

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY L. MONTIEL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50621

FILED

JUN 09 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; Donald M. Mosley, Judge.

On February 1, 2006, the district court convicted appellant, pursuant to a guilty plea, of one count of conspiracy to commit first degree kidnapping with the use of a deadly weapon (count 1), one count of first degree kidnapping (count 2), one count of conspiracy to commit robbery with the use of a deadly weapon (count 3), and one count of robbery with the use of a deadly weapon (count 4). The district court sentenced appellant to serve in the Nevada State Prison the following terms: (1) for count 1, two consecutive terms of 24 to 60 months; (2) for count 2, one term of 60 to 180 months; (3) for count 3, two consecutive terms of 24 to 60 months; and (4) for count 4, two consecutive terms of 36 to 96 months. The terms between counts were imposed to run concurrently. On appeal, this court affirmed the judgment of conviction in part, but reversed the deadly weapon enhancements for the conspiracy counts, and remanded the

matter for the district court to enter a corrected judgment of conviction.¹ The remittitur issued on August 2, 2006. On August 10, 2006, the district court entered an amended judgment of conviction striking the deadly weapon enhancements for counts 1 and 3.

On June 21, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition, and appellant filed a response. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. On November 21, 2007, after conducting an evidentiary hearing, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that his appellate counsel was ineffective for failing to claim that his conviction violated double jeopardy.² Specifically, appellant claimed that he should not have been convicted of two, separate conspiracies (conspiracy to commit robbery and conspiracy to commit kidnapping) arising from a single, continuous course of conduct.

To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting

¹Montiel v. State, Docket No. 46635 (Order Affirming in Part, Reversing in Part, and Remanding, July 6, 2006).

²To the extent that appellant raised his double jeopardy claim independently from this ineffective assistance of counsel claim, that claim fell outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea. See NRS 34.810(1)(a).

prejudice such that the omitted issue would have a reasonable probability of success on appeal.³ Appellate counsel is not required to raise every non-frivolous issue on appeal.⁴ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.⁵

Based upon our review of the record on appeal, we conclude that appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellant entered a guilty plea to both counts of conspiracy to commit first degree kidnapping and conspiracy to commit robbery. Appellant waived his double jeopardy challenge by entry of the guilty plea.⁶ Thus, appellate counsel was not deficient for failing to raise this argument on direct appeal. Appellant further failed to demonstrate that this issue had a reasonable likelihood of success. Applying the test set forth in Blockburger v. United States,⁷ convictions for conspiracy to commit robbery and conspiracy to commit kidnapping would not violate double jeopardy as each involves a conspiracy to violate a different statute.⁸ It is constitutionally permissible to convict a defendant of multiple conspiracies provided "the State was capable of proving that two separate and distinct agreements to commit

³Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

⁴Jones v. Barnes, 463 U.S. 745, 751 (1983).

⁵Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

⁶See Williams v. State, 103 Nev. 227, 737 P.2d 508 (1987); Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975).

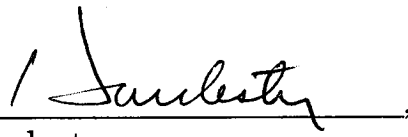
⁷284 U.S. 299 (1932).

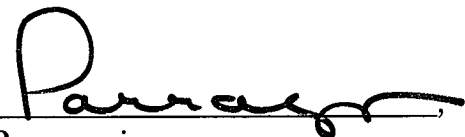
⁸Garcia v. State, 121 Nev. 327, 343-44, 113 P.3d. 836, 846-47 (2005).

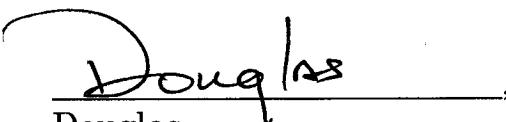
the two different crimes existed.”⁹ Again and most importantly, appellant by pleading guilty waived having the State prove two separate and distinct agreements to commit two different crimes. Therefore, we conclude that the district court did not err in denying this claim.

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.¹⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

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

⁹Id. at 343, 113 P.3d at 846-47.

¹⁰See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).