IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIK FLORES-GONZALES,
Appellant,
vs.
WARDEN, LOVELOCK CORRECTIONAL CENTER, LENARD VARE,
Respondent.

No. 45719

FILED

NOV 0 7 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

On October 2, 2003, the district court convicted appellant, pursuant to a plea of nolo contendere, of one count of high level trafficking in a controlled substance. The district court sentenced appellant to serve a term of ten to twenty-five years in the Nevada State Prison. This court affirmed appellant's judgment of conviction and sentence.[1] The remittitur issued on April 30, 2004.

On April 5, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

[1]Flores-Gonzalez v. State, Docket No. 42285 (Order of Affirmance, April 5, 2004).

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 July 19, 2005, the district court dismissed appellant's petition. This appeal followed.

In his petition below, appellant contended that his trial counsel was ineffective.[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.[3] 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.[4]

First, appellant claimed that counsel was ineffective for coercing him to plead guilty even though he was innocent of some of the counts he was being charged with. Appellant has not provided any evidence of his innocence, nor has he provided any specifics as to how he

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[2]To the extent that appellant raised any of the following issues independently from his ineffective assistance of counsel claims, we conclude that they fall outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea. NRS 34.810(1)(a).

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

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

was coerced by counsel.[5] During appellant's plea canvass, he acknowledged that counsel had explained the charges, his possible defenses, and the consequences of his plea. Appellant stated that the plea agreement was translated for him, he understood the agreement and all questions were answered for him. Appellant failed to demonstrate that counsel's performance was ineffective, and the district court did not err in denying this claim.

Second, appellant claimed that counsel was ineffective for moving for the suppression of his confession, rather than forcing the State to prove that he confessed. Appellant failed to demonstrate that counsel's performance was deficient. Although police detectives failed to record appellant's confession, they testified at the suppression hearing regarding his confession and the circumstances surrounding it. This court previously affirmed the judgment of conviction on the basis that appellant's confession was made freely and voluntarily. Thus, the district court did not err in denying this claim.

Third, appellant claimed that counsel was ineffective for failing to investigate and call witnesses. Specifically, appellant claimed that counsel was ineffective for failing to locate and present witnesses that would have mitigated his sentence. Appellant failed to demonstrate that counsel's performance was deficient, or that he was prejudiced and would

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[5]See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (holding that bare, or naked, allegations unsupported by specific facts are insufficient to grant relief).

have refused to plead guilty and proceed to trial. Even though the district court was not bound to do so, appellant was sentenced to the exact amount of time that he stipulated to in his plea agreement, which was the minimal amount allowed by statute. Appellant benefited by his plea agreement in that by pleading guilty, he avoided two charges of conspiracy to violate the Uniform Controlled Substances Act and one charge of principal to high-level trafficking in a schedule I controlled substance. Appellant faced significantly more time if he went to trial and was convicted of all charges. Appellant failed to demonstrate that counsel's performance was ineffective. Thus, the district court did not err in denying this claim.

Fourth, appellant claimed that counsel was ineffective for not objecting to the plea agreement as being defective as to form and content, which led to appellant's unknowing and involuntary plea. Specifically, appellant claimed that counsel should have objected to handwritten notations within the plea agreement referring to appellant as a "principal" when the facts of the case did not so demonstrate, and such a designation was improper under NRS 453.3385. Appellant failed to demonstrate that counsel's performance was ineffective. Appellant confessed to participation in the sale of and trafficking in cocaine. Appellant was convicted, per stipulation, of being a principal in the trafficking activities, pursuant to NRS 195.020; however, appellant's sentence was determined by the amount of controlled substance that was involved pursuant to NRS 453.3385(3), not according to appellant's classification as a "principal." The amount involved qualified as high-level trafficking. Thus, the district court did not err in denying this claim.

Fifth, appellant claimed that counsel was ineffective for misinforming him of the time that he would actually have to serve, and as a result of the misinformation, appellant's plea was involuntary and unknowing. Specifically, appellant claimed that counsel persuaded him to plead guilty by telling him that he would do less time because he was an illegal immigrant, and the United States would release him back to Mexico within six to ten years. Appellant failed to demonstrate that counsel's performance was deficient. The plea agreement specified what the term of sentence would be. During the plea canvass, appellant stated that he had consulted with his attorney prior to signing the plea agreement, the provisions and stipulated sentence had been explained to him, and a translator had been available and used. Appellant's mere subjective belief as to a potential sentence is insufficient to invalidate his guilty plea as involuntary and unknowing.[6] Thus, the district court did not err in denying this claim.

Sixth, appellant claimed that counsel was ineffective for failing to object to appellant's sentence enhancement based on the amount of drugs involved being determined by the district court rather than a jury, pursuant to Apprendi.[7] Appellant failed to demonstrate that counsel's performance was deficient. Appellant pleaded guilty to the crime of high level trafficking, and admitted in the plea agreement that the

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

[7]Apprendi v. New Jersey, 530 U.S. 466 (2000).

amount was 28 grams of a schedule I controlled substance. Thus, the district court was permitted to impose the sentence pursuant to NRS 453.3385(3).[8] Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that counsel was ineffective because appellant's co-defendant, who was more culpable than appellant, received a less harsh sentence. Specifically, appellant claimed that counsel should have insured a more proportionate sentence to the crime committed. This court has consistently stated that it will not disturb a district court's imposition of sentence "[w]hen the sentence is within statutory limits, and when there has been no proof of judicial reliance upon 'impalpable or highly suspect evidence.'"[9] Appellant failed to demonstrate that the district court relied on impalpable or highly suspect evidence, and appellant's sentence was within statutory limits.[10] Appellant confessed to supplying controlled substances to his co-defendant. The district court sentenced appellant to the minimum term

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[8]See Blakely v. Washington, 542 U.S. 296, ___ (2004) (stating that precedent makes it clear that the statutory maximum that may be imposed is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant") (emphasis in original).

[9]Lloyd v. State, 94 Nev. 167, 170, 576 P.2d 740, 742 (1978) (citation omitted).

[10]See NRS 453.3385.

allowed in the statute. Thus, the district court did not err in denying this claim.

Finally, appellant claimed that appellate counsel was ineffective. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington, 466 U.S. 668 (1984)."[11] Appellate counsel is not required to raise every non-frivolous issue on appeal.[12] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[13] "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."[14] Appellant claimed that appellate counsel was ineffective for failing to discuss and confer with appellant regarding appealable issues. Appellant failed to specify which issues counsel should have appealed, and whether those issues had a reasonable probability of success on appeal. Thus, the district court did not err in denying this claim.

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[11]Kirksey, 112 Nev. at 998, 923 P.2d at 1113.

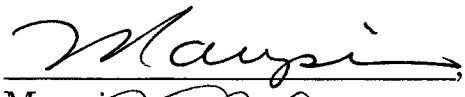
[12]Jones v. Barnes, 463 U.S. 745, 751 (1983).

[13]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

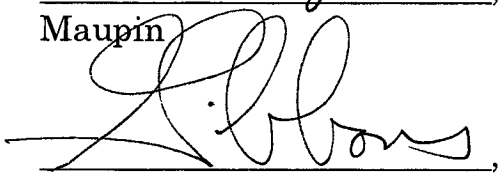
[14]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

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.[15] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Maupin



_____, J.
Gibbons

_____, J.
Hardesty

cc: Hon. Andrew J. Puccinelli, District Judge
Erik Flores-Gonzales
Attorney General
Elko County District Attorney
Elko County Clerk

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[15]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).