

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD RAY KEEN, JR. A/K/A
DONALD RAY KEEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51846

DONALD RAY KEEN, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52013

FILED

JAN 08 2010

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

ORDER OF AFFIRMANCE

These are consolidated appeals from district court orders denying appellant Donald Ray Keen's post-conviction petitions for writs of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Keen contends that the district court erred by denying his habeas petitions. Keen claims that counsel were ineffective for failing to (1) present additional mitigation evidence at sentencing; (2) ensure that direct appeals were pursued in both district court cases; (3) file a direct appeal in district court case number CR04-0973; and (4) object at sentencing and argue on direct appeal that the State breached the plea agreement. Keen also claims that his guilty plea was invalid because he "did not knowingly and intentionally waive application of his right to have the jury decide a sentencing enhancement." We disagree.

When reviewing the district court's resolution of an ineffective-assistance claim, we give deference to the court's factual

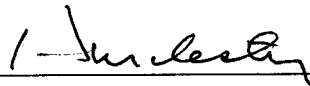
findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). In its orders denying the petitions, the district court stated that it considered "the relative credibility of the witnesses" and found that Keen entered his guilty plea knowingly and intelligently, was not improperly deprived of a direct appeal in district court case number CR04-0973, and did not receive ineffective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 687-88 (1984) (establishing two-part test for ineffective assistance of counsel); Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994); Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986). The district court's findings of fact are supported by substantial evidence and are not clearly wrong. Moreover, Keen has not demonstrated that the district court erred as a matter of law.

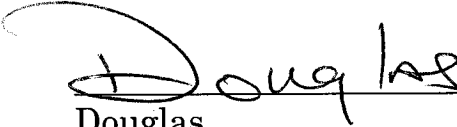
Next, Keen contends that the deadly weapon enhancement should be "stricken" from his sentence in one of the two robbery with the use of a firearm convictions in district court case number CR04-1687 because NRS 193.165 is unconstitutional. This claim could have been presented on direct appeal and therefore is procedurally barred absent a demonstration of good cause and actual prejudice, see NRS 34.810(1)(b)(2), (3), or that the failure to consider the claim amounts to a "fundamental miscarriage of justice," Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Keen failed to demonstrate good cause, and he failed to demonstrate a fundamental miscarriage of justice. Cf. Murray v. Carrier, 477 U.S. 478, 496 (1986) (holding that a federal habeas court may grant the writ in the absence of a showing of cause for the procedural default

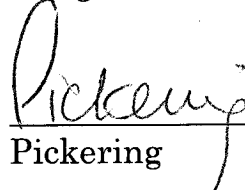
“where a constitutional violation has probably resulted in the conviction of one who is actually innocent”).

Having considered Keen’s contentions and concluded they lack merit, we

ORDER the judgments of the district court AFFIRMED.¹


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

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

¹Keen also contends that the Lozada remedy is inadequate for the deprivation of his right to a direct appeal. Because we have concluded that the district court did not err by rejecting Keen’s appeal deprivation claim, we need not address this issue. But see Gebers v. State, 118 Nev. 500, 505, 50 P.3d 1092, 1095 (2002) (approving of the Lozada remedy for meritorious appeal deprivation claims).