

IN THE SUPREME COURT OF THE STATE OF NEVADA

HARRY MARTIN BYARS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48271

FILED

APR 23 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Bloom*
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; Valorie Vega, Judge.

On January 29, 2004, the district court convicted appellant, pursuant to a jury verdict, of one count of stop required on the signal of a police officer, one count of grand larceny auto and one count of possession of a stolen vehicle. Pursuant to NRS 207.010(1)(a), appellant was sentenced as a habitual criminal to serve two consecutive terms of five to twenty years and a concurrent term of five to twenty years in the Nevada State Prison. This court affirmed the judgment of conviction on appeal.¹ The remittitur issued on May 19, 2005.

On May 3, 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

¹Byars v. State, Docket No. 42871 (Order of Affirmance, April 22, 2005).

conduct an evidentiary hearing. On August 23, 2006, the district court denied appellant's petition.

On July 14, 2006, appellant filed an amended post-conviction petition for a writ of habeas corpus. The State opposed this petition on the ground that it was procedurally barred because it was untimely and successive. Appellant filed a motion to vacate the August 23, 2006 order denying his May 3, 2006 petition. In his motion, appellant argued that he intended the July 14, 2006 petition to supercede the first petition. On September 1, 2006, the district court granted appellant's motion and vacated the August 23, 2006 order. The State filed a supplemental opposition to the July 14, 2006 petition. On October 4, 2006, the district court entered a written order denying appellant's petition. This appeal followed.²

In his petition, appellant contended that his trial counsel was ineffective for failing to object to the fact that the decision of whether it was just and proper to adjudicate appellant as a habitual criminal was not presented to a jury in violation of Apprendi v. New Jersey.³ Appellant claimed that the district court usurped his right to a jury trial in deciding the issue of habitual criminality.

²Because appellant's July 14, 2006 habeas corpus petition was an amendment to the May 3, 2006 habeas corpus petition and because the district court allowed the amendment, appellant's petition is timely filed based upon the original filing date of May 3, 2006 petition. See NRS 34.750(5).

³530 U.S. 466 (2000).

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that there is a reasonable probability of a different outcome.⁴ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁵

Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant failed to demonstrate that his trial counsel was ineffective in this regard. This court recently clarified that the just and proper determination relates to the discretion to dismiss a count and does not serve to increase the punishment, and thus, the district court could sentence appellant as a habitual criminal without submission of the issue before a jury upon presentation and proof of the requisite number of prior convictions.⁶ The State presented proof of at least two prior convictions, and thus the requirements of NRS 207.010(1)(a) were satisfied. Therefore, appellant failed to demonstrate that his trial counsel was ineffective in this regard, and we affirm the order of the district court denying appellant's petition.

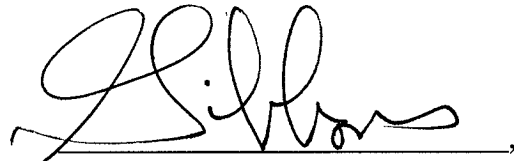
⁴Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

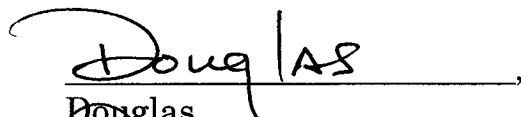
⁵Strickland, 466 U.S. at 697.

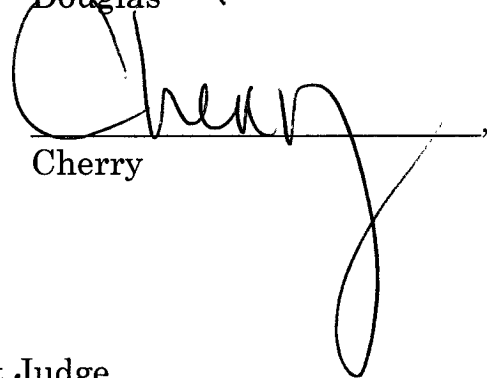
⁶O'Neill v. State, 123 Nev. ___, ___ P.3d ___ (Adv. Op. No. 2, March 8, 2007).

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.⁷ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

cc: Hon. Valorie Vega, District Judge
Harry Martin Byars
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

⁷See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).