

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS LYDELL HIGHTOWER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51512

**FILED**

OCT 21 2009

ORDER OF AFFIRMANCE

TRACEE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

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; Michael Villani, Judge.

On April 21, 2006, the district court convicted appellant, pursuant to a jury verdict, of one count each of conspiracy to commit larceny, unlawful taking of a motor vehicle, and conspiracy to commit robbery. With respect to conspiracy to commit robbery, the district court adjudicated appellant a habitual criminal pursuant to NRS 207.010(1)(a) and sentenced appellant to a term of twenty years in the Nevada State Prison with the possibility of parole after five years. The district court sentenced appellant to time served for conspiracy to commit larceny and unlawful taking of a motor vehicle. This court affirmed the judgment of conviction and sentence on direct appeal. Hightower v. State, 123 Nev. 55, 154 P.3d 639 (2007). The remittitur issued on May 1, 2007.

On November 15, 2007, appellant filed a proper person 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 March 27, 2008, the district court denied appellant's petition. This appeal followed.

In his petition, appellant argued that the district court abused its discretion in sentencing him as a small habitual offender, and that he received ineffective assistance of trial counsel. For the reasons stated below, we conclude that these claims lack merit and affirm the order of the district court.

First, appellant claimed that the district court abused its discretion when it sentenced him as a small habitual offender pursuant to NRS 207.010(1)(a). Appellant could have raised this claim on direct appeal, but failed to do so. Therefore, appellant waived the right to raise this claim absent a demonstration of good cause and prejudice. NRS 34.810(1)(b)(3); NRS 34.810(3). Appellant raised no facts to show either good cause or prejudice. Accordingly, the district court did not err in denying this claim.

Second, appellant claimed that he received ineffective assistance of trial counsel. To state a claim of ineffective assistance of trial 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

counsel's errors were so severe that they rendered the jury's verdict unreliable. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). 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. To demonstrate that counsel was ineffective, a petitioner must also support his claims with specific factual assertions, and may not assert "naked" claims for relief. See Pellegrini v. State, 117 Nev. 860, 889, 34 P.3d 519, 538 (2001).

Appellant first claimed that trial counsel was ineffective for failing to file a motion to sever his trial from the trial of his co-defendant. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. NRS 174.165(1) permits the trial court to sever a joint trial if it appears that the defendant is prejudiced by joinder of defendants for trial. However, "severance should only be granted when there is a 'serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'" Rodriguez v. State, 117 Nev. 800, 808-09, 32 P.3d 773, 779 (2001) (quoting Zafiro v. United States, 506 U.S. 534, 539 (1993)). In this case, the evidence against appellant and his co-defendant was largely identical. Appellant and his co-defendant were each identified by the victim as the participants in the robbery. Appellant and his co-defendant were apprehended together, during a felony traffic stop of the victim's vehicle. Beyond his blanket allegations that he could have

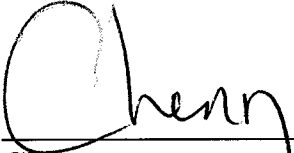
presented a better defense had his trial been severed, appellant presents no facts to suggest a risk that a joint trial compromised any of appellant's specific rights. Accordingly, a motion to sever would have been futile. Counsel cannot be deemed ineffective for failing to file futile motions. Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Therefore, the district court did not err in denying this claim.


Next, appellant claimed that trial counsel was ineffective for failing to inform him that the State had offered a plea negotiation with a recommended sentence of two to six years. Appellant failed to demonstrate that counsel was ineffective or that he was prejudiced. Appellant's assertion that the State had offered a term of two to six years or that counsel had not discussed plea negotiations with appellant is belied by the record. At a status hearing prior to trial, at which appellant was present, counsel for appellant's co-defendant stated that the State had indicated a possible negotiation offer of two to twenty years. Counsel for appellant indicated that appellant was not inclined to accept the State's offer at that time. Accordingly, it appears from the record that appellant was aware of any plea offers by the State and chose to proceed to trial. Therefore, the district court did not err in denying this claim.

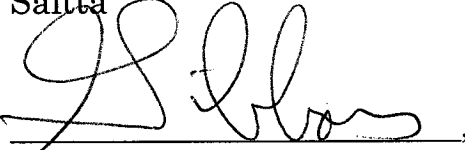
Having reviewed the record on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief and that

briefing and oral argument are unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>1</sup>

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

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

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

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

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<sup>1</sup>To the extent appellant attempted to file an “amended” petition on January 22, 2008, alleging new and different claims than those included in appellant’s November 15, 2007, petition, it appears that the district court elected to treat this “amended” petition as a separate post-conviction petition. The district court denied this petition in an order on May 19, 2008. Appellant did not appeal from this order. Therefore, the claims in appellant’s January 22, 2008 “amended” petition are not at issue in this appeal.