

IN THE SUPREME COURT OF THE STATE OF NEVADA

AMADO RUBIO-GALLEGO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 46186

**FILED**

JUN 30 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 a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On April 13, 2004, the district court convicted appellant, pursuant to a guilty plea, of one count of voluntary manslaughter with the use of a deadly weapon and one count of robbery. The district court sentenced appellant to serve consecutive prison terms totaling 108 to 270 months in the Nevada State Prison. No direct appeal was taken.

On April 11, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition.<sup>1</sup> Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. On September 26,

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<sup>1</sup>The State argued, among things, that appellant's petition was untimely filed. It appears that the State believed that the petition was not filed in the district court until April 14, 2005. However, a review of the record on appeal reveals a filing date of April 11, 2005. Thus, the petition was timely filed. See NRS 34.726(1).

2005, after hearing arguments on the petition, the district court denied appellant's petition.<sup>2</sup> This appeal followed.

In his petition, appellant raised two claims of ineffective assistance of trial counsel. 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 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 need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.<sup>4</sup>

First, appellant claimed that his trial counsel was ineffective for forcing appellant into signing the guilty plea agreement. Appellant claimed that his trial counsel tricked him into believing that he was not entering a guilty plea to the crime of robbery. Appellant claimed that his

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<sup>2</sup>The record on appeal contains an affidavit prepared by trial counsel. This court has held that a petitioner's statutory rights are violated when the district court improperly expands the record with an affidavit refuting the claims in the petition in lieu of conducting an evidentiary hearing when an evidentiary hearing is required. Mann v. State, 118 Nev. 351, 46 P.3d 1228 (2002). We conclude that the appellant suffered no prejudice with the filing of the affidavit because it does not appear that the district court relied on the affidavit and no evidentiary hearing was required on the claims.

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

<sup>4</sup>Strickland v. Washington, 466 U.S. 668, 697 (1984).

trial counsel took advantage of the fact that appellant was medicated at the time he entered his plea.

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The record does not support appellant's claim that he was tricked into entering a guilty plea to the crime of robbery. The written guilty plea agreement expressly informed appellant that he was entering a guilty plea to the crime of voluntary manslaughter with the use of a deadly weapon and robbery.<sup>5</sup> The plea negotiations were set forth during the plea canvass—including the fact that appellant was entering a guilty plea to one count of robbery. Appellant admitted the facts supporting the robbery charge during the plea canvass. In signing the guilty plea agreement, appellant acknowledged that he was not under the influence of any medication that prevented him from understanding or comprehending the guilty plea agreement or the proceedings. Further, trial counsel informed the district court during the plea canvass that appellant was taking an antibiotic for a foot problem but that he did not believe it affected appellant's ability to enter his guilty plea. Because the record does not support appellant's claim, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to investigate appellant's claim that he was innocent

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<sup>5</sup>During the plea canvass, appellant acknowledged that the guilty plea agreement was read to him in Spanish and that he understood its contents.

of robbery. Appellant claimed that the cell phone that he was accused of taking by force was actually his own.

Appellant failed to demonstrate that he was prejudiced by trial counsel's performance. Appellant was originally charged with murder with the use of a deadly weapon and robbery with the use of a deadly weapon for the stabbing death of Julio Martinez and the taking of his vehicle and personal effects by force, threat, or as a result of his death. Appellant substantially limited his potential sentence by entering a guilty plea to one count of voluntary manslaughter with the use of a deadly weapon and robbery of a cellphone. Appellant failed to demonstrate that further investigation into the factual basis for the robbery charge would have made a difference in his decision to enter a guilty plea given the potential sentences that he faced by going to trial on the original charges.<sup>6</sup> Appellant did not argue that there was not a factual basis for the robbery charge as originally drafted. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

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<sup>6</sup>NRS 200.030(4)(b) provides that the possible penalties for first degree murder, when the State does not seek the death penalty, include life without the possibility of parole, life with the possibility of parole after twenty years or a definite term of twenty to fifty years. Because the State alleged that the murder was committed with the use of a deadly weapon, appellant faced an equal and consecutive term pursuant to NRS 193.165. NRS 200.380(2) provides that a person who commits robbery faces a potential term of not less than two years nor more than fifteen years. Again, because the State alleged that appellant used a deadly weapon during the robbery, appellant faced an equal and consecutive term pursuant to NRS 193.165.

Next, appellant claimed that the deadly weapon enhancement was illegal because he did not admit to using a deadly weapon and there was no jury determination that he had used a deadly weapon.<sup>7</sup> Appellant further claimed that the deadly weapon enhancement violated double jeopardy. These claims fell outside the scope of claims permissible in a petition challenging a judgment of conviction based upon a guilty plea.<sup>8</sup> Moreover, as separate and independent grounds to deny relief, these claims lacked merit. Appellant pleaded guilty to voluntary manslaughter with the use of a deadly weapon, and appellant admitted to the facts supporting the deadly weapon enhancement. Thus, the district court was permitted to impose the deadly weapon enhancement.<sup>9</sup> Further, it is well settled that NRS 193.165 does not violate the Double Jeopardy Clause.<sup>10</sup> Therefore, we conclude that the district court did not err in denying these claims.

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<sup>7</sup>See Apprendi v. New Jersey, 530 U.S. 466 (2000).

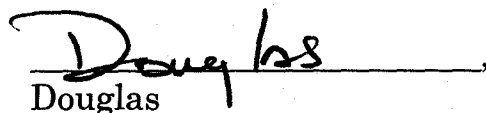
<sup>8</sup>See NRS 34.810(1)(a).

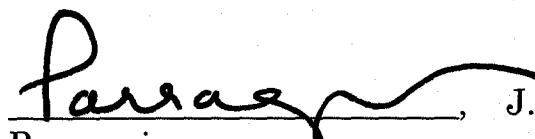
<sup>9</sup>See Blakely v. Washington, 542 U.S. 296, 303 (2004) (stating that precedent makes it clear that the statutory maximum that may be imposed is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant") (emphasis in original).

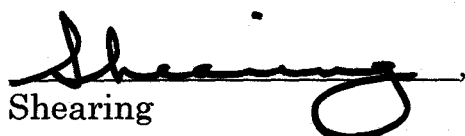
<sup>10</sup>Nevada Dep't of Prisons v. Bowen, 103 Nev. 477, 479, 745 P.2d 697, 698 (citing Woofter v. O'Donnell, 91 Nev. 756, 542 P.2d 1396 (1975)).

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.  
Douglas

 J.  
Parraguirre

 Sr. J.  
Shearing

cc: Hon. Donald M. Mosley, District Judge  
Amado Rubio-Gallego  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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

<sup>12</sup>The Honorable Miriam Shearing, Senior Justice, participated in the decision of this matter under general orders of assignment entered January 6, 2006.