

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL DWAYNE SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48630

FILED

JUN 21 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

On February 14, 2006, the district court convicted appellant, pursuant to a plea of guilty, of grand larceny of a motor vehicle. The district court sentenced appellant, as a habitual criminal, to serve a term of five to twenty years in the Nevada State Prison. Appellant appealed, and this court affirmed his conviction and sentence.¹ The remittitur issued on August 2, 2006.

On October 20, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

¹Smith v. State, Docket No. 46825 (Order of Affirmance, July 6, 2006).

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 November 7, 2006, the district court dismissed appellant's petition. This appeal followed.

In his petition, appellant claimed that his counsel was ineffective. 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, 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 his counsel was ineffective for failing to have him evaluated to determine whether he was competent to enter a plea. In particular, he claimed that he indicated to his counsel in open court that he was seeing a mental health professional to deal with family problems and other "stuff that is basically stressful." A defendant is competent to enter a plea if he has: (1) "sufficient present ability to

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

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

consult with his lawyer with a reasonable degree of rational understanding," and (2) "a rational as well as factual understanding of the proceedings against him."⁴ Nothing in the record indicates that appellant was not competent to enter his guilty plea. Appellant's alleged family problems and undisclosed illness requiring the care of a mental health professional, without more, did not indicate that he was unable to understand the charges and proceedings or assist his counsel in his defense. At the plea canvass, appellant responded appropriately and coherently to the district court's questions. It is not apparent from the record that appellant was impaired or that he did not understand the district court's questions. The district court informed appellant of the rights he was waiving by pleading guilty, and appellant acknowledged that he understood. Moreover, the waiver of rights was also set forth in the guilty plea agreement that appellant signed. Appellant failed to establish a reasonable probability that, had counsel investigated his competency or requested a competency hearing, the district court would have rejected his plea or he would have refused to plead guilty and insisted on going to trial. Therefore, the district court did not err in dismissing this claim.

Second, appellant claimed that his counsel was ineffective because his counsel coerced appellant into agreeing to a plea of guilty

⁴Godinez v. Moran, 509 U.S. 389, 396 (1993) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)); see also NRS 178.400(2).

despite the fact that he did not receive a benefit for doing so. Appellant did not specify how his attorney coerced him. Bare or naked allegations unsupported by specific facts are insufficient to grant relief.⁵ Moreover, appellant's claim was belied by the record as he admitted that he pled voluntarily absent any threat or promise outside of those contained in the plea agreement. In addition, appellant received a benefit as the State agreed in the plea agreement that it would only pursue sentencing appellant as a small habitual criminal.⁶ The State did not reserve the right to pursue large habitual criminal classification, which appellant could have received due to at least three of his seven prior felony convictions.⁷ Therefore, the district court did not err in dismissing this claim.

Next, appellant claimed that his appellate counsel had a conflict of interest. In particular, he claimed that, as his trial counsel also represented him on appeal, his counsel neglected to raise claims of his own ineffective assistance on appeal. To show a Sixth Amendment violation of his right to counsel, appellant must demonstrate both an actual conflict

⁵Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

⁶See NRS 207.010(1)(a).

⁷See NRS 207.010(1)(b).

and an adverse effect on his attorney's performance.⁸ "In general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties."⁹ Where a petitioner demonstrates an actual conflict of interest that adversely affects a lawyer's performance, this court presumes prejudice to the petitioner.¹⁰

Appellant did not demonstrate that his appellate counsel was placed in a situation conducive to divided loyalties. As discussed above, appellant did not demonstrate that his trial counsel provided ineffective assistance of counsel. Claims of ineffective assistance of counsel are generally raised in the district court in the first instance by filing a post-conviction petition for a writ of habeas corpus as the record is generally insufficient to raise such claims on direct appeal.¹¹ Therefore, no conflict

⁸Cuyler v. Sullivan, 446 U.S. 335, 348 (1980); see also Burger v. Kemp, 483 U.S. 776, 783 (1987) (providing that prejudice is presumed "only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance" (internal quotes and citation omitted, emphasis added)).

⁹Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)).

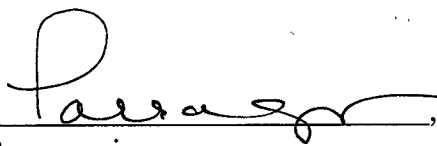
¹⁰Id.

¹¹See Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995); Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001).

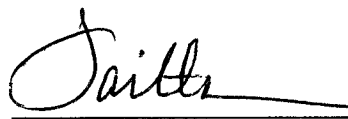
existed as appellate counsel did not neglect raising meritorious ineffective assistance of trial counsel claims on appeal.

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.¹² Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Parraguirre


_____, J.
Hardesty


_____, J.
Saitta

cc: Hon. Steven R. Kosach, District Judge
Michael Dwayne Smith
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

¹²See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).