

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL LEE CARTER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49403

DANIEL LEE CARTER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49404

DANIEL LEE CARTER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49405

DANIEL LEE CARTER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49407

**FILED**

DEC 10 2007

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE AND REMANDING FOR PROCEEDINGS TO  
CORRECT SENTENCE STRUCTURE

These are proper person appeals from orders of the district court denying a post-conviction petition for a writ of habeas corpus filed in four separate district court cases. We elect to consolidate these appeals for disposition.<sup>1</sup> Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

<sup>1</sup>See NRAP 3(b).

On September 8, 2004, the district court convicted appellant, pursuant to a plea of nolo contendere, of one count of ex-felon in possession of a firearm (district court case number CR04-0702). On that same date, appellant was convicted, pursuant to guilty pleas, of one count of possession of a stolen vehicle (district court case number CR03-1942), one count of burglary (district court case number CR04-0703), and one count of battery by a prisoner (district court case number CR04-0705). The district court sentenced appellant to serve the following terms in the Nevada State Prison: (1) for district court case number CR04-0702, a term of 28 to 72 months, to be served concurrently with the term imposed in district court case number CR03-1942; (2) for district court case number CR03-1942, a term of 48 to 120 months, to be served concurrently with district court case number CR04-0703; (3) for district court case number CR04-0703, a term of 48 to 120 months to be served consecutively to district court case number CR04-0702; and (4) for district court case number CR04-0705, a term of 28 to 72 months, to be served consecutively to district court case number CR04-0703. This court affirmed the judgments of conviction on direct appeal.<sup>2</sup>

On July 11, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus designating each of the four district court cases. The State filed an answer. 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 April 2, 2007, the

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<sup>2</sup>See *Carter v. State*, Docket Nos. 44123, 44124, 44125 and 44126 (Order of Affirmance, June 1, 2005).

district court denied appellant's petition in each case. These appeals followed.<sup>3</sup>

In his petition, appellant contended that he received ineffective assistance of trial and appellate counsel. To state a claim of ineffective assistance of trial 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.<sup>4</sup> To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal.<sup>5</sup> Appellate counsel is not required to raise every non-

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<sup>3</sup>Appellant filed a motion for reconsideration in each case raising an additional claim for relief. The district court denied the motion. To the extent that appellant appeals from the decision to deny the motion in each case, this court lacks jurisdiction over this portion of the appeals as no statute or court rule permits an appeal from an order of the district court denying a motion for reconsideration. See Phelps v. State, 111 Nev. 1021, 900 P.2d 344 (1995).

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

<sup>5</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

frivolous issue on appeal.<sup>6</sup> The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.<sup>7</sup>

First, appellant claimed that his trial counsel was ineffective for failing to inform the district court that he was using psychotropic medications when he entered his guilty plea and waived his rights. Appellant claimed that the medications that he was prescribed—thorazine, seroquel, lithium and prozac—taken alone or in combination are known to affect an individual by clouding the perceptions and causing the individual to not take matters seriously. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The record does not support appellant's allegation that he was unable to voluntarily or knowingly enter a guilty plea in the instant cases. During the plea canvass, appellant was personally canvassed about the terms of the plea agreement, the consequences of the guilty pleas, the constitutional rights he waived by entry of his guilty pleas, and the factual basis for the guilty pleas. Appellant answered all questions to him appropriately; in fact, during a discussion about the maximum term of years possible, appellant correctly added the sums of the sentences for the various counts and appellant acknowledged that he was "done" if he "mess[ed] up." Appellant informed the district court at sentencing that he had entered a guilty plea in the four district court cases not because he was guilty but because he was to receive probation under the original terms of the plea agreement. This statement indicates the

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<sup>6</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

<sup>7</sup>Strickland v. Washington, 466 U.S. 668, 697 (1984).

deliberative nature of appellant's decision to enter guilty pleas.<sup>8</sup> Finally, the record does not otherwise support any allegation that appellant was incompetent due to his use of psychotropic medications.<sup>9</sup> Therefore, the district court did not err in denying this claim.<sup>10</sup>

Second, appellant claimed that his trial counsel was ineffective for misstating the plea agreement. Appellant asserted that he asked his trial counsel about the effect of an arrest during the period of own-recognizance release before the sentencing hearing and trial counsel incorrectly informed him that it would have no effect if there was not an actual conviction. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that there was a reasonable probability of a different outcome absent the misstatement. The record indicates that appellant was eligible for habitual criminal adjudication, and thus, he received a substantial benefit by entry of his guilty plea. Further, the written plea agreements in the four district court cases, which appellant

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<sup>8</sup>Appellant did not receive probationary terms because he was arrested for level three trafficking while on own-recognizance release prior to sentencing.

<sup>9</sup>See Melchor-Gloria v. State, 99 Nev. 174, 660 P.2d 109 (1983) (holding that the test for competency is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether the defendant has a rational as well as factual understanding of the proceedings against him); see also Dusky v. United States, 362 U.S. 402 (1960).

<sup>10</sup>To the extent that appellant claimed that his appellate counsel was ineffective for failing to present an argument about his use of psychotropic medications, appellant failed to demonstrate that his appellate counsel was ineffective for the reasons discussed above.

signed, informed appellant that the State was free to argue for an appropriate sentence in contravention of the agreement to recommend probation if prior to the date of sentencing appellant was arrested in any jurisdiction for a violation of law. Thus, because the appellant was arrested for level three trafficking prior to the sentencing hearing, the State was free to argue for a term of imprisonment. Therefore, the district court did not err in denying this claim.<sup>11</sup>

Next, appellant claimed that his appellate counsel was ineffective for failing to argue that NRS 176.105 was applied in an unconstitutional manner. Appellant claimed that discrepancies with the sentences as announced and as set forth in the written judgments of conviction should have been resolved in his favor. Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. NRS 176.105 indicates the information that is required to be set forth in the judgment of conviction. Appellant failed to demonstrate that there was anything unconstitutional in the manner in which NRS 176.105 was applied in the instant case as the judgments of conviction contained the information contemplated by NRS 176.105. Further, on direct appeal, appellate counsel argued that there was a discrepancy between the judgments of conviction and the oral pronouncements, and this court

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<sup>11</sup>To the extent that appellant claimed that trial counsel was ineffective for failing to object to the State's alleged breach of the plea agreement, appellant failed to demonstrate that his trial counsel was ineffective in this regard. The underlying issue, whether there was a breach of the plea agreement, was considered and rejected by this court on direct appeal. Therefore, because the underlying issue has already been determined to lack merit, appellant cannot demonstrate that he was prejudiced by trial counsel's failure to object.

rejected the claim because the written judgments of conviction were the controlling documents. Appellant failed to demonstrate that any further argument on this point would have made a difference; therefore, appellant failed to demonstrate that his appellate counsel was ineffective in this regard, and the district court did not err in denying this claim.

In reviewing appellant's final claim for relief, this court observed an error in the sentence structure as imposed by the district court. Specifically, the sentence in district court case number CR03-1942 is to run concurrently with the sentences in two of the district court cases—district court case numbers CR04-0702 and CR04-0703. The problem in the sentence structure arises because the sentence in district court case number CR-04-0703 is to run consecutively to the sentence in district court case CR04-0702. Thus, the sentence in district court case number CR03-1942 cannot run concurrently to the sentences in both district court case numbers CR04-0702 and CR04-0703 as they run consecutively to one another. The district court should conduct a re-sentencing hearing to correct the sentence structure.<sup>12</sup> Therefore, we remand this matter to the district court for further proceedings to correct the inconsistent sentence structure.


Having reviewed the records 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.<sup>13</sup> Accordingly, we

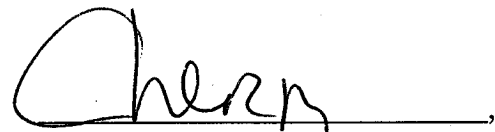
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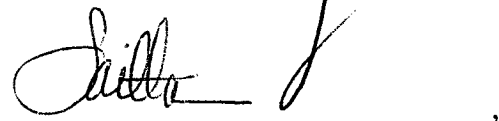
<sup>12</sup>The right to counsel would attach to this proceeding—whether that counsel be appointed due to indigency or retained.

<sup>13</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

ORDER the judgments of the district court AFFIRMED AND we REMAND these matters to the district court for proceedings consistent with this order.<sup>14</sup>

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

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

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<sup>14</sup>This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.