IN THE SUPREME COURT OF THE STATE OF NEVADA

PHILLIP A. SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49142

FILED

NOV 09 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

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; Douglas W. Herndon, Judge.

On November 20, 2006, appellant was convicted, pursuant to a guilty plea, of one count of attempted burglary and sentenced under the small habitual criminal statute to serve a term of five to twenty years in the Nevada Department of Corrections. No direct appeal was taken.

On December 8, 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 March 29, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that he received ineffective assistance of trial counsel. 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, the results of the proceedings would have been different.[1] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[2]

Appellant claimed that trial counsel was ineffective for failing to object to his being sentenced as a habitual criminal pursuant to NRS 207.010 because the district court sentenced him on the "mere, naked admission of the presentence report." Appellant's claim is belied by the record on appeal. On November 14, 2006, the State's attorney, "a Special D.A.," failed to show up timely for the sentencing hearing, which was held from 8:51 a.m. to 8:55 a.m. As a result, the court was forced to recall the matter, at 9:29 a.m., in order to allow the State to enter six judgments of conviction into evidence. The record establishes that the prior judgments of conviction were admitted at the sentencing hearing when the matter was recalled. Appellant's counsel was present at the recall of the hearing and specifically requested that the record reflect that there were only six

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

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

prior convictions and not fifteen as mentioned in the earlier sentencing hearing. The court noted, appropriately, that appellant still met the criteria for sentencing under the small habitual criminal statute. Appellant was provided notice of the State's intention to seek the habitual criminal enhancement in the State's information. Appellant cannot demonstrate any error regarding the timing of the admission of the prior convictions under these circumstances. As a result, the district court properly sentenced appellant under the small habitual criminal statute based on the proof of appellant's prior judgments of conviction. Therefore, appellant's trial counsel was not ineffective for failing to object to appellant being sentenced as such.[3]

Appellant also appeared to claim that his trial counsel was ineffective for failing to object to the State's failure to file an information seeking punishment under the habitual criminal statute. This claim is belied by the record as the information filed by the State on September 21, 2006, clearly provided notice of the State's intention to seek habitual criminal enhancement in this case. Therefore, the district court did not err in denying appellant's claim.[4]

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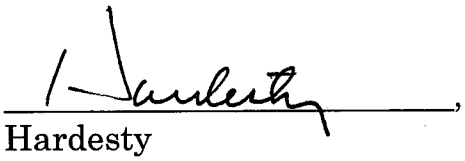
[3]Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (noting that trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims).

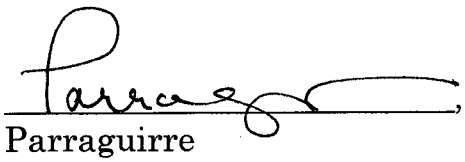
[4]Id.

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 affirm the order of the district court, and

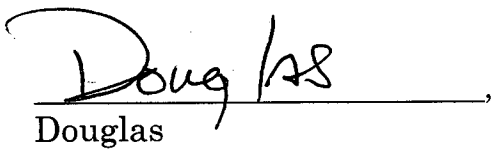
ORDER the judgment of the district court AFFIRMED.



_____, J.
Hardesty



_____, J.
Parraguirre



_____, J.
Douglas

cc: Hon. Douglas W. Herndon, District Judge
Phillip A. Smith
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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