

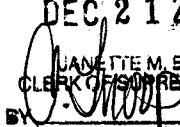
IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL THOMAS DAVITT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49795

FILED

DEC 21 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; Donald M. Mosley, Judge.

On May 5, 2006, the district court convicted appellant, pursuant to a guilty plea, of burglary. The district court sentenced appellant to serve a term of 28 to 72 months in the Nevada State Prison. This court dismissed appellant's appeal as untimely.¹

On April 24, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

¹Davitt v. State, Docket No. 49310 (Order Dismissing Appeal, May 31, 2007).

State opposed the petition. On June 12, 2007, appellant filed an "Amended Writ of Habeas Corpus Attachment" in response to the State's opposition. 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 July 12, 2007, the district court denied appellant's petition. This appeal followed.²

In his petition, appellant contended that he did not receive a timely preliminary hearing. As appellant's claim did not address the voluntariness of his plea or whether his plea was entered without the effective assistance of counsel, appellant's claim fell outside the scope of claims permissible in a habeas corpus petition challenging a judgment of conviction based upon a guilty plea.³ Therefore, the district court did not err in denying this claim.

Appellant also claimed that he received ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner

²To the extent that appellant appeals the denial of his May 30, 2007, "Motion for Procedural Order" seeking a transport order, we conclude that the district court did not abuse its discretion in denying appellant's motion.

³NRS 34.810(1)(a).

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.⁴ 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.⁵ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁶

First, appellant claimed that his counsel was ineffective for failing to move to dismiss the complaint against him because the justice court did not conduct a preliminary hearing within fifteen days of appellant's first appearance in the justice court. Appellant failed to demonstrate that he was prejudiced. The justice court must conduct its preliminary examination within fifteen days of a defendant's first appearance unless the defendant waives the examination or good cause is

⁴Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁵Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁶Strickland, 466 U.S. at 697.

shown to extend the time period.⁷ While the justice court did not conduct the preliminary examination within fifteen days of appellant's first appearance, any delay was due to continuances granted to appellant. Further, appellant waived his right to a preliminary hearing on the day of the rescheduled hearing. To the extent that appellant claimed that his counsel was ineffective for seeking the continuances, appellant did not assert any facts related to whether the State would have been unable to proceed with the preliminary hearing or would have failed to establish good cause to extend the time period.⁸ Therefore, the district court did not err in dismissing this claim.

Second, appellant claimed that his counsel was ineffective for failing to have appellant examined by a psychiatrist. Appellant asserted that his medical records would have revealed "an active major mental illness." To the extent that appellant asserted that his mental illness rendered him incompetent to enter a guilty plea, appellant failed to demonstrate that his counsel was deficient or he was prejudiced. A defendant is competent to enter a plea if he has: (1) "sufficient present

⁷NRS 171.196(2).

⁸See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (holding that "bare" or "naked" claims, which are unsupported by specific facts, are insufficient to grant relief).

ability to consult with his lawyer with a reasonable degree of rational understanding," and (2) "a rational as well as factual understanding of the proceedings against him."⁹ Nothing in the record indicates that appellant was not competent to enter a guilty plea. Appellant did not identify his "major mental illness" in the petition, but his counsel indicated that appellant had been diagnosed with bi-polar disorder during the sentencing hearing. Appellant's diagnosis, without more, did not indicate that he was unable to understand the charges and proceedings or assist his counsel in his defense. At the sentencing hearing, appellant's trial counsel stated that he believed that appellant had been examined for competency and he was determined to be competent. Further, at the plea canvass, appellant responded appropriately and coherently to the district court's questions. The district court informed appellant of the rights he was waiving by pleading guilty, and appellant acknowledged that he understood. It is not apparent from the record that appellant was impaired or that he did not understand the district court's questions. Appellant failed to establish a reasonable probability that, had counsel further investigated his competency or requested a competency hearing,

⁹Godinez v. Moran, 509 U.S. 389, 396 (1993) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960); see also 1995 Nev. Stat., ch. 637 § 23 at 2458 (NRS 178.400(2))).

the district court would have rejected his plea or he would have refused to plead guilty and insisted on going to trial. Therefore, the district court did not err in denying this claim.

To the extent that appellant asserted that his mental illness constituted a legal defense to his crime, appellant also failed to demonstrate that his counsel was defective or that he was prejudiced. To establish a valid insanity defense a defendant must show that he is "in a delusional state such that he cannot know or understand the nature and capacity of his act, or his delusion must be such that he cannot appreciate the wrongfulness of his act."¹⁰ Appellant's claim is bereft of facts concerning whether he was aware of the wrongfulness of his acts during the burglary.¹¹ Thus, he did not establish any reasonable probability that a jury would find him not guilty by reason of insanity. As appellant failed to establish that the defense was likely to succeed, he did not show that he would not have pleaded guilty and would have insisted upon going to trial had his counsel pursued the defense. Therefore, the district court did not err in denying this claim.

¹⁰Finger v. State, 117 Nev. 548, 576, 27 P.3d 66, 84-85 (2001); see also 2003 Nev. Stat., ch. 284 § 4 at 1457 (NRS 174.035(4)).

¹¹See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

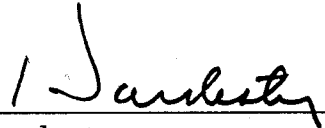
Third, appellant claimed that his counsel was ineffective for failing to prevent him from being convicted and sentenced to a charge he did not agree to plead guilty to in the plea agreement. Appellant asserted that the original plea agreement provided that he agreed to plead guilty to grand theft in exchange for the State's promise to seek mental health counseling. Appellant failed to demonstrate that he was prejudiced. The plea agreement, which appellant signed, indicated that he was pleading guilty to burglary. Moreover, appellant personally pleaded guilty to burglary during the plea canvass. While the plea agreement provided that the State agreed to recommend five years' probation with the Mental Health Court, the plea agreement further stated that the district court would ultimately determine appellant's sentence. Therefore, the district court did not err in denying this claim.

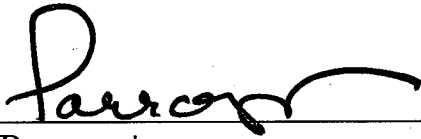
Fourth, appellant claimed that his counsel was ineffective for failing to ensure that he receive his case file. Specifically, he claimed that he was at a disadvantage in preparing his post-conviction petition for a writ of habeas corpus. This claim did not challenge the effective assistance of counsel in the trial proceedings, and thus, the claim was improperly raised in the petition.¹² Therefore, the district court did not err in denying this claim.

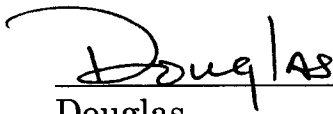
¹²See NRS 34.810(1)(a).

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.¹³ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Donald M. Mosley, District Judge
Michael Thomas Davitt
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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