

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEITH WILLIAM SULLIVAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51523

KEITH WILLIAM SULLIVAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51524

KEITH WILLIAM SULLIVAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51525

FILED

APR 21 2009

ORDER OF AFFIRMANCE

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

These are consolidated appeals from a single district court order dismissing appellant Keith William Sullivan's post-conviction petition and supplemental petitions for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

On August 16, 2006, the district court convicted Sullivan of three counts of possession of a stolen motor vehicle pursuant to guilty pleas entered in three different cases. The district court sentenced Sullivan to serve three consecutive prison terms totaling to 112 to 312 months. On direct appeal, we affirmed two of the judgments of conviction, affirmed in part and vacated in part the remaining judgment of conviction,

and remanded that judgment of conviction to the district court for a restitution hearing. Sullivan v. State, Docket Nos. 48007, 48008, 48009 (Order Affirming in Part, Vacating in Part and Remanding, January 11, 2007). Thereafter, the district court entered an amended judgment of conviction.

On March 14, 2007, Sullivan filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Later, Sullivan filed a supplemental habeas petition, the district court appointed counsel to represent Sullivan, and counsel filed another supplemental habeas petition. The district court dismissed Sullivan's habeas petition without requesting a response from the State, hearing argument on the petition, or conducting an evidentiary hearing. This appeal followed.

Sullivan challenges the district court's rulings on five claims of ineffective assistance of counsel and further argues that the district court erred by denying these claims without the benefit of an evidentiary hearing.

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, and that the petitioner was prejudiced by counsel's performance. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1987)). To show prejudice, a petitioner who has entered a guilty plea must demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 988, 923 P.2d at 1107 (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)) (emphasis omitted). The court need not consider both prongs of

this test if the petitioner makes an insufficient showing on either prong. See Strickland, 466 U.S. at 697.

“A post-conviction habeas petitioner is entitled to an evidentiary hearing ‘only if he supports his claims with specific factual allegations that if true would entitle him to relief.’ However, if the record belies the petitioner’s factual allegations, the petitioner is not entitled to an evidentiary hearing.” Means v. State, 120 Nev. 1001, 1016, 103 P.3d 25, 35 (2004) (quoting Thomas v. State, 120 Nev. 37, 44, 83 P.3d 818, 823 (2004)) (internal footnote omitted).

First, Sullivan contends that defense counsel was ineffective for failing to locate “Dawn,” a witness who he claims could “explain the circumstances under which he obtained possession of the Mitsubishi, that he did not know the car to be stolen and that he received it under circumstances which did not alert him to the fact that the car was stolen.”

The district court determined that Sullivan had failed to show that counsel was ineffective. The district court noted that Sullivan admitted that he had a significant prior criminal record, the State agreed that it would not seek additional criminal enhancements and would not seek a habitual criminal adjudication, and Sullivan acknowledged that he believed that entering the plea was in his best interest and that going to trial was not in his best interest. The district court observed that “while [Sullivan] contends that he had a favorable witness, he decided to forgo trial and avoid exposure to habitual offender enhancements, was thoroughly canvassed, and decided it was in his best interest to plead guilty.” And the district court concluded that there was no reasonable probability that, but for the alleged errors of counsel, Sullivan would have

insisted on going to trial. The record on appeal supports the district court's analysis and therefore we conclude that the district court did not abuse its discretion by dismissing this contention without the benefit of an evidentiary hearing.

Second, Sullivan contends that defense counsel was ineffective for failing to request a competency hearing. Sullivan specifically claims that he "expressed to the district court that he suffered from mental health issues which affected his competence."

Our review of the record on appeal reveals that Sullivan indicated that he may have mental health issues during following colloquy:

THE COURT: Come on, man. You're better than this. Three possession of stolen motor vehicles. So you get out of prison, "Oh, I think I'll steal a car." Gee, man. I mean, aren't you even a little embarrassed?

THE DEFENDANT: I'm very ashamed of myself.

THE COURT: "What can we do about this?" is probably the best thing to ask.

THE DEFENDANT: Well, Your Honor, I have been accepted to the Salvation Army Program, and I hope that, you know, I can get some treatment for my disorder. I mean, it's the only way I can look at it. I can tell you what I did, but I can't explain my behavior. I don't understand it myself.

While this colloquy may suggest that Sullivan believes that he has mental health issues, it does not signify that he was incompetent for the purposes of the proceedings below. See NRS 178.400(2). Sullivan has not provided sufficient factual support for his allegations that he should have received a

competency hearing and that defense counsel was ineffective for failing to request such a hearing. Accordingly, we conclude that the district court did not abuse its discretion by dismissing this contention without the benefit of an evidentiary hearing.

Third, Sullivan contends that defense counsel was ineffective for promising that he would receive minimum sentences if he accepted the State's offer. Sullivan claims that "he felt coerced by the threat of the habitual criminal enhancement to plead guilty even though he had [a] defense to some of the charges."

Our review of the record on appeal reveals that in each of the three written plea agreements Sullivan acknowledged that he may be imprisoned for a period of one to ten years; the State would be free to argue for an appropriate sentence; the sentences may be imposed to run consecutively or concurrently; he was satisfied with defense counsel's advice and representation; and his plea was not the result of any threats, coercion, or promises of leniency. During the plea canvass, Sullivan told the district court that no one made any promises other than those contained in the negotiations to induce his change of plea, no one had threatened him to induce his change of plea, he was changing his plea freely and voluntarily, and he understood that he could face a possible maximum prison sentence of thirty years. We also note that "a defendant's desire to plead guilty to an original charge in order to avoid the threat of the habitual criminal statute will not give rise to a claim of coercion." Schmidt v. State, 94 Nev. 665, 667, 584 P.2d 695, 696 (1978). Under these circumstances, we conclude that Sullivan's contention is belied by the record and that the district court did not abuse its discretion

by dismissing this contention without the benefit of an evidentiary hearing. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Fourth, Sullivan contends that defense counsel was ineffective for failing to investigate the charges before recommending that he accept the State's plea offer. Sullivan specifically claims that defense counsel should have investigated the value of the stolen 1995 Ford van. Sullivan asserts that it was not worth \$2,500 and, therefore, he should have been convicted of a Category C felony instead of a Category B felony. Sullivan further claims that he "was illegally sentenced on the possession of a stolen motor vehicle charge involving the van" because the State failed to prove the value of the van beyond a reasonable doubt as is required by NRS 205.273(4).

The district court determined that Sullivan failed to demonstrate a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. The district court noted that part of the plea bargain was that the State would not seek additional criminal enhancements and would not seek a habitual criminal adjudication. And the district court observed that Sullivan relieved the State of its burden to prove each element of the offense beyond a reasonable doubt when he admitted that he "willfully and unlawfully [had] in his possession a Ford Econoline van, valued at \$2,500.00 or more." The record on appeal supports the district court's analysis and therefore we conclude that the district court did not abuse its discretion by dismissing this contention without the benefit of an evidentiary hearing.

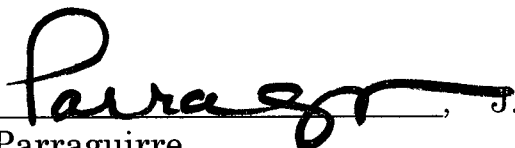
Fifth, Sullivan contends that counsel was ineffective for failing to seek District Judge Steven R. Kosach's recusal. Sullivan claims that the judge was biased and should have been recused for asking him "How are you going to live when you get parole?" and stating that he was "institutionalized" during his plea canvass. Sullivan argues that these statements demonstrate that the district court had determined that he would receive a prison sentence prior to the entry of his plea.

We have previously held that the "remarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all evidence," Cameron v. State, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998), and that "[a] judge is presumed to be impartial, and the party asserting the challenge carries the burden of establishing sufficient factual grounds warranting disqualification. Disqualification must be based on facts, rather than mere speculation." Rippo v. State, 113 Nev. 1239, 1248, 946 P.2d 1017, 1023 (1997) (internal citations omitted).

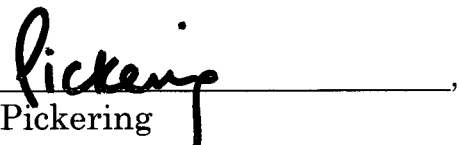
Based on our review of the record on appeal, we conclude that Sullivan has not shown that District Judge Kosach closed his mind to the presentation of all evidence, asserted factual grounds that would warrant the judge's disqualification, or otherwise demonstrated that defense counsel was ineffective for failing to seek the judge's recusal. Accordingly, Sullivan has not demonstrated that the district court abused its discretion by dismissing this contention without the benefit of an evidentiary hearing.

Having considered Sullivan's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.


Parraguirre


Douglas


Pickering

cc: Hon. Steven R. Kosach, District Judge
Karla K. Butko
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk