

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA B. DESANTIAGO A/K/A
JOSHUA DESANTIAGO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48645

FILED

JUN 07 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 post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

On October 24, 2005, the district court convicted appellant, pursuant to a no contest plea, of attempted murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of 24 to 90 months in the Nevada State Prison. No direct appeal was filed.

On August 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, but did conduct an evidentiary hearing. On January 23, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that his counsel were ineffective for advising him that he could or would get probation and that his sentences could be concurrent. 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.¹ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.² A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.³ The district court's factual findings regarding ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁴

Appellant cited NRS 193.165(4) for the proposition that his offense was not probationable; however, that statute bars probation for a person convicted of murder with the use of a deadly weapon. Appellant was convicted of attempted murder with the use of a deadly weapon, and the provision does not apply to his offense. Our review of the record on appeal reveals that appellant's signed no contest plea agreement correctly advised him that he was eligible for probation and that whether he would receive probation was at the sentencing judge's discretion. At the evidentiary hearing, counsel testified that they did not believe they had or would have told appellant that he would receive probation. Accordingly, the district court did not err in denying this claim.

¹Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

²Strickland v. Washington, 466 U.S. 668, 697 (1984).

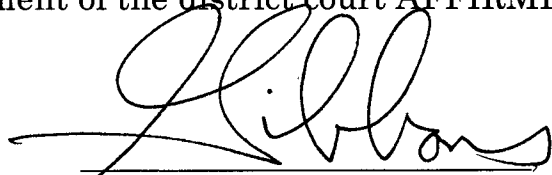
³Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

⁴Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

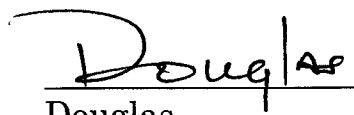
Appellant also contended that counsel were ineffective for erroneously advising him that his sentences could run concurrently. Appellant's signed plea agreement correctly advised him that the sentence for the deadly weapon enhancement would run consecutively to the sentence for the primary offense. At the evidentiary hearing, counsel testified that they normally advise defendants facing a deadly weapon enhancement that the penalty for the enhancement will be equal and consecutive. Accordingly, 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.⁵ Accordingly, we

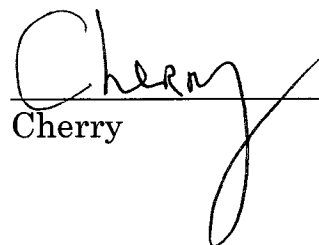
ORDER the judgment of the district court AFFIRMED.⁶



Gibbons J.



Douglas J.



Cherry J.

⁵See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁶In light of the foregoing, petitioner's proper person motion for appointment of counsel, filed in this court on May 21, 2007, is hereby denied.

cc: Hon. Valerie Adair, District Judge
Joshua B. DeSantiago
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk