

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA LEE CARMICHAEL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47216

FILED

AUG 24 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

On January 27, 2004, appellant Joshua Lee Carmichael was convicted, pursuant to a guilty plea, of one count each of burglary and fraudulent use of a credit card. The district court sentenced Carmichael to serve a prison term of 26 to 120 months and a concurrent prison term of 12 to 48 months. The district court ordered the sentence to run consecutively to the sentence imposed in another unrelated criminal case. Carmichael did not file a direct appeal.

On July 29, 2004, Carmichael filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. The district court appointed counsel to represent Carmichael, and counsel filed a supplement to the petition. After conducting an evidentiary hearing, the district court denied Carmichael's petition. This appeal followed.

Carmichael first claims that the district court erred by denying the petition because his guilty plea was unknowing. In

particular, Carmichael contends that he pleaded guilty based on defense counsel's assurances that the sentence imposed in this case would run concurrently to the sentence he was serving in an unrelated case. We conclude that Carmichael's contention lacks merit.

The district court found that the totality of the circumstances indicates that Carmichael's guilty plea was knowing and voluntary and that he was properly advised with regard to the potential sentence. We conclude that the district court's finding is supported by substantial evidence.¹ In particular, at the post-conviction hearing, defense counsel Byron Bergeron testified that he could not recall his specific conversations with Carmichael, but that he would never advise a client that a concurrent sentence was guaranteed if the State agreed to recommend it. Further, the signed plea agreement contained an acknowledgement from Carmichael that he was aware that "the Court is not bound by the agreement of the parties and the matter of sentencing is to be determined solely by the court." Finally, at the plea canvass, the district court emphasized that it did not have to follow the sentencing recommendation and could impose consecutive sentences, stating, "So you understand [the State is recommending concurrent sentences], but at the end of the day the Court will make the decision as to . . . how the sentences will run."

Although Carmichael testified at the post-conviction hearing that he pleaded guilty based on defense counsel's assurances he would receive concurrent sentences, the district court found that Carmichael's testimony was not credible. Further, the "mere subjective belief of a

¹See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

defendant as to potential sentence, or hope of leniency, unsupported by any promise from the State or indication by the court, is insufficient to invalidate a guilty plea as involuntary or unknowing.”² Accordingly, the district court did not abuse its discretion by rejecting Carmichael's claim regarding the validity of his guilty plea.

Carmichael also claims that the district court erred by denying his petition because defense counsel was ineffective for failing to file an appeal. We conclude that the district court did not abuse its discretion by denying Carmichael's claim.

The district court found that Carmichael failed to demonstrate that he requested an appeal. The district court's factual finding is supported by substantial evidence. In particular, Bergeron testified at the evidentiary hearing that he did not recall Carmichael ever requesting an appeal. Moreover, Bergeron testified that, if Carmichael had done so, he would have notified appellate deputy Petty by email. At the post-conviction hearing, Petty was not called to testify about his involvement with Bergeron, and Carmichael declined the district court's offer to continue the proceeding so that Petty could testify.


Although Carmichael testified that he requested an appeal, the district court did not abuse its discretion by finding that his testimony was not credible. Accordingly, we conclude that the district court did not

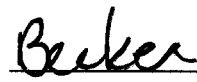
²State v. Langarica, 107 Nev. 932, 934, 822 P.2d 1110, 1112 (1991) (quoting Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975)).

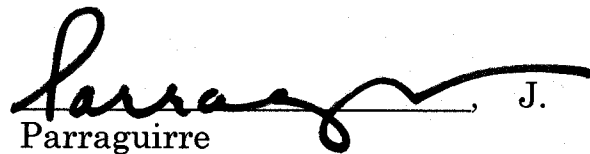
err by rejecting Carmichael's claim that he was deprived of his right to a direct appeal.³

Having considered Carmichael's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

 _____, J.
Douglas

 _____, J.
Becker

 _____, J.
Parraguirre

cc: Hon. Janet J. Berry, District Judge
Nathalie Huynh
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

³Because Carmichael has failed to show that defense counsel's conduct was deficient with respect to filing an appeal, we need not address his remaining contention that the district court erred by finding that he was not prejudiced by counsel's alleged failure to file an appeal. See Strickland v. Washington, 466 U.S. 668, 687 (1984); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (A court need not consider both prongs of the Strickland analysis if the defendant makes an insufficient showing on either one.).