

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN M. AKERSTROM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50309

FILED

AUG 25 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

On July 11, 2006, the district court convicted appellant Brian Akerstrom, pursuant to a guilty plea, of one count of attempted lewdness with a minor under 14 and one count of attempted sexual assault. The district court sentenced appellant to serve two concurrent terms of 60 to 180 months in the Nevada State Prison. No direct appeal was taken.

On June 4, 2007, appellant filed a 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 August 28, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that his trial counsel was ineffective because he informed appellant that the State would not oppose concurrent sentences, but would argue regarding the duration of the total sentence imposed. In fact, the State retained the right to argue with no limitations. At sentencing, the State argued for consecutive maximum sentences for each count, while appellant argued for probation. Appellant claimed that the misinformation he received from his trial counsel caused him to suffer prejudice because the sentence imposed was a longer term than what he believed he would receive when contemplating a guilty plea and resulted in a "compromise" sentence. Appellant appeared to claim that the district court took a "compromise approach" when imposing sentence. Appellant noted that he had argued for probation, the State argued for a minimum sentence of ten years, and he received a sentence somewhere in the middle.

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 counsel's performance fell below an objective standard of reasonableness,¹ and that, but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going

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

to trial.² The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.³

Appellant failed to demonstrate that he suffered prejudice resulting from his trial counsel allegedly misinforming him regarding the State's right to argue at sentencing. In the guilty plea agreement, signed by appellant, the State specifically retained the right to argue the sentence to be imposed and no limitations on the State were listed on the agreement. Further, the guilty plea agreement stated that the decision to run the sentences concurrently or consecutively was within the discretion of the district court. Appellant also acknowledged in the agreement that he had not been promised or guaranteed any particular sentence and that his sentence was to be determined by the district court within the limits prescribed by statute. Additionally, at the plea canvass, the State informed the district court that negotiations included the State's retention of the right to argue sentencing and no limitations were stated. Appellant's trial counsel informed the district court that he agreed with the State's representation of the plea negotiations. The district court asked appellant if he had heard the plea negotiations and if what was stated was appellant's understanding of the plea, to which appellant responded "Yes." Therefore, appellant failed to demonstrate he was

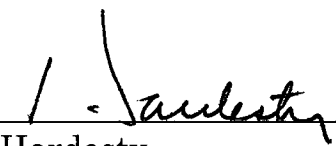
²See Hill v. Lockhart, 474 U.S. 52, 58-9 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

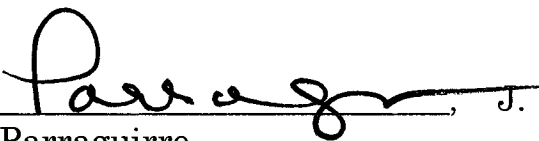
³Strickland, 466 U.S. at 697.

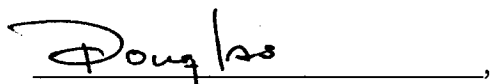
prejudiced in this regard. We conclude that the district court did not err in denying this claim.⁴

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

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

⁴To the extent that appellant argued that his plea was involuntary and unknowing due to his misunderstanding regarding the State's right to argue at sentencing, we conclude that he has failed carry his burden to invalidate his plea. Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975) (stating that mere subjective belief as to a potential sentence is insufficient to invalidate a guilty plea as involuntary and unknowing).

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

cc: Hon. Michael Villani, District Judge
Brian M. Akerstrom
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk