

IN THE SUPREME COURT OF THE STATE OF NEVADA

GERALD H. DESANTIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47845

FILED

MAR 22 2007

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 appellant's postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

On September 4, 2003, appellant was convicted, pursuant to a guilty plea, of four counts of sale of a controlled substance. He was sentenced to serve three concurrent terms and one consecutive term of 24 to 60 months in prison. This court affirmed the judgment of conviction and sentence on direct appeal.¹ The remittitur issued on March 1, 2005.

On December 12, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus. The district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On August 1, 2006, the district court dismissed the petition. This appeal followed.

¹DeSantis v. State, Docket No. 43705 (Order of Affirmance, February 4, 2005).

Appellant claimed he received ineffective assistance of trial and appellate 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. A petitioner must also show resulting prejudice: a reasonable probability that, but for trial counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.² Prejudice from appellate counsel's performance must be such that the omitted issue would have a reasonable probability of success on appeal.³ Appellant claimed his trial counsel allowed him to plead guilty without advising him that he could contact the Argentine consulate for assistance since he was an Argentine citizen. Appellant failed to explain how knowing of his right to contact the consulate might have caused him not to plead guilty and instead to insist on going to trial.

Appellant also claimed he received ineffective assistance of counsel at sentencing and on direct appeal. Pursuant to NRS 34.810(1)(a), the court shall dismiss a petition where the petitioner's conviction was based on a guilty plea and the petition is not based upon a claim that the plea was involuntarily or unknowingly entered or was entered without the

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

³Kirksey, 112 Nev. at 998, 923 P.2d at 1114 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

effective assistance of counsel. The district court did not err in dismissing these claims. Further, the claims lacked merit.

Appellant failed to articulate how counsel could have performed at sentencing that might have resulted in appellant receiving a sentence of probation. Appellant failed to appear on his initial sentencing date; he advised the sentencing court that his failure to appear was related to his medical problems, that he had advised his counsel he would be unable to appear, and that he had instructed his counsel to communicate that to the court. He also failed to make any payments on the fines imposed on him pursuant to his guilty plea agreement during the year before he was formally sentenced. His signed plea agreement advised him that probation was at the sentencing court's discretion. Appellant's sentence was within the sentencing guidelines for his charges,⁴ and the sentencing court set three of the four sentences to run concurrently rather than consecutively.


Appellant also failed to explain how the claims that he requested appellate counsel to bring might have had a reasonable probability of success on appeal. Claims of ineffective assistance of trial counsel, as related above, are properly brought in a post-conviction petition for a writ of habeas corpus, not a direct appeal. The district court did not abuse its discretion in sentencing, as appellant was sentenced within the range allowable for his charges. The State did not breach the

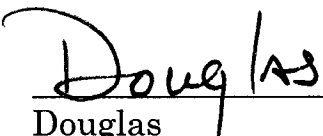
⁴See NRS 453.321(2)(a).

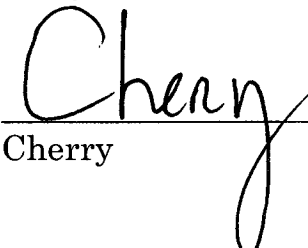
plea agreement by arguing at sentencing, which it specifically reserved the right to do in appellant's guilty plea agreement.

Having reviewed appellant's contentions and concluded he is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

cc: Hon. Sally L. Loehrer, District Judge
Gerald H. DeSantis
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk