IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL ALFRED FARMER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51580

FILED

APR 21 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
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; David B. Barker, Judge.

On August 21, 2007, the district court convicted appellant, by a guilty plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), of first-degree kidnapping and robbery. The district court sentenced appellant to serve concurrent terms of life in the Nevada State Prison with the possibility of parole after 5 years for the kidnapping charge and of 35 to 60 months for the robbery charge. No direct appeal was taken.

On November 13, 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 April 17 2008, the district court conducted an evidentiary hearing. Pursuant to NRS 34.750 the district court declined to appoint counsel to represent appellant. On May 9, 2008, the district court denied appellant's petition. This appeal followed.

09-09927

Appellant claimed that he received ineffective assistance of trial counsel. The right to the effective assistance of counsel applies "when deciding whether to accept or reject a plea bargain." 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)). 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, 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), and that, but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial. See Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). The court can dispose of a claim if the petitioner makes an insufficient showing on either prong. Strickland, 466 U.S. at 697. 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. 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).

First, appellant claimed that his trial counsel was ineffective for promising him that he would receive a 5 to 15 year sentence. He was instead sentenced to serve a term of life with the possibility of parole after 5 years. Appellant failed to demonstrate that he was prejudiced. In entering his guilty plea, the parties stipulated to a term of 5 to 15 years on

both counts. However, the guilty plea agreement informed appellant "that if my attorney or the State of Nevada or both recommend any specific punishment to the Court, the Court is not obligated to accept the recommendation." Also, appellant was informed in the guilty plea agreement and during the plea canvass that one of the possible sentences was a term of life with the possibility of parole after 5 years for the kidnapping count. The plea was not made conditional in that it did not give appellant the right to withdraw the plea if he were not sentenced to serve 5 to 15 years. Appellant, by signing the guilty plea agreement, acknowledged that he was not acting under any promises of leniency and had not been promised or guaranteed any particular sentence. In addition, appellant received a substantial benefit with his plea, as burglary, grand larceny auto, and deadly weapon enhancements were dropped from the charges. The district court concluded that appellant failed to demonstrate that his trial counsel was ineffective and substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to move to withdraw his guilty plea when it became clear that the district court would not follow the State's recommendation of a sentence of 5 to 15 years on the kidnapping count. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521

(1994). A defendant's mere subjective belief as to a potential sentence is insufficient to invalidate the guilty plea as involuntary and unknowing. Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975). At the evidentiary hearing, appellant's counsel stated that she had informed appellant prior to sentencing that his desire for a lenient sentence was an insufficient basis for withdrawing a guilty plea. Appellant failed to identify any reasons why his plea was not entered knowingly and voluntarily. As such, appellant failed to demonstrate that a presentence motion to withdraw guilty plea had a reasonable likelihood of success. Kirksey v. State, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996). As stated earlier, appellant's plea was not conditioned upon receiving a sentence of 5 to 15 years. The district court concluded that appellant did not demonstrate that his trial counsel was ineffective for failing to file a motion to withdraw guilty plea and substantial evidence supports that finding. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for showing him his Presentence Investigation Report (PSI) only 45 minutes before the sentencing hearing. Appellant claimed that facts set forth in the PSI did not allow him to argue his innocence and the short length of time before the sentencing hearing did not allow him to seek to have the PSI altered. Appellant failed to demonstrate that he was prejudiced. As appellant had already pleaded guilty, he had agreed to relieve the State of its burden of proving his guilt by proof beyond a reasonable doubt. Appellant failed to identify any of the facts in the PSI that he disputed or how those facts would have affected the sentencing

hearing. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). As such, appellant failed to demonstrate a reasonable probability that the outcome of the sentencing hearing would have been different had he had a chance to review the PSI at an earlier time. Therefore, the district court did not err in denying this claim.[1]

Fourth, appellant claimed that his trial counsel was ineffective for failing to file a direct appeal. 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." 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). "The burden is on the client to indicate to his attorney that he wishes to pursue an appeal." Davis, 115 Nev. at 20, 974 P.2d at 660. At the evidentiary hearing, appellant's trial counsel stated that appellant did not ask her to file an appeal. Also at the evidentiary hearing, appellant stated that he did not ask his trial counsel to file a direct appeal. Substantial evidence supports

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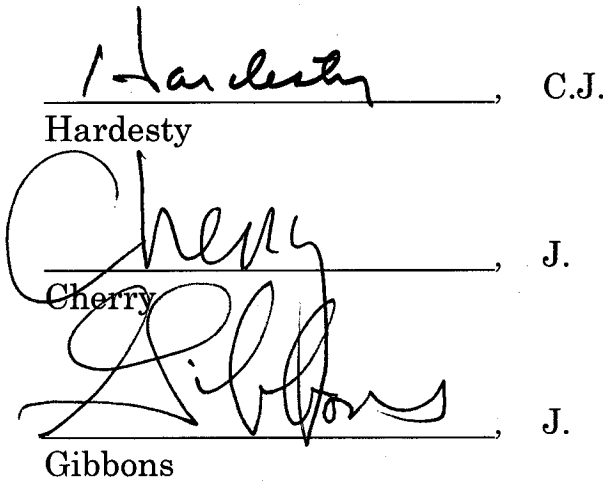
[1]To the extent that appellant claimed that the short length of time he had to review the PSI before the sentencing hearing and the alleged errors in the PSI caused his plea to be involuntary, appellant failed to identify how information contained in the PSI affected his decision to plead guilty. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). As such, we conclude that the district court did not err in denying this claim.

the district court's finding that appellant did not request a direct appeal. 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.



_____, C.J.
Hardesty

_____, J.
Cherry

_____, J.
Gibbons

cc: Hon. David B. Barker, District Judge
Daniel Alfred Farmer
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk