

IN THE SUPREME COURT OF THE STATE OF NEVADA

PATRICK CURTIS JACKSON A/K/A  
KEITH TOLIVER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51504

**FILED**

SEP 03 2009

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

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 December 6, 2006, the district court convicted appellant, pursuant to a guilty plea, of burglary. The district court adjudicated appellant a habitual criminal pursuant to NRS 207.010(a) and sentenced appellant to serve a term in the Nevada State Prison of 84 to 240 months. No direct appeal was taken.

On November 17, 2007, appellant filed a proper person 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 April 3, 2008, the district court denied the petition. This appeal followed.<sup>1</sup>

Appellant claimed that he received ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that but for counsel's errors there would be a reasonable probability of a different outcome of the proceedings. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697.

First, appellant claimed that his trial counsel was ineffective for failing to force specific performance of a plea agreement obtained in justice court. On May 18, 2006, in the justice court, appellant waived his right to a preliminary hearing and the State indicated that a plea agreement had been reached and that the State would not seek treatment as a habitual criminal. However, after further review of the case, the State discovered that appellant's case did not meet the District Attorney's

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<sup>1</sup>In his petition, appellant claimed that he was experiencing difficulty obtaining transcripts of the district court proceedings. This claim was outside of the scope of the claims permissible in a post-conviction petition for a writ of habeas corpus. See NRS 34.810(1)(a).

Office policy for the type of agreement that had been offered, and the State rescinded the plea offer. Following a hearing concerning the withdrawal of the plea offer, the district court allowed the State to withdraw the offer and remanded the case to the justice court for a preliminary hearing. A preliminary hearing was held on August 3, 2006 and appellant was bound over to the district court on the original charges. Appellant eventually agreed to plead guilty and to be sentenced as a habitual criminal. In his petition, appellant claimed that the original agreement should have been enforced and the State should have been precluded from seeking habitual criminal treatment. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel argued that the State should be bound by the original agreement, but the district court rejected that argument. Further, the State is permitted to withdraw a plea offer after it has been accepted by a defendant if a defendant has not yet relied on the offer to his detriment. See State v. Crockett, 110 Nev. 838, 843-44, 877 P.2d 1077, 1079-80 (1994). Here, a preliminary hearing was held after the plea offer was withdrawn by the State and, thus, appellant failed to demonstrate that he relied on the offer to his detriment. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to object when the district court failed to exercise its discretion when adjudicating him a habitual criminal. Appellant claimed that the district court did not make a finding that it was just, fit, and

proper to sentence him as a habitual criminal, and thus did not exercise its discretion when pronouncing sentence. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The district court stated that treatment as a habitual criminal was appropriate considering the length of appellant's record and the circumstances of the crimes. Appellant failed to demonstrate that there would have been a reasonable probability of altering the outcome of the proceedings had his trial counsel raised this objection. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to object when the district court abused its discretion by adjudicating him a habitual criminal. Appellant claimed that his trial counsel should have argued that the district court abused its discretion for failing to state that his previous crimes were stale, trivial, and nonviolent. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The habitual criminal statute "makes no special allowance for non-violent crimes or for remoteness of [the prior] convictions; instead, these are considerations within the discretion of the district court." Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992); NRS 207.010. Counsel stated that the defense was bound by the guilty plea agreement not to argue against treatment as a habitual criminal, but that it was a harsh sentence since appellant's crimes were nonviolent. Appellant received the sentence that he bargained for and failed to demonstrate that there was a reasonable probability that the

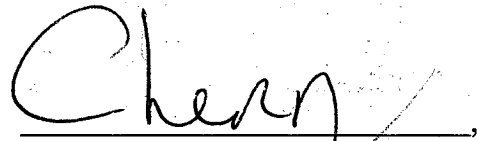
outcome of the proceedings would have been different had his trial counsel made this objection. Therefore, the district court did not err in denying this claim.

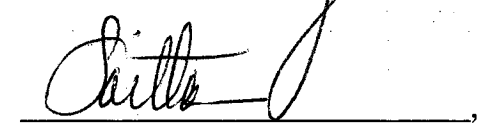
Fourth, appellant claimed that his trial counsel was ineffective for failing to require the State to file three certified judgments of conviction. Appellant failed to demonstrate that his trial counsel's performance was deficient. The State filed four judgments of conviction listing five felonies in the district court. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to argue that a jury should determine his status as a habitual criminal pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000). Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. A defendant is not entitled to a jury determination of criminal habituality. See O'Neill v. State, 123 Nev. 9, 17, 153 P.3d 38, 43 (2007); see also Howard v. State, 83 Nev. 53, 57, 422 P.2d 548, 550 (1967) (holding that the Nevada Constitution does not require that status as a habitual criminal be determined by a jury.). Further, appellant waived his right to a jury determination of the facts of the crime by entering a guilty plea. Appellant failed to demonstrate that there was a reasonable probability that the outcome of the proceedings would have been altered had his trial counsel argued that a jury should determine his status as a habitual criminal. Therefore, 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. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

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