

IN THE SUPREME COURT OF THE STATE OF NEVADA

KHANG A. DANG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51513

FILED

MAR 05 2009

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 appellant Khang Dang's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

On January 16, 2007, the district court convicted Dang, pursuant to a guilty plea, of two counts of securities fraud. The district court sentenced Dang to serve concurrent sentences of 24 to 60 months and 36 to 120 months in the Nevada State Prison. The sentences were imposed consecutively to a sentence in another case. No direct appeal was taken.

On January 8, 2008, Dang 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 Dang or to conduct an evidentiary hearing. On May 1, 2008, the district court denied Dang's petition. This appeal followed.

In his petition, Dang claimed that the State violated his due process rights by delaying the filing of charges in the instant case until Dang had been released on parole in a prior case and the district court

erred in imposing genetic marker testing despite the fact that Dang had provided a biological specimen in a prior case. As these claims did not address the voluntariness of his plea or whether his plea was entered without the effective assistance of counsel, the claims fell outside the scope of claims permissible in a habeas corpus petition challenging a judgment of conviction based on a guilty plea. NRS 34.810(1)(a). Therefore, the district court did not err in denying these claims.

Dang also contended that he received ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability of a different outcome in the proceedings. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984). To demonstrate prejudice sufficient to invalidate the decision to enter a guilty plea, a petitioner must demonstrate that he would not have pleaded guilty and would have insisted upon going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). 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, Dang claimed that his counsel incorrectly informed him that, in the event he was convicted, NRS 176.035(2) mandated that any sentence received in the instant case would have to be imposed consecutively to a sentence he was serving in a prior case. Therefore, Dang agreed to stipulate to a consecutive sentence with the prior case as part of the guilty plea negotiations. Dang failed to demonstrate that he was prejudiced. Dang acknowledged, in the guilty plea memorandum and

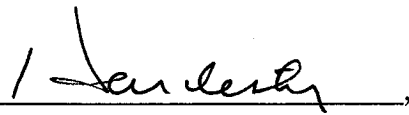
at the plea hearing, that sentencing was up to the district court, and the district court was not bound by the plea negotiations. Further, Dang received a substantial benefit by entry of his guilty plea because he avoided a trial and possible conviction for two counts of transacting a business as an unlicensed sales representative, nine counts of uttering a forged instrument, and two counts of theft of property valued in excess of \$2,500. A conviction on these charges could have resulted in two possible sentences of 1 to 20 years, nine possible sentences of 1 to 4 years, and two possible sentences of 1 to 10 years. See NRS 90.310(1); NRS 90.650(1)(c); NRS 193.130(2)(d); NRS 205.090; NRS 205.110; 1997 Nev. Stat., ch. 150, § 11, at 340-41 (NRS 205.0835(4)). Pursuant to the plea negotiations, the State agreed not to pursue the charges. Further, it agreed not to oppose concurrent sentences for the remaining charges. In light of the significant reduction in Dang's potential liability and his acknowledgment that the district court was not bound by the stipulation, Dang failed to demonstrate that he would have proceeded to trial on the full fifteen count complaint if his counsel informed him that the district court was not required to impose the sentences in the instant case consecutive to the sentences in his prior case pursuant to NRS 176.035(2). Therefore, the district court did not err in denying this claim.

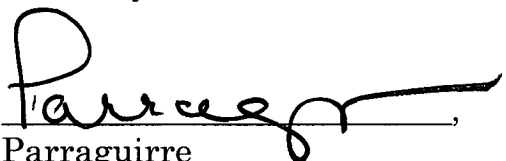
Second, appellant claimed that his counsel was ineffective for failing to move the district court for a hearing concerning whether he should receive drug and alcohol addiction treatment pursuant to NRS 458.300. Pursuant to NRS 458.300, except under certain circumstances, "an alcoholic or a drug addict who has been convicted of a crime is eligible to elect to be assigned by the court to a program of treatment for the abuse of alcohol or drugs." Dang failed to demonstrate that his counsel was deficient because his counsel argued at the sentencing hearing that an

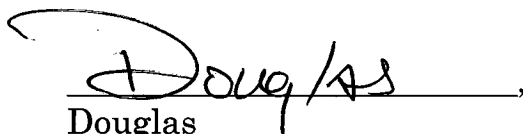
appropriate sentence would consist of probation with drug court supervision. Moreover, Dang failed to demonstrate that he was prejudiced by any deficiency in his counsel's presentation of his substance abuse issues because the district court was aware of those issues. The presentence investigation report indicated that Dang admitted to alcohol and methamphetamine addictions as well as regular consumption of crack cocaine and asked for drug treatment. Dang also personally stated that he wanted probation to address his substance abuse issues at the sentencing hearing. See NRS 458.310 (providing that a defendant's statement that he is a drug addict or alcoholic and the district court's finding that the defendant is eligible for a treatment program is sufficient to prompt the court to conduct a hearing concerning whether drug treatment is appropriate). 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 Dang 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.


_____, C.J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Douglas W. Herndon, District Judge
Khang A. Dang
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk