IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON ROBERT SPARKS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46021

FILED

APR 27 2007

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 denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On June 23, 2004, the district court convicted appellant, pursuant to a guilty plea, of failure stop on signal of a police officer. The district court adjudicated appellant a small habitual criminal and sentenced appellant to serve a term of 60 to 150 months in the Nevada State Prison. This court affirmed the judgment of conviction on direct appeal.[1] The remittitur issued on June 16, 2006.

On June 21, 2005, while his direct appeal was still pending, 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

[1]Sparks v. State, Docket No. 43656 (Order of Affirmance, May 22, 2006).

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represent appellant or to conduct an evidentiary hearing. On July 17, 2006, the district court denied appellant's petition.[2] This appeal followed.

In his petition, appellant contended that trial counsel was ineffective. 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 was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability of a different outcome but for counsel's errors.[3] In order to demonstrate prejudice to invalidate the decision to enter a guilty plea, a petitioner must demonstrate a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial.[4] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[5]

First, appellant claimed that his counsel was ineffective for failing to be knowledgeable about NRS 207.010, the habitual criminal statute, and failing to properly advise appellant regarding that statute and the consequences of pleading guilty. Appellant claimed that his counsel had persuaded him to plead guilty by wrongly informing him that

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[2]The district court verbally denied appellant's petition on August 15, 2005.

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

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

[5]Strickland, 466 U.S. at 697.

he could be sentenced to no more than 5 years under the negotiated plea. Appellant's claim is not supported by the record. Appellant's guilty plea agreement, which appellant stated he read, understood, and signed, specified that appellant was pleading guilty to a stipulated sentence of 60 to 150 months,[6] and that in return for appellant's guilty plea, the State agreed not to seek adjudication as a large habitual criminal. During the plea canvass, the parties discussed the terms of the stipulated sentence, and appellant stated that he understood the negotiated sentence and his adjudication as a small habitual criminal. The district court sentenced appellant to the stipulated sentence. It is apparent from the record that appellant was informed of the sentence he was stipulating to, including adjudication as a small habitual criminal. Appellant failed to demonstrate that there was a reasonable probability that he would have refused to plead guilty and would have insisted on proceeding to trial had counsel further advised him of the habitual criminal statute and the consequences of his pleading guilty. Further, appellant's mere subjective belief as to a potential sentence is insufficient to invalidate his guilty plea as involuntary and unknowing.[7] Therefore, the district court did not err in denying this claim.

Second, appellant appeared to claim that counsel was ineffective for failing to object to language in the plea agreement which

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[6]The district court specified that appellant's term would run concurrent to district court case numbers 199327 and 190501.

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

inferred that appellant was facing conviction of more than one offense. Specifically, appellant claimed that the State presented documents attached to his plea agreement that referred to the "primary offense" when he was only pleading guilty to one offense. Appellant failed to demonstrate that his counsel was deficient. The language that appellant referred to was in the attached information in which the State gave notice that it would seek habitual criminal adjudication. The document specifically stated that "[u]nder no circumstances is the language contained hereinafter to be read to a jury hearing the primary offense for which the defendant is presently charged." The offense of failure to stop on signal of a police officer was the primary offense and the felony that subjected appellant to the habitual criminal enhancement of his sentence.[8] Thus, the language appellant referred to in no way implied that appellant was facing more than one conviction. Accordingly, the district court did not err in denying this claim.

Third, appellant claimed that counsel was ineffective for failing to challenge his adjudication as a habitual criminal based upon prior convictions from fifteen years prior. Specifically, appellant claimed that counsel should have challenged the prior convictions as ancient, trivial and stale. The habitual criminal statute makes no special allowance for non-violent crimes or for the remoteness of the prior convictions; these are merely considerations within the discretion of the

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[8]NRS 207.010

district court.[9] The record indicates that appellant's past convictions were not remote. He pleaded guilty to felony burglary in 2001, in which he was facing revocation of parole. In 2000, appellant was convicted of possession of a firearm by a convicted felon, also a felony. The district court stated it was taking into consideration the information provided in the Presentence Investigation Report, and sentenced appellant to a term running concurrent with the other sentences in cases 199327 and 190501. Therefore, his counsel was not deficient for failing to challenge the prior convictions as trial or stale. Further, appellant failed to demonstrate that such a challenge would have altered the outcome of the proceedings. Thus, the district court did not err in denying this claim.

Fourth, appellant claimed that counsel was ineffective for failing to object to the adjudication of appellant as a habitual criminal because his prior convictions were never submitted to the jury and proved beyond a reasonable doubt, pursuant to Apprendi v. New Jersey.[10] Specifically, appellant claimed that the district court improperly considered the following facts in adjudicating him a habitual criminal: 1) that appellant was on supervision at the time of his arrest; (2) that appellant had failed previous parole and probation grants; (3) that the offense was deliberately committed; and (4) that appellant had a long history of substance abuse. Appellant failed to demonstrate that he was

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[9]See NRS 207.010; see also Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992).

[10]530 U.S. 466 (2000).

prejudiced. In Apprendi, the United States Supreme Court held, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[11] The "statutory maximum for Apprendi purposes 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."[12] This court recently clarified that the plain language of NRS 207.010(2) grants the district court discretion to dismiss a count of habitual criminality and the exercise of discretion does not serve to increase the punishment.[13] Thus, the district court could sentence appellant as a habitual criminal without submission of the issue before a jury. In exercising its discretion to dismiss, the record reveals that the district court considered appellant's prior convictions, appellant's "plea agreement, the information filed in this case, a presentence report prepared for an unrelated felony, [appellant's] responses during the plea canvass, and counsels' argument during sentencing."[14] Thus, the district court did not err in denying this claim.

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[11]Id. at 490.

[12]Blakely v. Washington, 542 U.S. 296, 303 (2004) (emphasis in original); see also Cunningham v. California, 546 U.S. ___, 127 S. Ct. 856 (2007).

[13]O'Neill v. State, 123 Nev. ___, ___ P.3d ___ (Adv. Op. No. 2, March 8, 2007).

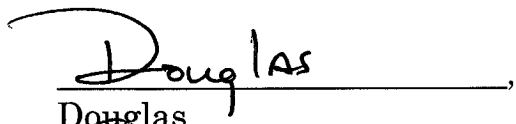
[14]Sparks v. State, Docket No. 43656 (Order of Affirmance, May 22, 2006).

Fifth, appellant claimed that his counsel was ineffective for failing to file a direct appeal for appellant after appellant requested counsel to do so. This claim is belied by the record.[15] This court affirmed appellant's direct appeal on May 22, 2006. Thus, the district court did not err in denying this claim.

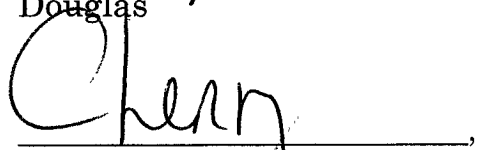
Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.[16] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[17]

_____, J.
Gibbons



_____, J.
Douglas



_____, J.
Cherry

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[15]Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

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

[17]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.

cc: Hon. Joseph T. Bonaventure, District Judge
Jason Robert Sparks
Attorney Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth Judicial Court Clerk