IN THE SUPREME COURT OF THE STATE OF NEVADA

MATHEW HOVIOUS A/K/A MATHEW E. HOVIOUS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48874

FILED

AUG 24 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY G. Alvarado
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

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; David Wall, Judge.

On April 26, 2006, the district court convicted appellant, pursuant to a guilty plea, of two counts of burglary. The district court sentenced appellant as a habitual criminal to serve two consecutive terms of 60 to 180 months in the Nevada State Prison. No appeal was taken.

On November 8, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the majority of the claims, but requested an evidentiary hearing on the appeal deprivation claim. 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 February 6, 2007, 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 in the proceedings.[1] To demonstrate prejudice sufficient to invalidate the decision to enter a guilty plea, a petitioner must demonstrate that he 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 inform him at the time he entered his plea that he could be sentenced as a habitual criminal. He further asserted that his counsel told him that he could receive a sentence of one to ten years in the Nevada State Prison. Appellant's ineffective assistance of counsel claim lacked merit. The second amended information, filed during the plea canvass, contained a notice that the State sought to sentence appellant as a habitual criminal.[4] Further, appellant acknowledged that the State could seek habitual criminal adjudication under both the small and large

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

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

[3]Strickland, 466 U.S. at 697.

[4]The State's notice was timely as appellant pleaded guilty on March 2, 2006, and was later sentenced on April 19, 2006. See NRS 207.016(2) (providing that a hearing concerning habitual criminal adjudication may not be held until 15 days after the filing when a count charging a defendant as a habitual criminal is filed after conviction of the primary offense).

habitual criminal provisions during the plea canvass. Appellant also acknowledged that the decision concerning his ultimate sentence rested with the district court and he could not rely on any promises regarding his sentence. Thus, as the district court informed appellant that the State could pursue habitual criminal adjudication and the district court could sentence appellant to any legally permissible sentence, he did not show that he was prejudiced by his counsel's alleged predictions or failure to inform him of the possibility of habitual criminal adjudication. Accordingly, the district court did not err in denying this claim.

Second, appellant claimed that his counsel was ineffective for failing to prepare to argue against his adjudication as a habitual criminal. Appellant's claim lacked merit. At his sentencing, appellant's primary counsel was not present, however, appellant was represented by another attorney from the public defender's office. Appellant's counsel requested a continuance, which the court granted, however, appellant insisted that he be sentenced at that time. Appellant's counsel indicated that he reviewed the presentence investigation report. Appellant's counsel then argued for leniency based upon the facts of appellant's instant conviction and appellant's drug abuse and his need for treatment. Appellant did not show that his counsel was deficient or unprepared merely because his counsel inquired as to whether notice had been served for the habitual criminal enhancement. Moreover, he did not show that he was prejudiced as he did not show how better preparation would have resulted in a lesser sentence. Accordingly, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to object to his sentencing based on facts not admitted by him or found by a jury beyond a reasonable doubt in violation of Apprendi v. New

Jersey.[5] Appellant's claim lacked merit. Apprendi provides that "*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[6] This court has held that the sentencing court's determination of the habitual criminal allegation does not violate Apprendi.[7] NRS 207.010 gives the sentencing court discretion to dismiss a habitual criminal allegation, not the discretion to impose such an adjudication based on factors other than prior convictions, and, therefore, a habitual criminal adjudication does not serve to increase the punishment.[8] In the instant case, appellant's prior California convictions for petty theft with priors; escape from jail while charged with a felony; grand theft of money, labor, or property; and second degree burglary, made him eligible for habitual criminal treatment. The district court exercised its discretion to adjudicate appellant a habitual criminal. Thus, he did not show that his counsel was deficient for failing to object, or that he was prejudiced for his counsel's failure to raise a meritless objection. Accordingly, the district court did not err in denying this claim.

Fourth, appellant claimed that his counsel was ineffective for failing to object to evidence that was improperly put before the court at sentencing. In particular, he asserted that his counsel was defective for failing to object to: (1) the inclusion of statements by the parole officer

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[5]530 U.S. 466 (2000).

[6]Id. at 490 (emphasis added).

[7]See O'Neill v. State, 123 Nev. ___, ___, 153 P.3d 38, 40-43 (2007).

[8]Id. at ___, 153 P.3d at 40.

that appellant had failed at probation and parole in the past and had other arrests that did not result in convictions; and (2) the statement of the victim referring to Hovious's statement about the crime. Appellant's claim lacked merit. This court has consistently afforded the district court wide discretion in its sentencing decision.[9] "[T]his court will reverse a sentence if it is supported *solely* by impalpable and highly suspect evidence."[10] Even assuming that the evidence of which appellant complains at sentencing was impalpable, we conclude that the district court's sentence is not supported solely by reliance on those statements. Appellant's prior convictions were sufficient to support appellant's adjudication as a habitual criminal and the sentence imposed was within the parameters provided by the relevant statute.[11] Further, there is no indication in the record that the district court relied on the challenged statements in imposing sentence.[12] As appellant did not show that his counsel's performance was deficient for failing to object to the evidence, or

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[9]See Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

[10]Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996) (emphasis in original) (citations omitted).

[11]See NRS 207.010(1)(a).

[12]Cf. Norwood v. State, 112 Nev. 438, 439-40, 915 P.2d 277, 278-79 (1996) (district court abused discretion where court stated its belief, unsubstantiated by the record, that appellant was a gang member and leader and court imposed harsher sentence to send message to appellant and others like him); Goodson v. State, 98 Nev. 493, 654 P.2d 1006 (1982) (district court abused discretion when it rejected defendant's denial of unsubstantiated allegations and imposed sentence based upon those allegations).

that he was prejudiced by the failure to object, the district court did not err in denying this claim.

Fifth, appellant claimed that his counsel was ineffective for failing to file an appeal despite his timely request that counsel do so. This court has held that if a defendant expresses a desire to appeal, counsel is obligated to file a notice of appeal on the defendant's behalf.[13] Prejudice is presumed where a defendant expresses a desire to appeal and counsel fails to do so.[14] A petitioner is entitled to an evidentiary hearing on claims supported by specific facts, which if true, would entitle the petitioner to relief.[15]

It appears from this court's review of the record on appeal that the district court erred in denying this claim without first conducting an evidentiary hearing. Appellant's appeal deprivation claim was supported by specific facts and was not belied by the record on appeal, and if true, would have entitled him to relief. Notably, the State in its response to the petition below indicated that an evidentiary hearing should be conducted on appellant's appeal deprivation claim.

Therefore, we reverse the district court's order to the extent that it denied appellant's appeal deprivation claim, and we remand this matter to the district court to conduct an evidentiary hearing on appellant's appeal deprivation claim. If the district court determines that

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[13]See Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003); Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999); see also Roe v. Flores-Ortega, 528 U.S. 470 (2000).

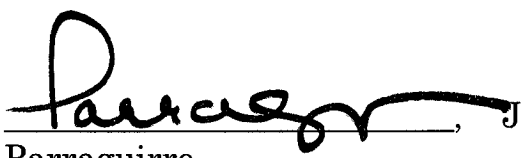
[14]Mann v. State, 118 Nev. 351, 353-54, 46 P.3d 1228, 1229-30 (2002).

[15]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

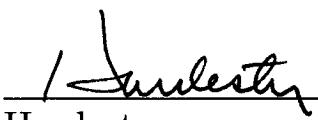
appellant was deprived of a direct appeal without his consent, the district court shall appoint counsel to pursue the remedy set forth in Lozada v. State.[16] If the district court determines that appellant was not deprived of a direct appeal without his consent, the district court shall enter a final written order to that effect. We affirm the remainder of the district court's order denying his petition for the reasons set forth above.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that briefing and oral argument are unwarranted in this matter.[17] Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[18]



_____, J.
Parraguirre



_____, J.
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[16]110 Nev. 349, 871 P.2d 944 (1994).

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

[18]This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

cc: Hon. David Wall, District Judge
Mathew Hovious
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk