IN THE SUPREME COURT OF THE STATE OF NEVADA

PHILIP THOMSON, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51038

FILED

DEC 03 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; Kenneth C. Cory, Judge.

On September 15, 2006, the district court convicted appellant Philip Thomson, Jr., pursuant to a guilty plea, of felony driving while under the influence of intoxicating liquor and with a prohibited substance in the blood causing substantial bodily harm. The district court sentenced appellant to serve a term of 24 to 180 months in the Nevada State Prison. No direct appeal was taken.

On April 30, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On January 28, 2008, the district court held an evidentiary hearing. Pursuant to NRS 34.750 the district court declined to appoint counsel to represent appellant. On February 4, 2008, the district court denied appellant's petition. This appeal followed.

Appellant claimed that his trial counsel was ineffective. The right to the effective assistance of counsel applies "when deciding whether to accept or reject a plea bargain."[1] 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,[2] and that, but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial.[3] The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.[4] A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel by a preponderance of the evidence, and the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.[5]

Appellant claimed that his trial counsel was ineffective for informing him that the State had agreed to recommend a sentence with a maximum of ten years. However, appellant claimed that, at the last

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[1]Larson v. State, 104 Nev. 691, 693 n.6, 766 P.2d 261, 262 n.6 (1988) (citing McMann v. Richardson, 397 U.S. 759 (1970)).

[2]See Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the test set forth in Strickland).

[3]See Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

[4]Strickland, 466 U.S. at 697.

[5]Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

minute prior to his plea, his counsel told him that the State had changed the agreement to recommend a maximum 15 years. Appellant claimed that he could not afford his trial counsel's fees, so he pleaded guilty even with the last minute change in maximum time. Appellant failed to demonstrate that he was prejudiced. In the guilty plea agreement, which appellant signed, appellant was informed that the possible sentence ranged from 2 to 20 years. Further, the guilty plea agreement stated that both parties had agreed to recommend a sentence with a term of 2 to 15 years. Also, the guilty plea agreement informed appellant that the district court determined the sentence appellant was to receive. In addition, at the plea canvass, appellant stated that he had understood the plea negotiations and had no questions regarding the negotiations. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to investigate facts regarding the accident between appellant and the victim. Appellant claimed that the police reports indicated that the cause of the accident was another vehicle that rear-ended appellant's vehicle; therefore he would have only been convicted of driving while intoxicated, but not causing the bodily injury, had his trial counsel investigated the accident further. Appellant failed to demonstrate that his attorney was deficient or that he was prejudiced. Appellant's claim was belied by the record, as the presentence investigation report indicated that an unsafe left turn by appellant was the cause of the accident.[6] Therefore, the district court did not err in denying this claim.

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[6]See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Third, appellant claimed that his trial counsel failed to file a direct appeal after a request to do so. Appellant claimed that he and his wife both told his trial counsel to file an appeal due to their dissatisfaction with the length of the sentence. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. "[A]n attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction."[7] "The burden is on the client to indicate to his attorney that he wishes to pursue an appeal."[8] At the evidentiary hearing, appellant's trial counsel stated that he was not asked to file an appeal by appellant. Substantial evidence supports the district court's finding that appellant did not request a direct appeal.[9] Therefore, the district court did not err in denying this claim.

Next, appellant claimed that the district court considered improper evidence at sentencing. 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.[10] Therefore, the district court did not err in denying this claim.

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[7]Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994); see Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999).

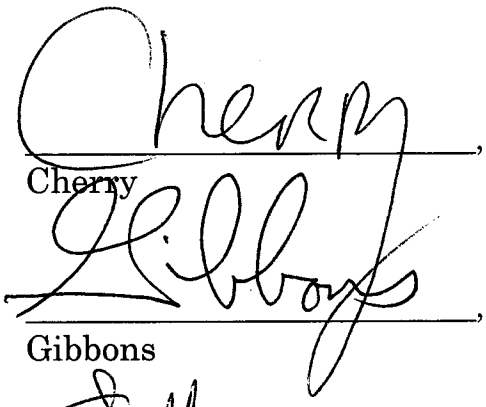
[8]Davis, 115 Nev. at 20, 974 P.2d at 660.

[9]Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

[10]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.[11] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[12]



_____, J.
Cherry

_____, J.
Gibbons

_____, J.
Saitta

cc: Hon. Kenneth C. Cory, District Judge
Philip Thomson, Jr.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[11]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).

[12]We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.