilty plea, of three counts of robbery with use of a deadly weapon. Benitez was sentenced to prison terms of 50-156 months, plus equal and consecutive terms for the use of a deadly weapon on all three counts to run concurrent with his sentence in another case.

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 post-conviction petition for a writ of habeas corpus 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.²

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.³ 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.⁴ Benitez's 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.⁵ Additionally, Benitez received the benefit of numerous dismissals of charges against him in exchange for his guilty plea.

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

³Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

⁴See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

⁵See Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975).

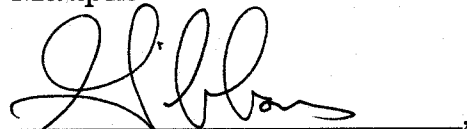
The remainder of Benitez's claims are barred by NRS 34.810 because they are not based upon assertions his plea was involuntary or unknowingly entered or without effective assistance of counsel. Benitez could have raised these issues in a direct appeal and his failure to do so constitutes a waiver pursuant to NRS 34.810(1)(a).

Therefore we,

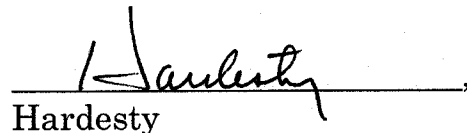
ORDER the judgment of the district court AFFIRMED.

 J.

Maupin

 J.

Gibbons

 J.

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