

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD J. ALFORD, JR.,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

No. 47390

FILED

SEP 20 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
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 6, 2005, the district court convicted appellant, pursuant to a guilty plea, of one count of possession of a stolen vehicle. The district court sentenced appellant to serve a term of eighteen to sixty months in the Nevada State Prison. No direct appeal was taken.

On February 15, 2006, 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 represent appellant or to conduct an evidentiary hearing. On July 14, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, 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.¹ In order to demonstrate prejudice sufficient to invalidate the decision to enter a guilty plea, the petitioner must demonstrate that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.² The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.³

First, appellant claimed that his trial counsel was ineffective for failing to provide a viable legal defense and failing to preserve his rights. Appellant asserted that he should not have been charged with possession of a stolen vehicle as a trailer is not a motorized vehicle. He further claimed that his trial counsel erroneously informed him that the penalties were the same for the crimes of possession of stolen property and possession of a stolen vehicle.

Appellant failed to demonstrate that he was prejudiced by counsel's performance. Appellant's trial counsel correctly informed

¹Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

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

³Strickland, 466 U.S. at 697.

appellant that the penalties were the same for possession of a stolen vehicle and possession of stolen property unless the property was worth less than \$250.⁴ Thus, even assuming that a trailer does not qualify as a motorized vehicle under NRS 205.273, appellant cannot demonstrate any prejudice by entry of his guilty plea. Appellant benefitted by entry of his guilty plea by reducing his exposure to further punishment; in exchange for his guilty plea, the State agreed not to oppose the dismissal of case O4F07330X, appellant was not liable for restitution for the contents of the stolen trailer, and the State would not oppose bail in the amount of \$3000 after entry of the plea. Therefore, 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 move to withdraw his guilty plea after the State allegedly opposed dismissal of case O4F07330X. Appellant failed to demonstrate that he was prejudiced. The district court specifically found that case O4F07330X was ultimately dismissed, and thus, the plea agreement was honored. Therefore, we conclude that the district court did not err in denying this claim.

⁴Compare NRS 205.273(3), (4) (possession of a stolen vehicle) and NRS 205.275(2) (possession of stolen property). The record indicates that appellant sold the stolen trailer for \$1000 to a couple on the side of the road.

Third, appellant claimed that his trial counsel was ineffective for failing to produce mitigating evidence at sentencing. Specifically, appellant claimed that his trial counsel should have presented a copy of the surveillance videotape from the Home Depot parking lot. The videotape would have shown that appellant did not steal the trailer from the Excalibur parking lot, but instead took the trailer that had already been stolen from the Excalibur and abandoned in the Home Depot parking lot. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant was not convicted of theft of the stolen trailer nor is there any indication that the district court sentenced him believing that appellant was responsible for the original theft. Appellant's trial counsel specifically informed the district court of the circumstances of the theft. Appellant failed to demonstrate that presentation of the videotape would have resulted in a reduced sentence. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that the State breached the plea agreement. Appellant claimed that the State opposed the dismissal of case O4F07330X in violation of the plea agreement. Appellant failed to provide sufficient facts demonstrating any breach or that he suffered any

prejudice.⁵ The district court found that case O4F07330X was ultimately dismissed. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed: (1) the district attorney erroneously filed a criminal complaint charging him with theft and possession of a stolen vehicle when the police report indicated that he had committed the crimes of obtaining money under false pretenses and possession of stolen property; (2) the district attorney erroneously charged him with possession of a stolen vehicle because a trailer is not a motorized vehicle; (3) the district attorney failed to present the surveillance videotape to the district court at sentencing; (4) the district court relied upon remote and trivial convictions from his criminal record in sentencing him; (5) the presentence investigation report drafter did not spend enough time with appellant; and (6) his due process rights were violated because he was not provided with a copy of the presentence investigation report before sentencing. These claims were outside the scope of claims permissible in a petition challenging a judgment of conviction based upon a guilty plea, and therefore, the district court did not err in denying these claims.⁶

⁵See Van Buskirk v. State, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986). Because the remedy for a breach of the plea agreement is specific performance, appellant cannot demonstrate any prejudice as the case was dismissed regardless of the timing or circumstances of the dismissal.

⁶See NRS 34.810(1)(a).

Finally, it appeared that appellant moved to modify his sentence. Appellant claimed that the district court relied upon the following pieces of false information in the presentence investigation report: (1) offense synopsis that included facts about the original theft; (2) statement that appellant was unemployed when appellant owned and operated a small business; and (3) conclusion reached by presentence investigation report that appellant had an extensive criminal record, that he had learned little from his prior periods of incarceration, that he had sketchy employment, and that he was a career criminal.

A motion to modify a sentence "is limited in scope to sentences based on mistaken assumptions about a defendant's criminal record which work to the defendant's extreme detriment."⁷ Appellant failed to demonstrate the district court relied upon any mistaken assumptions appellant's criminal record that worked to his extreme detriment. During sentencing, appellant's trial counsel informed the district court of the circumstances of the original theft and that appellant had a business. Appellant failed to indicate that the district court relied upon any impalpable or highly suspect evidence in considering his past criminal record.⁸ Therefore, we conclude that the district court did not err in denying this claim.

⁷Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

⁸See Silks v. State, 92 Nev. 91, 545 P.2d 1159 (1976).

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.⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁰

Becker, J.
Becker

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁰We 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. Donald M. Mosley, District Judge
Donald J. Alford Jr.
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk