IN THE SUPREME COURT OF THE STATE OF NEVADA

RITA DUNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47415

FILED

JAN 24 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; Michael A. Cherry, Judge.

On March 29, 2005, the district court convicted appellant, pursuant to a guilty plea, of one count of attempted robbery. The district court sentenced appellant to serve a term of 24 to 120 months in the Nevada State Prison. Appellant did not file a direct appeal.

On January 26, 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 May 2, 2006, the district court denied appellant's petition. This appeal followed.

In her petition, appellant contended that trial counsel was ineffective.[1] 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 her 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.[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 her counsel was ineffective for failing to inform appellant of the consequences of her plea. Additionally, appellant claimed that trial counsel promised probation in exchange for her guilty plea. Appellant failed to demonstrate that she was prejudiced by counsel's representation. Although the presentence investigation report (PSI) recommended that appellant receive probation, her guilty plea agreement stated that appellant could face a prison term of one to ten years. During appellant's plea canvass, appellant stated that she had

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[1]To the extent that appellant raised any of the underlying issues independently from her ineffective assistance of counsel claims, we conclude that they fell 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).

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

[3]Strickland v. Washington, 466 U.S. 668, 697 (1984).

read, understood and signed the plea agreement. Appellant acknowledged that she understood that the district court could exercise its discretion and sentence her up to ten years. Appellant's mere subjective belief as to a potential sentence is insufficient to invalidate her guilty plea as involuntary and unknowing.[4] Furthermore, appellant benefited from the plea negotiations in that she avoided more serious charges, and thus, failed to demonstrate prejudice.[5] Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that her trial counsel was ineffective for failing to discuss discrepancies in her PSI. Specifically, appellant claimed that counsel did not discuss the fact that her PSI listed the wrong birthdate, alleged she had tattoos when she had none, showed zero jail terms when she had served three terms, showed a false conviction of delinquency of a minor, and listed the incorrect employment date. Appellant failed to demonstrate that counsel's performance was deficient or that had counsel objected to the alleged incorrect information, her sentence would have been different. The district court explained what information it was considering in sentencing appellant to two to ten years, including the serious injuries sustained by the victim.[6] Appellant failed to

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

[5]Appellant was initially charged with attempted robbery (NRS 200.380, NRS 193.330); battery with the use of a deadly weapon (NRS 200.481(2)(e)); and possession of a controlled substance (NRS 453.336).

[6]Silks v. State, 92 Nev. 91, 94 n.2, 545 P2d 1159, 1161 n.2 (1976). The district court may properly consider other criminal conduct, even if

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demonstrate that the district court relied on the purported discrepancies in the PSI. Thus, the district court did not err in denying this claim.

Third, appellant claimed that her trial counsel was ineffective for failing to request a continuance so that he could be present at her sentencing, rather than another attorney from the public defender's office. Appellant failed to demonstrate that if counsel had objected that the outcome at her sentencing would have been different. Counsel filed a motion to reconsider sentence following sentencing, arguing in part that appellant might have been sentenced to probation had counsel been present. Counsel presented argument to the court at that time; however, the district court denied the motion to reconsider. Therefore, appellant failed to demonstrate prejudice, and the district court did not err in denying this claim.

Fourth, appellant claimed that her trial counsel was ineffective for failing to request a continuance because the sentencing judge was not familiar with her case. Specifically, appellant claimed that counsel should have requested a continuance because Judge Cherry had canvassed her during her plea entry, but Judge Bell sentenced her. Appellant failed to demonstrate that she was prejudiced. Generally, a criminal defendant is entitled to be sentenced by the district judge who

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. . . continued

appellant was never charged or convicted of such conduct, thus, the district court could properly consider the injuries to the victim.

accepts her guilty plea.[7] However, that general principle is subject to numerous exceptions, including where "[t]he judge . . . from other cause is unavailable to act."[8] We note that appellant was not prejudiced by the change in the district judge prior to sentencing.[9] The record reveals that Judge Bell familiarized himself with appellant's case prior to exercising his sentencing discretion; he reviewed the PSI, listened to defendant's statement, and heard argument by defense counsel as to the PSI recommendation for probation. Thus, the district court did not err in denying this claim.

Last, appellant claimed that her counsel was ineffective for failing to inform her of her right to file a direct appeal. Appellant failed to demonstrate that she was prejudiced.[10] The written guilty plea agreement correctly informed appellant of her limited right to a direct appeal.[11] Appellant did not state that she asked counsel to file an appeal or

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[7]See DCR 18; Marshall v. District Court, 79 Nev. 280, 382 P.2d 214 (1963).

[8]DCR 18(2)(a).

[9]See State v. Carson, 597 P.2d 862 (Utah 1979) (holding that defendant was not prejudiced by the appointment of a replacement judge for sentencing where the record revealed the judge was familiar with the defendant's record and the facts of the case).

[10]See Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

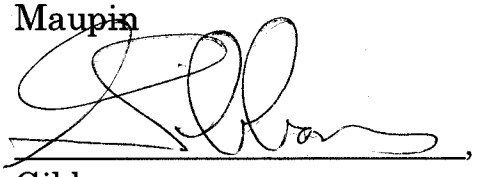
[11]See Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).

otherwise expressed a desire for counsel to file an appeal.[12] Therefore, the district court did not err in denying this claim.

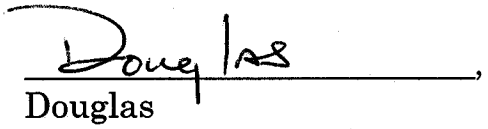
Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.[13] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Maupin



_____, J.
Gibbons



_____, J.
Douglas

cc: Eighth Judicial District Court, Department Seventeen
Hon. Stewart L. Bell, District Judge
Rita Dunson
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[12]See id.

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