IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWN BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47731

FILED

DEC 0 4 2006

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

On March 10, 2005, the district court convicted appellant, pursuant to a guilty plea, of attempted possession of a stolen vehicle in district court case number C196328. The district court sentenced appellant to serve a term of nineteen to forty-eight months in the Nevada State Prison. The district court suspended the term of imprisonment and placed appellant on probation for a period not to exceed three years. The district court further imposed restitution in the amount of $17,200. On June 7, 2005, the district court entered an order revoking probation, executing the original sentence, and amending the judgment of conviction to include seventy-eight days of credit for time served. No appeal was taken.

On March 1, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a response. Pursuant to NRS

06-24750

34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On June 16, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of counsel.[1] To state a claim of ineffective assistance of counsel, 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 in the proceedings.[2] In order to demonstrate prejudice sufficient to invalidate a judgment of conviction based upon a guilty plea, a petitioner must demonstrate that but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.[3] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[4]

First, appellant claimed that his trial counsel was ineffective for failing to object to all actions of the district court not within the bounds

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[1]To the extent that appellant raised any claims independently from his ineffective assistance of counsel claims, those claims were outside the scope of a habeas corpus petition challenging a judgment of conviction based upon a guilty plea. See NRS 34.810(1)(a).

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

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

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

of the plea agreement. Appellant further claimed that his trial counsel failed to advise him when the district court did not act in appellant's best interests. Appellant failed to set forth any specific facts in support of these claims.[5] Thus, appellant failed to demonstrate that his counsel was ineffective, and the district court did not err in denying these claims.

Second, appellant claimed that his trial counsel was ineffective for advising him that he would likely get probation, not be sentenced to a term greater than forty-eight months, and that his sentence in the instant case would run concurrently with any other sentence. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant did receive probation in the instant case and his term of imprisonment in the instant case was not greater than forty-eight months. Appellant was informed in the written guilty plea agreement and during the plea canvass that it was within the district court's discretion to impose concurrent or consecutive sentences. Appellant acknowledged in the written plea agreement that he was not made any promises not set forth in the plea agreement. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to object to restitution in the instant case. Appellant claimed that he should not have been ordered to pay restitution to the victim because the victim had already been compensated by the insurance

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[5]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

company. Appellant further complained that a hearing was not conducted on the amount of restitution. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The written guilty plea agreement informed appellant that he would have to pay restitution, if appropriate, as part of the plea agreement. The district court did not err in awarding restitution to the victim.[6] Further, appellant was not entitled to a full evidentiary hearing at sentencing regarding restitution, and appellant failed to indicate what challenge to the restitution amount trial counsel should have made at sentencing.[7] Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to file a direct appeal despite the fact that trial counsel was aware that the district court's sentence was in violation of the plea negotiations. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant was advised of the limited right to appeal in the written guilty plea agreement.[8] Appellant did not assert that he asked counsel to file an

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[6]See NRS 176.033(1)(c); see also Martinez v. State, 115 Nev. 9, 12, 974 P.2d 133, 135 (1999) (holding that a defendant's obligation to pay restitution may not be reduced because the victim has been reimbursed by insurance proceeds).

[7]See Martinez, 115 Nev. at 13, 974 P.2d at 135.

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

appeal within thirty days from entry of the original judgment of conviction and that counsel refused to do so,[9] nor did appellant demonstrate that there was an issue which had a reasonable likelihood of success on appeal.[10] Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to object to the fact that the district court heard two of appellant's cases on the same day. Appellant claimed that the district court was biased and prejudiced because it heard multiple cases. Appellant further claimed that counsel should have filed a motion to disqualify the district court. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that an objection would have been meritorious or that there was a reasonable probability of a different outcome. Appellant further failed to demonstrate that there was a legitimate ground for

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[9]Appellant was sentenced on February 17, 2005. Appellant's assertion that he asked for an appeal from his judgment of conviction after a resentencing hearing on June 7, 2005, is not supported by the record. No hearing was conducted on June 7, 2005. A hearing was conducted on June 2, 2005; however, the June 2, 2005 hearing was a probation revocation hearing. A request on June 2, 2005 to file an appeal from the original judgment of conviction would have been untimely, and trial counsel would not be ineffective for failing to file an untimely notice of appeal from the judgment of conviction. Appellant did not state that he asked counsel to file an appeal from the revocation of his probation. Thus, he failed to demonstrate that his counsel was ineffective in this regard.

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

disqualification in the instant case.[11] Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel failed to object to an ambiguity in the plea agreement. Specifically, appellant claimed that he was led to believe that he would be convicted of a gross misdemeanor in the instant case if he successfully completed a program of regimental discipline. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The written guilty plea agreement in the instant case did not promise that the district court would treat this conviction as a gross misdemeanor if he successfully completed a program of regimental discipline. Rather, appellant was expressly informed in the written guilty plea agreement, during the guilty plea canvass, and during a hearing after the plea canvass but prior to the February 17, 2005 sentencing hearing that it was within the district court's discretion to treat this conviction as a felony or a gross misdemeanor. Regimental discipline was not a part of the original plea agreement in this case; the district court ordered regimental discipline after appellant failed to appear for his initial sentencing hearing in the instant case. Therefore, we conclude that the district court did not err in denying this claim.

Seventh, appellant claimed that his trial counsel was ineffective in failing to provide him with sufficient time to read the written

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[11]See NRS 1.230; NRS 1.235.

guilty plea agreement. Appellant failed to demonstrate prejudice. The plea negotiations were set forth as early as the date that appellant waived his preliminary hearing. Appellant failed to indicate how additional time would have made a difference in his decision to enter a guilty plea in the instant case. Therefore, we conclude that the district court did not err in denying this claim.

Eighth, appellant claimed that his trial counsel was ineffective for instructing appellant to lie during the plea canvass. Appellant claimed that he was coached in his answers. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to indicate what answers were false. Appellant further failed to demonstrate that trial counsel's coaching made a difference in his decision to enter a guilty plea in the instant case. Therefore, we conclude that the district court did not err in denying this claim.

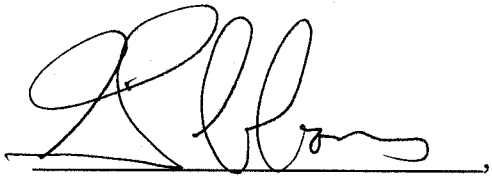
Ninth, appellant claimed that his trial counsel failed to adequately communicate with him. Appellant failed to indicate how further communication would have made a difference in his decision to enter a guilty plea. Therefore, we conclude that the district court did not err in denying this claim.

Tenth, appellant claimed that his trial counsel was ineffective for failing to object to the district court's failure to award him with one hundred and eighty days of credit for time spent in the regimental discipline program. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that he was entitled to additional credits in the

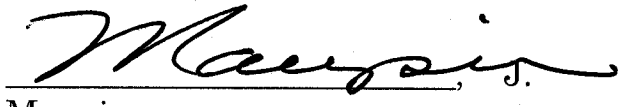
instant case.[12] Therefore, we conclude that the district court did not err in denying this claim.

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.



_____, J.
Gibbons



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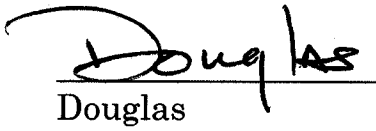

_____, J.
Douglas

cc: Hon. Donald M. Mosley, District Judge
Shawn Brown
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[12]See NRS 176.055(1). It appears from the record that appellant was in the regimental discipline program for two different district courts cases and that the credits sought were applied to the other district court case.

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