

IN THE SUPREME COURT OF THE STATE OF NEVADA

RODERICK LAMAR HYMON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52179

FILED

ORDER OF AFFIRMANCE

MAY 20 2009
TRACIE A. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

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; Kenneth C. Cory, Judge.

On April 15, 2003, the district court convicted appellant, pursuant to a jury verdict, of one count of robbery with the use of a deadly weapon, one count of larceny from the person, and one count of assault with a deadly weapon. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve two consecutive terms and one concurrent term of life with the possibility of parole in the Nevada State Prison. The district court provided appellant with 285 days of credit for time served. Hymon v. State, 121 Nev. 200, 111 P.3d 1092 (2005). The remittitur issued on August 23, 2005.

On August 19, 2005, appellant filed a proper person post-conviction petition in the district court. The State opposed the petition. The district court denied the petition. This court affirmed the denial of the majority of the claims raised in the petition, but reversed and remanded for further proceedings on the followings claims: (1) whether appellate counsel was ineffective for failing to argue that the judgment of

conviction did not set forth all of the presentence credits to which he was entitled; and (2) whether appellate counsel was ineffective for failing to properly argue that the district court erred by not exercising discretion regarding the habitual criminal adjudication based upon a possible misapprehension regarding habitual felon treatment pursuant to NRS 207.012 and habitual criminal treatment pursuant to NRS 207.010 and a confusing notice of the charge of habitual felon treatment in the information. Hymon v. State, Docket No. 46515 (Order Affirming in Part, Reversing in Part, and Remanding, September 6, 2006).

Upon remand, the district court appointed counsel to represent appellant. The State filed a sentencing memorandum and notice of the correct statute for habitual felon treatment. Appellant's counsel also filed a sentencing statement. After conducting a new sentencing hearing, the district court entered a new judgment of conviction on March 21, 2008.¹ The district court adjudicated appellant a habitual felon pursuant to NRS 207.012 for the robbery count and a habitual criminal pursuant to NRS 207.010 for the larceny and assault counts. The district court sentenced appellant to serve three concurrent terms of 10 to 25 years in the Nevada State Prison. The district court provided appellant with 2,508 days of credit for time served. No appeal was taken from the 2008 judgment of conviction.

On May 2, 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

¹It appears that the district court determined that appellate counsel was ineffective.

district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On August 26, 2008, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of counsel at the 2008 sentencing hearing.² To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that there was a reasonable probability of a different outcome in the proceedings. See Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland).

Appellant claimed that his counsel appointed for the 2008 sentencing hearing was ineffective for failing to object to the fact that the State did not present or file the prior judgments of conviction at the 2008 sentencing hearing, and the State failed to establish he was represented by counsel in the prior cases. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Four prior judgments of conviction had been filed in the district court record at the time of the original sentencing proceedings.³ Those judgments of

²To the extent that appellant raised the underlying claim independently from the claim of ineffective assistance of counsel, we conclude that the claim was waived as it could have been raised on an appeal from the 2008 judgment of conviction, and appellant failed to provide good cause for his failure to do so. NRS 34.810(1)(b).

³In the direct appeal from the original judgment of conviction, this court noted that the prior judgments of conviction were presented by the
continued on next page . . .

conviction were available to the district court at the 2008 sentencing hearing and were in fact referenced by the State and appellant's counsel during the 2008 sentencing hearing. The judgments of conviction and accompanying documentation filed in the record on appeal establish that appellant was represented by counsel in those cases. Counsel argued for leniency at the sentencing hearing, and in fact, the sentence imposed by the district court on remand was less harsh than the sentence imposed in the original judgment of conviction.⁴ Appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel objected at the 2008 sentencing hearing. Therefore, we conclude that the district court did not err in denying this claim.

Appellant also claimed that the district court did not state any reasons for adjudicating appellant a habitual criminal. This claim was waived as it should have been raised on an appeal from the 2008 judgment of conviction, and appellant failed to demonstrate good cause for his failure to so. NRS 34.810(1)(b). Therefore, we conclude that the district court did not err in denying this claim.

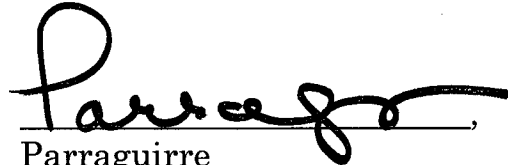
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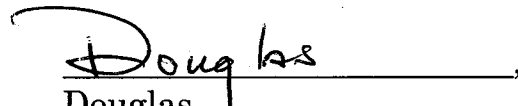
State, marked, received into evidence, reviewed by the district court and contained in the vault exhibit form, even though the prior judgments of conviction were not formally admitted. Hymon, 121 Nev. at 216, 111 P.3d at 1103. Notably, the record on appeal contains copies of the prior judgments of conviction as exhibits filed in the district court.

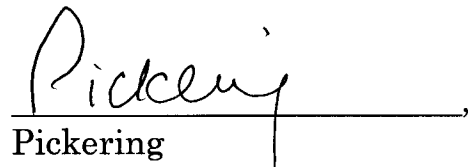
⁴The district court noted at the 2008 sentencing hearing that appellant's counsel had made a compelling argument during the proceedings.

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.

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Hon. Kenneth C. Cory, District Judge
Roderick Lamar Hymon
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk