IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 52246

FILED

JAN 08 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; Donald M. Mosley, Judge.

On January 16, 2008, the district court convicted appellant, pursuant to a guilty plea, of one count of conspiracy to commit robbery (count 1), one count of robbery with the use of a deadly weapon (count 2), and one count of second-degree kidnapping with the use of a deadly weapon (count 3). The district court sentenced appellant to serve in the Nevada State Prison: (1) for count 1, a term of 12 to 48 months; (2) for count 2, a term of 24 to 120 months for the primary offense and a consecutive term of 18 to 72 months for the deadly weapon enhancement, count 2 to be served concurrently with count 1; and (3) for count 3, a term of 24 to 120 months for the primary offense and a consecutive term of 18 to 72 months for the deadly weapon enhancement, count 3 to be served concurrently with count 2. No direct appeal was taken.

On May 27, 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

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conduct an evidentiary hearing. On September 5, 2008, the district court entered a written order denying appellant's petition. This appeal followed.

The district court determined that the petition was a fugitive document because appellant was represented by trial counsel as no motion to withdraw from representation had been filed when appellant filed his post-conviction petition for a writ of habeas corpus. We conclude that the district court erroneously concluded that the petition was a fugitive document in the instant case. A post-conviction petition for a writ of habeas corpus is a collateral proceeding from the underlying criminal conviction, and thus, the fact that trial counsel had not withdrawn from the case when appellant filed his petition had no bearing upon the propriety of the filing of the petition in proper person.[1] Nevertheless, the district court correctly further determined that the petition lacked merit.

In his petition, appellant claimed that he received ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, 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 of a different outcome but for counsel's errors.[2] In order to demonstrate prejudice to invalidate the

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[1]NRS 34.724(2); NRS 34.738. It would be improper for trial counsel to participate in the filing of a post-conviction petition for a writ of habeas corpus raising claims of ineffective assistance of trial counsel. Likewise, the failure of trial counsel to formally withdraw from representation should not hinder a proper person litigant from filing a post-conviction petition for a writ of habeas corpus raising claims of ineffective assistance of trial counsel.

[2]Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

decision to enter a guilty plea, a petitioner must demonstrate a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial.[3] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[4]

First, appellant claimed that his trial counsel was ineffective for failing to challenge imposition of the deadly weapon enhancement. Appellant claimed that the district court should have conducted a hearing on whether a BB gun or pocket knife satisfied the inherently dangerous weapon test set forth in NRS 193.165. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant entered a guilty plea to using a deadly weapon in the commission of robbery and second-degree kidnapping. Thus, imposition of the deadly weapon enhancement was appropriate.[5] Appellant admitted during the plea canvass that a gun or knife had been used in the commission of the crimes. Appellant's claim that a BB gun would not qualify under NRS 193.165 was without merit. NRS 193.165 (6)(c) includes as a definition of a deadly weapon a dangerous weapon described in NRS 202.265. NRS 202.265 defines a firearm to include, "[a]ny device from which a metallic projectile, including any ball bearing or pellet, may be expelled by means of spring, gas, air or other force."[6]

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[3]Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

[4]Strickland, 466 U.S. at 697.

[5]Blakely v. Washington, 542 U.S. 296 (2004) (stating that precedent makes it clear that the statutory maximum that may be imposed is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant).

[6]See NRS 202.265(5)(b).

Thus, a BB gun may be used to enhance the primary offenses in the instant case. Moreover, appellant received a substantial benefit by entry of his guilty plea as he was originally charged with six counts of conspiracy to commit robbery, two counts of robbery with an older victim enhancement, four counts of robbery with the use of a deadly weapon, one count of first-degree kidnapping, one count of battery with the intent to commit a crime, and one count of burglary while in possession of a firearm. In exchange for his guilty plea to one count each of conspiracy to commit robbery, robbery with the use of a deadly weapon, and second-degree kidnapping, the State agreed to no opposition to concurrent time between counts and agreed not to file charges on two incidents occurring on September 26, 2007, and on September 27, 2007. Therefore, we conclude that the district court did not err in denying this claim.[7]

Second, appellant claimed that his trial counsel misrepresented the penalty. Appellant claimed that his trial counsel told him that he would get a two-year sentence, or a sentence of three to eight years, but that he received a sentence in excess of this. Appellant claimed that his trial counsel never gave him a copy of the plea agreement to obfuscate the potential penalties. Appellant failed to demonstrate that he was prejudiced. Appellant was informed in the written plea agreement and during the plea canvass of the potential penalties and that sentencing was in the discretion of the district court. Appellant acknowledged reading and understanding the plea agreement during the plea canvass. Appellant's mere subjective belief as to a potential sentence is insufficient

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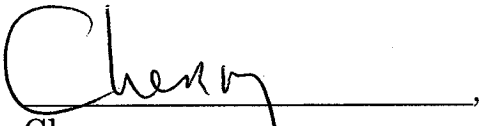
[7]To the extent that appellant claimed that the district court failed to conduct a hearing on the deadly weapon enhancement, this claim fell outside the scope of claims permissible. See NRS 34.810(1)(a).

to invalidate his guilty plea as involuntary and unknowing.[8] Therefore, we conclude that the district court did not err in denying this claim.[9]

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.[10] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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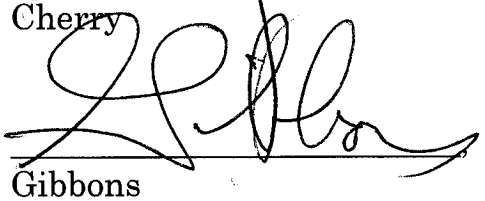

_____, J.
Gibbons

_____, J.
Saitta

cc: Hon. Donald M. Mosley, District Judge
Joshua Croft
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[8]See Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975).

[9]To the extent that appellant claimed that his guilty plea was not knowingly or intelligently entered, appellant failed to carry his burden of demonstrating that his plea was invalid for the reasons discussed above. See State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

[10]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).