

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID HOWELL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49654

**FILED**

DEC 10 2007

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

On June 16, 2004, appellant David Howell was convicted, pursuant to a guilty plea, of one count of grand larceny. The district court adjudicated Howell as a habitual criminal and sentenced him to serve a prison term of 10 to 25 years. Howell filed a direct appeal, and this court affirmed the judgment of conviction.<sup>1</sup>

On May 17, 2005, Howell filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. The district court appointed counsel to represent Howell, and counsel filed a supplement to the petition. Without conducting an evidentiary hearing, the district court denied the petition. Howell filed this timely appeal.

Howell contends that the district court erred in rejecting his claims of ineffective assistance of counsel. Specifically, Howell argues that he was entitled to an evidentiary hearing on his claims that trial and

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<sup>1</sup>Howell v. State, Docket No. 43625 (Order of Affirmance, January 20, 2005).

appellate counsel were ineffective for failing to: (1) contend that appellant's due process rights were violated when the State filed a habitual criminal allegation after the entry of the guilty plea; and (2) allege that the habitual criminal allegation should have been determined by a jury pursuant to Apprendi v. New Jersey.<sup>2</sup>

Howell also contends that the district court erred in finding that his guilty plea was knowing, voluntary and intelligent. In particular, Howell argues that his guilty plea was invalid because he was not advised, before entering the plea, that the State was proceeding on the habitual criminal enhancement. Howell notes that the original notice of intent to seek habitual criminality was defective, pursuant to Crutcher v. District Court,<sup>3</sup> and "if the State made procedural errors which benefited [him], than that is what should have happened."

The district court found that counsel were not ineffective under the standard set forth in Strickland v. Washington,<sup>4</sup> and that Howell's guilty plea was knowing, voluntary, and intelligent. The district court's factual findings regarding the validity of a guilty plea and claims of ineffective assistance of counsel are entitled to deference when reviewed on appeal.<sup>5</sup> Howell has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong.

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<sup>2</sup>530 U.S. 466 (2000).

<sup>3</sup>111 Nev. 1286, 903 P.2d 823 (1995).

<sup>4</sup>466 U.S. 668 (1984).

<sup>5</sup>See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Moreover, Howell has not demonstrated that the district court erred as a matter of law.

We note that Howell was correctly advised in the plea agreement that the State was seeking habitual criminal adjudication, that the habitual criminal determination was discretionary with the district court, and that Howell could potentially receive a maximum prison sentence of life without the possibility of parole. We further note that, although the original habitual criminal allegation was defective, the State filed an amended notice identifying Howell's prior convictions, and the sentencing hearing was continued in accordance with NRS 207.016(2). Finally, we note that Howell was not entitled to have the habitual criminal allegation determined by a jury. In O'Neill v. State, this court concluded that Nevada's habitual criminal statute, NRS 207.010, does not violate Apprendi.<sup>6</sup> Specifically, this court clarified that the plain language of NRS 207.010(2) grants the district court discretion to dismiss a count of habitual criminality and, therefore, the district court's discretionary determination of the habitual criminal allegation does not serve to increase the punishment.<sup>7</sup> Accordingly, we conclude that the district court did not abuse its discretion in finding that the guilty plea was valid and that counsel were not ineffective.

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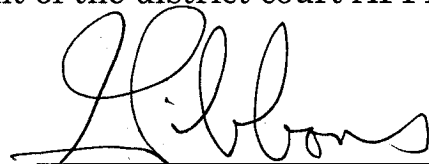
<sup>6</sup>123 Nev. \_\_\_, 153 P.3d 38 (2007), cert. denied, \_\_\_ U.S. \_\_\_, 128 S. Ct. 153 (2007).

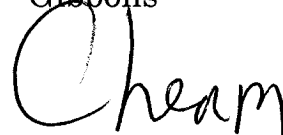
<sup>7</sup>Id. Howell argues that O'Neill should not apply to him retroactively. We note however that, even prior to O'Neill, this court recognized that the habitual criminal allegation was to be determined by the district court. See Parkerson v. State, 100 Nev. 222, 678 P.2d 1155 (1984).

Howell also argues that NRS 207.010 is unconstitutional in that it deprives a defendant of the constitutional right to a jury trial and asks this court to reconsider its holding in O'Neill in light of Cunningham v. California.<sup>8</sup> We decline to revisit our holding in O'Neill, and conclude that the district court did not err in rejecting Howell's claim.

Having considered Howell's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Robert H. Perry, District Judge  
Karla K. Butko  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

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<sup>8</sup>549 U.S. \_\_\_, 127 S. Ct. 856 (2007).