

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKEY TOLTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49193

FILED

JUL 26 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Davis*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Fifth Judicial District Court, Mineral County; John P. Davis, Judge.

On October 22, 2003, the district court convicted appellant, pursuant to a guilty plea, of one count of possession of a controlled substance for the purpose of sale in district court case number 1966. The district court sentenced appellant to serve a sentence of 12 to 30 months in the Nevada State Prison. The district court further awarded appellant 258 days of credit for time served.

On October 22, 2003, the district court also convicted appellant, pursuant to a guilty plea, of one count of trafficking in a controlled substance in district court case number 1968. The district court sentenced appellant to serve a term of 60 to 150 months in the Nevada State Prison. The district court ordered that this sentence be run consecutively with the sentence in district court case number 1966. The district court further ordered that all credit for time served was applied in district court case number 1966.

Appellant timely appealed the judgments of conviction in both district court cases, and this court affirmed the judgments of conviction.¹ The remittitur issued on September 22, 2004.

On May 5, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in district court case number 1966. That same date, appellant filed a memorandum of points and authorities designating both district court case numbers 1966 and 1968. The State filed an answer to the petition designating district court case numbers 1966 and 1968. Appellant filed a response in both district court cases. 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 28, 2007, the district court denied the petitions in both district court cases. This appeal followed.²

¹Tolton v. State, Docket Nos. 43175, 43177 (Order of Affirmance, August 27, 2004).

²Because the record on appeal in district court case number 1968 did not contain a copy of a post-conviction petition for a writ of habeas corpus, this court directed the clerk of the district court to supplement the record on appeal or inform this court that no such petition had been filed in district court case number 1968. The clerk of the district court has informed this court that no such petition was filed in district court case number 1968. It is unclear whether such a petition was served upon the State, but for some reason, not actually submitted to the district court for filing. Service upon the State would not constitute proper filing of the petition in the district court. See NRS 34.735; NRS 34.738. However, we construe the memorandum of points and authorities in district court case
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In his petition in district case number 1966, 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 of a different outcome in the proceedings but for counsel's errors.³ In order to demonstrate prejudice to invalidate the decision to enter a guilty plea, petitioner must demonstrate that he would not have pleaded guilty and would have insisted on going to trial absent trial counsel's alleged deficient performance.⁴ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁵

First, appellant claimed that his trial counsel was ineffective for advising him to waive the preliminary hearing in district court case

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1968 as initiating the habeas proceedings, and we have considered those claims specifically raised in appellant's response to the State's opposition.

³See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁴Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁵Strickland, 466 U.S. at 697.

number 1966 without investigating whether the State was able to prove possession of a controlled substance.⁶ Appellant appeared to opine that the State would not have successfully demonstrated probable cause at a preliminary hearing. Appellant failed to demonstrate that he was prejudiced by trial counsel's performance in this regard. Appellant offered no facts in support of his claim that the State would not have successfully demonstrated probable cause had the matter been presented at a preliminary hearing.⁷ Appellant further failed to indicate how further investigation would have resulted in a different outcome. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for advising him to enter a guilty plea in district court case number 1966 because the State would not have been able to prove each element of the crime. Appellant further claimed that his trial counsel was ineffective for failing to explain matters sufficiently for appellant to make an informed decision. These claims were based upon mere speculation,

⁶In his petition filed in district court case number 1966, appellant offered no specific or cogent argument regarding his trial counsel's performance relating to the timing of his preliminary hearing in this case.

⁷See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984); see also Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) (citations omitted) (holding that [p]robable cause to support a criminal charge "may be based on slight, even 'marginal' evidence, because it does not involve a determination of the guilt or innocence of an accused").

and appellant offered no factual support for these claims.⁸ Thus, he failed to demonstrate that he was prejudiced. Further, appellant received a substantial benefit by entry of his guilty plea as he avoided the possibility of habitual criminal adjudication and other charges in district court case number 1968.⁹ Therefore, we conclude that the district court did not err in denying these claims.

Third, appellant claimed that his trial counsel was ineffective for failing to argue in a presentence motion to withdraw a guilty plea that a manifest injustice occurred because appellant had entered a guilty plea to an unsustainable charge in district court case number 1966. Appellant provided no factual support for this claim, and thus, he failed to demonstrate that such a claim would have had a reasonable probability of success.¹⁰ 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 the State's late filing of an opposition to a presentence motion to withdraw a guilty plea. Appellant failed to demonstrate that he was prejudiced by trial counsel's failure to file an opposition—appellant failed to demonstrate that had trial counsel objected

⁸See Hargrove, 100 Nev. 498, 686 P.2d 222.

⁹The record on appeal indicates that appellant had as many as 6 prior felony convictions.

¹⁰See id.

that there was a reasonable probability of a different result. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for advising appellant to waive his preliminary hearing and enter a guilty plea in district court case number 1968 without investigating the facts of the case. Appellant specifically claimed that an investigation would have shown that appellant had been in custody without a preliminary hearing for 106 days before he waived his preliminary hearing. Appellant claimed that his trial counsel should have filed a motion to dismiss the charges due to the delay. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that he would not have entered a guilty plea and would have insisted on going to trial if trial counsel had pursued the delay in the preliminary hearing as there is not a reasonable probability that the motion to dismiss would have been successful. The record reveals there was good cause for the justice court to delay the preliminary hearing due to a delay requested first by his trial counsel, the unavailability of the co-defendant's counsel for the joint preliminary hearing at one scheduled date, the State's motion for a continuance made upon affidavit that a material witness was not available for a scheduled date, and appellant's dismissal of his attorney for the appointment of new counsel.¹¹ Further, appellant ultimately signed a waiver for the 15-day

¹¹See NRS 171.196(2) (providing that if the defendant does not waive a preliminary hearing, the magistrate shall hear the evidence within 15 days, unless for good cause shown the magistrate extends such time and
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examination and an unconditional waiver of the preliminary hearing.¹² Appellant received a substantial benefit by entry of his guilty plea; in exchange for his guilty plea in district court case number 1968 to one count of mid-level trafficking in a controlled substance (cocaine), appellant avoided one count of high-level trafficking in a controlled substance (methamphetamine), two counts of conspiracy to traffic in a controlled substance, and one count of possession of 1 ounce or less of marijuana.¹³ Appellant further avoided the possibility of habitual criminal adjudication.

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that reasonable time must be allowed for counsel to appear); NRS 171.196(4) (providing that if there is an application for the appointment of counsel for an indigent defendant, the magistrate shall postpone examination if the application is granted until counsel has reasonable time to appear); Hill v. Sheriff, 85 Nev. 234, 452 P.2d 918 (1969) (holding that a party seeking to continue a preliminary hearing upon the ground of an absence witness must submit an affidavit regarding the unavailability of the witness).

¹²We note that appellant signed the waiver of the 15-day examination prior to the appointment of the second trial counsel.

¹³Appellant was also charged with two counts of possession of a controlled substance for the purpose of sale for the cocaine and methamphetamine that was the subject of the trafficking counts. Appellant correctly asserted that he could not have been convicted of both trafficking and possession of a controlled substance for the purpose of sale for the same controlled substances. However, as noted above, appellant still received a substantial benefit by entry of his guilty plea in regards to the other charges and habitual criminal adjudication.

Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for advising him to enter a guilty plea in district court case number 1968 because the State would not have been able to prove every element of the offense beyond a reasonable doubt. Appellant appeared to claim that trial counsel should have known that appellant was not in actual possession of a controlled substance. Appellant failed to demonstrate that he was prejudiced. Appellant offered no facts demonstrating that the State would not have been able to prove every element of the offense and his claim is no more than speculation.¹⁴ Further, as discussed above, appellant received a substantial benefit by entry of his guilty plea in both district court—notably, appellant avoided the possibility of habitual criminal adjudication. Therefore, we conclude that the district court did not err in denying this claim.

Seventh, appellant claimed that his trial counsel was ineffective for deceiving appellant into believing he was receiving a deal by entry of his guilty plea in district court case number 1968. Appellant claimed that the dismissal of the additional original charges included only redundant or lesser offenses. Appellant further claimed that his trial counsel informed him that he could face life in prison if he did not accept the plea negotiations. Appellant failed to demonstrate that he was

¹⁴See Hargrove, 100 Nev. 498, 686 P.2d 222.

prejudiced. Only two of the original charges in district court case number 1968 were redundant to the original trafficking charges—possession of a controlled substance for sale. The high-level trafficking charge involving methamphetamine was not redundant to the mid-level trafficking involving cocaine. The conspiracy counts were not redundant to the primary offenses. In addition, appellant faced the possibility of habitual criminal adjudication and possibility of a life sentence.¹⁵ Trial counsel's candid advice about the potential outcome of a trial is not deficient. Therefore, we conclude that the district court did not err in denying this claim.

Eighth, appellant claimed that his trial counsel was ineffective for failing to file pretrial motions and make valuable arguments in the proceedings in district court case number 1968. Appellant failed to demonstrate that he was prejudiced. Appellant did not identify the pretrial motions, other than those addressed earlier, that should have been filed or the valuable arguments that were not made, and appellant failed to demonstrate that he would not have entered a guilty plea absent these shortcomings. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that his appellate counsel was ineffective. To state a claim of ineffective assistance of appellate counsel,

¹⁵See NRS 207.010. The record on appeal indicates that appellant had as many as six prior felony convictions.

a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal.¹⁶ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹⁷ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.¹⁸

Appellant claimed that his appellate counsel was ineffective for raising claims on direct appeal that lacked merit and appellate counsel should have known that those claims lacked merit. Appellant also claimed that trial counsel raised an issue on direct appeal that had nothing to do with the judgment of conviction. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellant did not demonstrate that appellate counsel raised any objectively unreasonable claims. Further, appellant failed to identify any meritorious claims omitted by trial counsel. Therefore, we conclude that the district court did not err in denying this claim.

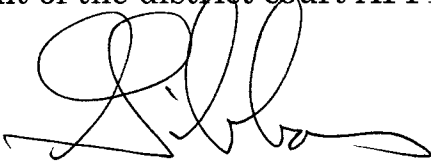
¹⁶Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

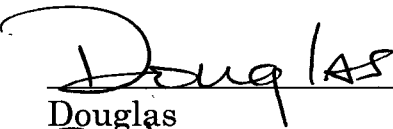
¹⁷Jones v. Barnes, 463 U.S. 745, 751 (1983).

¹⁸Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

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.¹⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

cc: Hon. John P. Davis, District Judge
Rickey Tolton
Attorney General Catherine Cortez Masto/Carson City
Mineral County District Attorney
Mineral County Clerk

¹⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).