

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARLON FLOWERS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48438

FILED

APR 26 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
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 September 20, 2005, the district court convicted appellant, pursuant to a guilty plea, of one count of burglary and one count of grand larceny. The district court sentenced appellant to serve a term of forty-eight to one hundred twenty months in the Nevada State Prison for burglary and a concurrent term of twelve to thirty-six months for grand larceny. No direct appeal was taken.

On September 11, 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 December 7, 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 but for counsel's errors.¹ In order to demonstrate prejudice to invalidate the decision to enter a guilty plea, a petition 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 inform him of the right to appeal. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant was informed in the written guilty plea agreement of the limited right to appeal.⁴ Appellant did not assert that he

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.

⁴See Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).

asked counsel to file an appeal and that counsel refused to do so, nor did appellant demonstrate that there was an issue which had a reasonable likelihood of success on appeal.⁵ 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 disclose an offer of leniency. This claim is not supported by any specific facts, and thus, appellant necessarily failed to demonstrate that his trial counsel was ineffective.⁶ Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to prepare, present, pursue and investigate a defense theory involving a lesser defense. It appears that appellant believed that his trial counsel should have pursued a defense theory that he was only guilty of attempted larceny as he did not plan to steal the items and he did not take the items more than ten feet from the store. Appellant failed to demonstrate that he was prejudiced. Appellant failed to indicate what further investigation should have been conducted such that there was a reasonable probability that he would have insisted on going to trial. The facts in the record indicate that appellant entered the department store with a backpack and placed items in the backpack. Additionally,

⁵See Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

⁶Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

appellant damaged at least one other item in the store with an ink tag. Appellant left the department store without paying for any items and fled from security and the police when they attempted to stop him. The total amount of goods stolen and/or damaged was \$469.50. Under these facts, appellant failed to demonstrate that trial counsel was deficient in failing to pursue a defense theory of attempted larceny. 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 object to prosecutorial misconduct. Appellant failed to specifically identify any instances of prosecutorial misconduct, and thus, he failed to demonstrate that his trial counsel was ineffective. 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 submit any substantial mitigating evidence at sentencing. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant was eligible for large habitual criminal adjudication, but the State did not actively seek large habitual criminal adjudication. Appellant failed to indicate what mitigating evidence should have been presented or demonstrate that there was a reasonable probability of a different result if mitigating evidence had been presented. Appellant personally addressed the district court at sentencing and offered statements in mitigation. Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to inform him that he could receive a sentence of four to ten years. Appellant failed to demonstrate that he was prejudiced. The written guilty plea agreement informed appellant of the potential penalties appellant faced by entry of his guilty plea. Additionally, we note that appellant entered a guilty plea with the proviso that the State could seek habitual criminal adjudication—if appellant had been adjudicated a habitual criminal he faced a substantially greater penalty.⁷ Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that multiple charges were unfairly stacked in this case for conduct that amounted to shoplifting and he was unfairly denied bail. These claims 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.⁸ Therefore, we conclude that the district court did not err in denying these claims.

Finally, appellant attached a motion to modify his sentence to his petition. In the motion, appellant sought to modify his sentence based upon trial counsel's alleged ineffective assistance of counsel at sentencing, the positive programming that he had engaged in during his incarceration, and the hardships his incarceration created for his family. Appellant

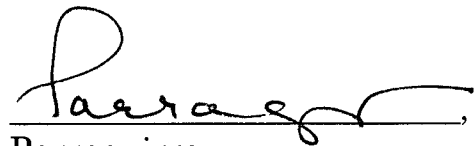
⁷See NRS 207.010.

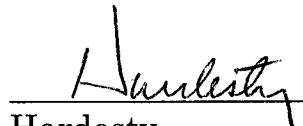
⁸See NRS 34.810(1)(a).


failed to demonstrate that the district court made a mistaken assumption about appellant's criminal record that worked to his extreme detriment, and thus, the district court did not err in concluding no relief was warranted.⁹

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.¹⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Parraguirre


_____, J.
Hardesty


_____, J.
Saitta

⁹See Edwards v. State, 112 Nev. 704, 918 P.2d 321 (1996).

¹⁰See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Donald M. Mosley, District Judge
Marlon Flowers
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk