

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA COLA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52094

**FILED**

FEB 20 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 a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

On November 13, 2006, the district court convicted appellant, pursuant to a guilty plea, of three counts of robbery with the use of a deadly weapon and one count of conspiracy to commit a robbery. The district court sentenced appellant to serve a total of four consecutive terms of 24 to 60 months in the Nevada State Prison. This court affirmed the judgment of conviction on direct appeal. Cola v. State, Docket No. 48578 (Order of Affirmance, May 11, 2007). The remittitur issued on June 5, 2007.

On October 23, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On February 28, 2008, appellant filed a motion for leave to file an amended petition, and on April 23, 2008, appellant filed an amended post-conviction

petition for a writ of habeas corpus. 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 June 26, 2008, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised seven claims of ineffective assistance of trial counsel. 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 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 that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (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 v. Washington, 466 U.S. 668, 697 (1984). A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004).

First, appellant claimed that his trial counsel was ineffective for failing to raise a competency issue. Appellant claimed that the presentence investigation report raised doubt about his competency because it included a reference to a mental health institutionalization. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. This court has held that the test for

determining competency is “whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.” Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)). Appellant failed to demonstrate by a preponderance of the evidence that he did not have sufficient ability to consult with his trial counsel and that he did not have a rational as well as factual understanding of the proceedings against him. A prior mental health institutionalization is insufficient by itself to demonstrate incompetency. A review of the plea canvass indicates that appellant answered all questions put to him appropriately. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that he received ineffective assistance of counsel because he was represented by different attorneys at the Public Defender’s Office at various hearings. He claimed that the attorneys were unprepared to effectively represent his interests because each time he met with a new attorney he would have to explain his defense and circumstances anew. Appellant failed to demonstrate that he was prejudiced. Appellant failed to specifically articulate how further preparation or continuity in representation would have had a reasonable probability of altering his decision to enter a guilty plea. In signing his guilty plea agreement, appellant acknowledged that he had discussed possible defenses and circumstances that might be in his favor. Appellant received a substantial benefit by entry of his guilty plea; in exchange for

his guilty plea to the four counts set forth above, appellant avoided the possibility of being convicted of three additional counts of conspiracy to commit robbery, two additional counts of robbery with the use of a deadly weapon, two counts of burglary while in possession of a firearm, and one count of battery with a deadly weapon. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to challenge his indictment. Appellant claimed that the district attorney should have been barred from seeking a grand jury indictment because charges had previously been filed in a criminal complaint. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that the State was precluded from seeking an indictment in the instant case. NRS 172.105 ("The grand jury may inquire into all public offenses triable in the district court . . . committed within the territorial jurisdiction of the district court for which it is impaneled."); NRS 178.562(2) ("The discharge of a person accused upon preliminary examination is a bar to another complaint against him for the same offense, but does not bare the finding of an indictment or filing of an information."); see also State of Nevada v. District Court (Warren), 114 Nev. 739, 742, 964 P.2d 48, 50 (1998) (recognizing that a discharge pursuant to the grant of a pretrial petition for a writ habeas corpus does not bar subsequent proceedings pursuant to NRS 178.562). Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to challenge the grand jury indictment because counts 7 through 12 did not specifically name a suspect, but instead only named “defendants,” and the grand jury indictment proceedings were tainted by in-court identifications that were the products of photographic line-ups. Appellant failed to demonstrate that his trial counsel’s performance was deficient or that he was prejudiced. The indictment set forth “a plain, concise and definite written statement of the essential facts,” and thus, appellant failed to demonstrate that the indictment was defective. See NRS 173.075(1) (setting forth that the indictment must be a “plain, concise and definite written statement of the essential facts constituting the offense”). Appellant further failed to demonstrate that the photographic line-up was impermissibly suggestive. Cunningham v. State, 113 Nev. 897, 904, 944 P.2d 261, 265 (1997) (recognizing that a photographic identification must be set aside when the procedure was so impermissibly suggestive that it gave rise to a very substantial likelihood of irreparable misidentification). Finally, appellant failed to demonstrate that he would not have entered a guilty plea and would have insisted on going to trial absent trial counsel’s alleged errors. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to challenge the validity of the telephonic search warrant because the search warrant was not based upon probable cause. Appellant further claimed that the residence in question in the warrant was not his home, the evidence collected was not his property, and he had never possessed

the evidence in question. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to set forth any facts demonstrating that the telephonic search warrant was not based upon probable cause, and consequently, he failed to demonstrate that the warrant was invalid. Appellant's purported argument that the warrant was defective because the residence was not his would not invalidate the search warrant. Notably, appellant would have no standing to challenge the search of a residence in which he did not have a protected privacy interest. Rakas v. Illinois, 439 U.S. 128, 130-31 n.1 (1978) ("The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search."); Katz v. United States, 389 U.S. 347, 352 (1967) (recognizing that the Fourth Amendment requires an inquiry into whether the person claiming protection was entitled to assume privacy at the place under the circumstances concerned); see also State v. Taylor, 114 Nev. 1071, 1077, 968 P.2d 315, 320 (1998) (recognizing that one must have an objective and subjective expectation of privacy in the place to be searched). Appellant failed to demonstrate that he would not have entered a guilty plea and would have insisted on going to trial absent trial counsel's alleged errors. Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to investigate his innocence as to counts 1 through 18 of the indictment. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The record on

appeal indicates that an investigation was performed in appellant's case. Appellant failed to articulate what further investigation should have been performed and failed to demonstrate how further investigation would have had a reasonable probability of altering his decision to enter a guilty plea in the instant case. Therefore, we conclude that the district court did not err in denying this claim.

Seventh, appellant claimed that his trial counsel was ineffective for failing to read the guilty plea agreement to appellant knowing that appellant had a limited education and was barely literate. Appellant claimed that he was not capable of understanding the guilty plea agreement on his own. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant affirmatively acknowledged at the plea canvass that he had read the plea agreement and that trial counsel had reviewed the plea agreement with him. In signing the guilty plea agreement, appellant acknowledged that counsel had explained the elements, consequences, rights and waiver of rights. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant raised three claims of ineffective assistance of appellate counsel. To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Appellate counsel is not required to raise every

non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

First, appellant claimed that his appellate counsel was ineffective for failing to argue that he was incompetent because of the reference to a prior mental health institutionalization in the presentence investigation report. As discussed previously, appellant failed to demonstrate that he was incompetent, and thus, he failed to demonstrate that any such argument would have had a reasonable probability of success on appeal. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that the grand jury proceedings were defective. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. As stated earlier, appellant failed to demonstrate that the grand jury proceedings were defective, and thus, appellant failed to demonstrate that any such argument would have had a reasonable probability of success on appeal.

Third, appellant claimed that his appellate counsel was ineffective for failing to challenge the telephonic search warrant. Appellant failed to demonstrate that appellate counsel's performance was deficient or that he was prejudiced. As stated earlier, appellant failed to demonstrate that the telephonic search warrant was invalid, and thus,

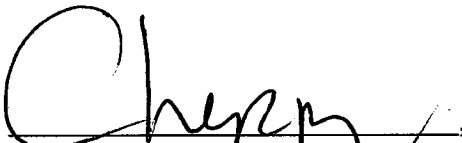



appellant failed to demonstrate that any such argument would have had a reasonable probability of success on appeal.


Finally, appellant claimed that the indictment was invalid because the grand jury notice was insufficient and NRS 172.241 does not adequately protect an accused's rights. These claims fell outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea. NRS 34.810(1)(a). Therefore, we conclude that 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.

  
Cherry J.

  
Saitta J.

  
Gibbons J.

cc: Hon. Valorie Vega, District Judge  
Joshua Cola  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk