

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK SCOTT GIARDINA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 45921

**FILED**

FEB 16 2006

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 appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On July 17, 2003, the district court convicted appellant, pursuant to a guilty plea, of assault with a deadly weapon. The district court sentenced appellant to serve a term of 18 to 72 months in the Nevada State Prison. Appellant did not file a direct appeal.

On May 18, 2004, 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, the district court declined to appoint counsel to represent appellant; however, pursuant to NRS 34.770, the district court conducted an evidentiary hearing. On August 16, 2005, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that counsel was ineffective.<sup>1</sup> 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.<sup>2</sup> 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>3</sup> The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>4</sup> A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.<sup>5</sup> Further, the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.<sup>6</sup>

---

<sup>1</sup>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).

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

<sup>3</sup>See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

<sup>4</sup>Strickland, 466 U.S. at 697.

<sup>5</sup>Means v. State, 120 Nev. \_\_\_, \_\_\_, 103 P.3d 25, 33 (2004).

<sup>6</sup>Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, appellant claimed that his counsel was ineffective for not objecting to mistakes in the presentence investigation report (PSI). Specifically, appellant claimed that counsel should have objected to the amount of felonies in the PSI and the mention in the PSI of appellant using more than one knife in the assault. Appellant failed to demonstrate that counsel was ineffective. During the evidentiary hearing the district court asked appellant if he had informed his attorney of the errors, and appellant stated that he did not, even though he had received a copy of the PSI a week prior to sentencing. Transcripts revealed that appellant's counsel had made the district court aware that appellant only threw a single knife. The district court verified that he had not considered the amount of prior felonies or the reference to more than one knife during sentencing. Thus, the district court did not err in denying this claim.

Second, appellant claimed that his counsel was ineffective for failing to have appellant's girlfriend, the victim, testify at the sentencing hearing. Appellant failed to demonstrate that counsel was deficient or that the failure to have appellant's girlfriend testify prejudiced his sentencing. Appellant's girlfriend was not the reported victim, and the district court verified that during sentencing it did not consider reports that appellant had been choking the girlfriend when police were called. Thus, the district court did not err in denying this claim.

Third, appellant claimed that his counsel was ineffective for failing to provide discovery to appellant. Appellant failed to demonstrate that his counsel was deficient. Counsel testified at the evidentiary hearing that he sent appellant all paperwork that had been in his file

while preparing for the preliminary hearing. Thus, the district court did not err in denying this claim.

Fourth, appellant claimed that counsel was ineffective for failing to object to the State's statements that appellant had stabbed a police officer. The claim is belied by the record.<sup>7</sup> Counsel objected to the State's statement, and informed the district court that appellant's actions had not resulted in any injuries. Appellant failed to demonstrate that counsel was ineffective and, thus, the district court did not err in denying this claim.

Last, appellant claimed that his counsel was ineffective for not informing him of his right to appeal. Appellant failed to demonstrate that his counsel was ineffective for failing to inform him of the right to appeal.<sup>8</sup> The written guilty plea agreement correctly informed appellant of his limited right to a direct appeal.<sup>9</sup> Appellant did not state that he expressed a desire to appeal and that counsel failed to do so.<sup>10</sup> Therefore, the district court did not err in denying this claim.

---

<sup>7</sup>See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

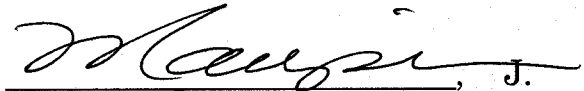
<sup>8</sup>See Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999) (holding that there is no constitutional requirement to always inform a defendant who pleads guilty of the right to a direct appeal).

<sup>9</sup>See Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).

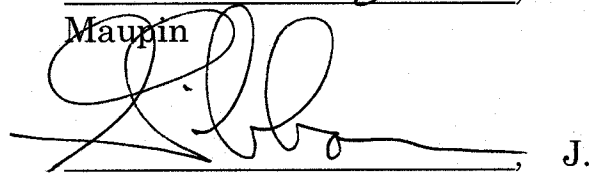
<sup>10</sup>See id.

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>11</sup> Accordingly, we

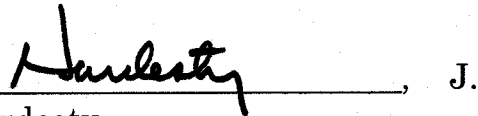
ORDER the judgment of the district court AFFIRMED.<sup>12</sup>

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

cc: Hon. Donald M. Mosley, District Judge  
Frank Scott Giardina  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

---

<sup>11</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>12</sup>We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.