IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRANCE L. OLIVER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52121

FILED

FEB 04 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 Terrance L. Oliver's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

On November 16, 2007, the district court convicted appellant, pursuant to a guilty plea, of one count of attempted sexual assault and one count of fourth-degree arson. The district court sentenced appellant to serve a term of 32 to 144 months in prison for attempted sexual assault and a term of 19 to 48 months in prison for fourth-degree arson. Appellant did not file a direct appeal.

On March 11, 2008, appellant 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 appellant or to conduct an evidentiary hearing. On July 9, 2008, the district court denied the petition. This appeal followed.

Appellant claimed that he received 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, 57, 58-59 (1985); Kirksey v. State, 112 Nev. 980, 978-88, 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). Appellant also raised claims of ineffective assistance of trial counsel at the sentencing proceeding. To state a claim of ineffective assistance of counsel sufficient to warrant a new sentencing hearing, a petitioner must demonstrate that 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, the outcome of the proceedings would have been different. Id. at 694; Weaver v. Warden, 107 Nev. 856, 858-59, 822 P.2d 112, 114 (1991).

First, appellant claimed that his trial counsel was ineffective for failing to file a motion to suppress appellant's statements made at the time of arrest. Appellant asserted that at the time he made the statements, he was in custody and that he was intoxicated. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Our review of the record reveals that the statements made by appellant were voluntary. When the officer arrived at the scene, appellant stood in front of her car, with his hands up and stated "Arrest me. I did it." Appellant was then placed in handcuffs while the officer

ascertained the nature of the situation. Appellant again stated, "I did it." He then informed the officer that she might want to take the lighted newspaper out of the gas tank of the victim's car "cuz it is gonna blow up." Appellant was not in custody when the first statements were made and did not make these statements in response to any questions from the arresting officer. In addition, appellant did not explain how his intoxication affected the voluntariness of his plea and consequently failed to show that he was prejudiced by counsel's decision not to file a motion to suppress. See Floyd v. State, 118 Nev. 156, 172, 42 P.3d 249, 260 (2002), abrogated on other grounds by Grey v. State, 124 Nev. ___, 178 P.3d 154 (2008). Therefore, the district court did not err by denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to file a motion to dismiss when the State did not present exculpatory DNA evidence. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Appellant did not explain this claim or demonstrate that exculpatory DNA evidence existed. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying this claim.

In a related claim, appellant claimed that trial counsel was ineffective because trial counsel failed to file a motion to dismiss based on the State's failure to produce the results of the DNA test. Appellant stated that the district court twice ordered the State to provide the results of the DNA test. Appellant failed to demonstrate that he was prejudiced. First, appellant did not allege that the State failed to comply with the orders, only that two orders were necessary. Second, appellant failed to show that the DNA test was exculpatory and that the district court would

have granted the motion. Therefore, the district court did not err by denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to present favorable "rape kit test" evidence. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Appellant did not explain this claim or demonstrate that the rape kit test contained exculpatory evidence. See id. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel failed to advise him of his right to appeal. Appellant failed to demonstrate that he was prejudiced. The written plea agreement expressly informed appellant of the limited scope of his right to appeal. See Davis v. State, 115 Nev. 17, 19, 974 P.2d 658, 659 (1999). Further, this court has held "that there is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to pursue a direct appeal." Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999). Appellant did not claim that he asked for an appeal and that counsel failed to file it or demonstrate that circumstances warranted the filing of an appeal. Therefore, we conclude that the district court did not err by denying this claim.

Fifth, appellant claimed that trial counsel was ineffective because he coerced appellant into pleading guilty by informing him that he would lose if he went to trial. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced by trial counsel's performance. Candid advice about the possible outcome of trial is not evidence of a deficient performance. Appellant acknowledged in the guilty plea agreement that his guilty plea was voluntary, that he signed with the advice of counsel, and that his plea was not the result of any threats,

coercion or promises of leniency. At the plea canvass, appellant acknowledged that his plea was given freely and voluntarily, without threats or promises. In addition, at the plea canvass, appellant was informed of the potential sentences he could receive, for both the attempted sexual assault count and the fourth-degree arson count. Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel was ineffective because trial counsel failed to develop a defense, file pre-trial motions, conduct discovery, suppress statements, conduct interviews, or argue for a dismissal where the rape kit did not "include evidence for a conviction." Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Appellant failed to provide sufficient facts that, if true, would entitle him to relief. See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. In particular, appellant failed to specify what defenses were available that counsel did not develop, indicate what pre-trial motions could have been filed, identify what exculpatory evidence or information would have been revealed as a result of additional discovery or investigation, or explain how the rape kit did not "include evidence for a conviction." Appellant did not explain how the failure to investigate these areas affected his decision to plead guilty. Therefore the district court did not err by denying this claim.

Seventh, appellant claimed that trial counsel was ineffective at sentencing because trial counsel failed to call witnesses, cross-examine the victim, present evidence that appellant was not a threat to society, or attack erroneous entries in the PSI. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced.

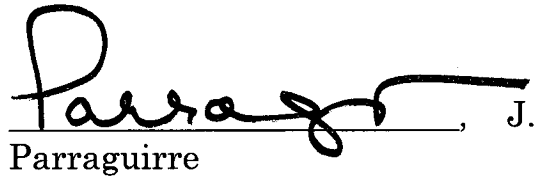
Appellant contended that he had four witnesses willing to come in and testify on his behalf at sentencing; however, appellant failed to explain what the nature of their testimony would be. See id. He also failed to explain what issues he wanted trial counsel to cross-examine the victim about or what errors were made in the PSI. Id. Moreover, counsel did present evidence that appellant did not represent a risk to society. Counsel filed a sentencing memorandum which included a psychologist's report that concluded that appellant's risk to reoffend was low. This sentencing memorandum also included certificates that appellant earned while incarcerated showing that he completed numerous anger management, domestic violence and chemical dependency courses. Counsel also provided several letters from family members requesting leniency. Appellant failed to demonstrate a reasonable possibility of a different outcome at sentencing had trial counsel acted differently. Therefore, we conclude that the district court did not err in denying this claim.

Finally, appellant claimed that his plea was not knowing and voluntary. 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). Appellant did not explain how his plea was not knowing and voluntary and, therefore, failed to meet his burden. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. Accordingly, the district court did not err in denying this claim.

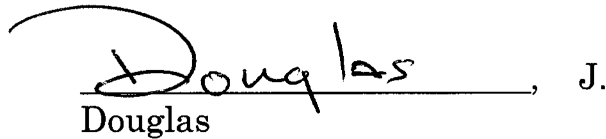
Having reviewed the record on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief and that

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.



_______________, J.
Parraguirre



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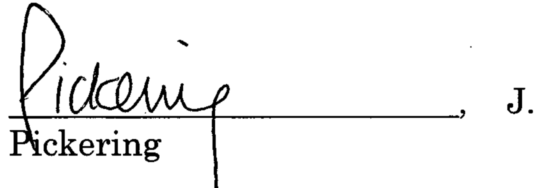
Douglas



_______________, J.
Pickering

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