

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRANDON DOUGLAS ALLAN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52275

**FILED**

**JUL 23 2009**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

On June 23, 2000, the district court convicted appellant, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life with the possibility of parole after 20 years in the Nevada State Prison. On appeal, this court reversed appellant's judgment of conviction and remanded the matter to the district court. Allan v. State, 118 Nev. 19, 38 P.3d 175 (2002). The remittitur issued on April 18, 2002. On August 29, 2003, the district court convicted appellant, pursuant to a guilty plea, of second-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve a term in the Nevada State Prison of life with the possibility of parole after 10 years and an equal and consecutive term for the deadly weapon enhancement. Appellant did not file a direct appeal from the judgment of conviction entered pursuant to his guilty plea.

On August 26, 2004, 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 October 23, 2007, the district court denied appellant's petition. This court affirmed in part, reversed in part and remanded for a limited evidentiary hearing on an appeal deprivation claim. Allan v. State, Docket No. 50480 (Order Affirming in Part, Reversing in Part, and Remanding, April 18, 2008).

On remand, the district court appointed counsel to represent appellant. The day before the evidentiary hearing, post-conviction counsel submitted an amended petition. After conducting a limited evidentiary hearing, the district court denied the petition on August 12, 2008. This appeal follows.

First, appellant argues that the district court erred by failing to appoint counsel to represent appellant in the initial post-conviction proceedings before the district court. Appellant argues that post-conviction counsel should have been appointed for the proceedings prior to the October 23, 2007 denial of appellant's petition. Appellant argues that he had difficulty comprehending the post-conviction proceedings, as indicated by his claims in his 2004 petition that he lacked education or legal training, and that he had limited access to the prison library. Appellant further argues that the issues were complex, that counsel was necessary to discover important claims, and that he faces a severe sentence.

Appellant fails to demonstrate that the district court abused its discretion by refusing to appoint post-conviction counsel for the

proceedings for the 2004 petition. This issue could have been raised in the first appeal from the district court's denial of the 2004 petition. Regardless, post-conviction counsel has been appointed for the instant appeal and appellant fails to demonstrate the district court abused its discretion by denying appellant's 2004 request for post-conviction counsel. NRS 34.750 provides for the discretionary appointment of post-conviction counsel and sets forth the following factors which the court may consider in making its determination to appoint counsel: the petitioner's indigency, the severity of the consequences to the petitioner, the difficulty of those issues presented, whether the petitioner is unable to comprehend the proceedings, and whether counsel is necessary to proceed with discovery. Here, appellant fails to demonstrate that the legal issues were complex or that counsel was needed for discovery. In addition, appellant fails to demonstrate that he had difficulty comprehending the proceedings when he filed his 2004 petition. While appellant faces a lengthy prison sentence, he failed to demonstrate that the severity of his sentence should outweigh the other factors. Therefore, appellant fails to demonstrate he is entitled to relief on this issue.

Second, appellant argues that the district court abused its discretion by refusing to allow an amended petition to be filed following the remand for a limited evidentiary hearing. Appellant argues that counsel has an ethical duty to raise claims discovered in the course of her review of the case in addition to those previously raised in proper person. Further, appellant argues the claim in the amended petition should relate back to the 2004 petition.

Appellant fails to demonstrate that the district court abused its discretion. Pursuant to this court's 2008 order, the matter was

remanded to the district for a limited evidentiary hearing on the issue of whether appellant's trial counsel refused to file an appeal after being asked by appellant to do so. Post-conviction counsel was appointed to represent appellant for the limited evidentiary hearing and it would not have been proper to allow appellant to raise additional claims due to the limited scope of the evidentiary hearing. Additionally, "[n]o further pleadings may be filed except as ordered by the [district] court." NRS 34.750(5). It is within the discretion of the district court to allow further pleadings and appellant fails to demonstrate that the district court abused its discretion. Further, NRCPC 15(c), which discusses relation back of amended pleadings, does not apply to amendments or supplements to habeas petitions. State v. Powell, 122 Nev. 751, 757-58, 138 P.3d 453, 457 (2006). Accordingly, appellant fails to demonstrate that the district court erred by refusing to allow the filing of the amended petition. Therefore, appellant is not entitled to relief on this issue.<sup>1</sup>

Moreover, even assuming the district court erred by not allowing the filing of the amended petition, appellant fails to demonstrate that he is entitled to relief. In the amended petition, appellant claimed that his trial counsel was ineffective for failing to present mitigation evidence at his sentencing hearing and failing to file a brief with documentation of the mitigation evidence. Appellant failed to demonstrate that he was prejudiced. See Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432, 683 P.2d

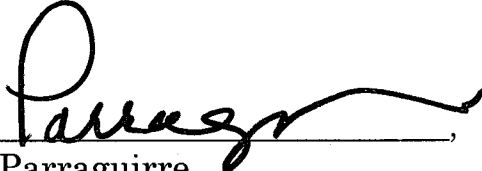
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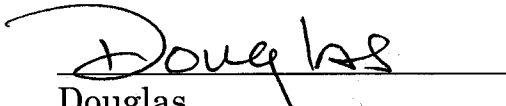
<sup>1</sup>We note that appellant did not raise any claims regarding the district court's denial of the appeal deprivation claim. Thus, we conclude that he has abandoned this claim.

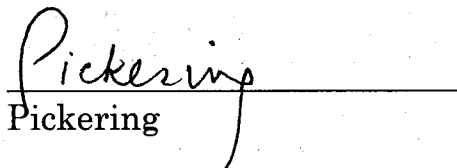
504, 505 (1984) (adopting the test set forth in Strickland). Appellant stipulated in the guilty plea agreement to a term in the Nevada State Prison of ten years for second-degree murder plus an equal and consecutive sentence for the deadly weapon enhancement and he received that sentence from the district court. Thus, appellant received the sentence that he bargained for. Therefore, appellant fails to demonstrate that this claim had merit.

Accordingly, having considered appellant's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

 J.  
Parraguirre

 J.  
Douglas

 J.  
Pickering

cc: Hon. Steven R. Kosach, District Judge  
Mary Lou Wilson  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk