

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKY I. NELSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52306

FILED

SEP 03 2009

TRACEY K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying in part a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

On September 21, 2006, the district court convicted appellant, pursuant to a guilty plea, of two counts of robbery with the use of a deadly weapon. The district court sentenced appellant to serve a term of 4 to 10 years in the Nevada State Prison for each of the two robbery counts with an equal and consecutive term for the deadly weapon enhancement. The terms for the counts were ordered to run concurrently. No direct appeal was filed.

On May 25, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. In his petition, appellant claimed, among other things, that he was deprived of the right to appeal. The State opposed the petition. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. On July 1, 2008, after conducting a hearing on appellant's appeal deprivation claim, the district court granted in part and denied in part appellant's petition. In particular, the district court granted relief on

appellant's appeal deprivation claim and appointed counsel to pursue appellant's remedy pursuant to Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994), but denied appellant's remaining claims. This appeal followed.¹

In his petition, in addition to his appeal deprivation claim, appellant raised four claims of ineffective assistance of trial counsel: (1) counsel did not adequately inform appellant of the consequences of his plea, (2) counsel promised appellant a specific sentence, (3) counsel coerced appellant into pleading guilty, and (4) counsel failed to defend appellant, file motions, investigate, and present mitigating evidence. 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, 987-88, 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).

First, appellant claimed that trial counsel was ineffective because counsel did not adequately inform appellant of the direct

¹The State did not appeal the district court's determination that appellant was deprived of his right to appeal. Thus, this appeal considers only the claims denied.

consequences of his plea. Specifically, appellant claimed that he was not informed that the deadly weapon enhancement sentences would be served consecutively to the sentences for the primary offenses, robbery. Appellant failed to demonstrate that counsel's performance was deficient. Appellant was informed in the plea agreement that for each count of robbery, he was facing a possible minimum term of 2 years in prison to a maximum term of 15 years in prison. He was also informed that he faced an equal and consecutive term of imprisonment for the deadly weapon enhancement. Appellant signed the plea agreement and stated during the plea colloquy that he had read the plea agreement with counsel and that he understood his rights and responsibilities under the agreement. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective because counsel promised him a particular sentence which he did not receive. It appears that appellant claimed that counsel promised him that the State would agree to a particular sentence and that this promise coerced him into pleading guilty. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. Appellant failed to allege what he was promised. It appears from the transcript of the evidentiary hearing that counsel may have received an indication in an ex parte meeting from the district court judge that appellant would be sentenced to concurrent time between the robbery counts. Appellant was sentenced to concurrent time, and therefore, appellant has failed to demonstrate that he was prejudiced by counsel's relation to him of the district court's intention. There is no indication in the record that the State promised appellant a particular sentence except that the plea agreement required the State to "stand silent" at sentencing regarding

whether the counts should be concurrent or consecutive. Further, appellant's plea agreement clearly laid out that he was facing a minimum term of 2 years to a maximum term of 15 years in prison for each count of robbery. Appellant received a term of 4 to 10 years for each count of robbery, which was within the statutory range. See NRS 200.380(2). Appellant stated in his petition that he discussed possible sentences with counsel and admitted during the plea colloquy that he and counsel discussed the terms of the plea agreement before he signed it. Therefore, the district court did not err in denying this claim.

Third, 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. 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. Therefore, the district court did not err in denying this claim.

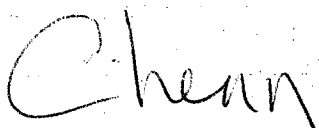
Fourth, appellant claimed that counsel was ineffective for failing to defend appellant, failing to file motions, failing to investigate, and failing to present mitigating evidence regarding his upbringing and mental stability. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. Appellant failed to provide sufficient facts, that if true, would entitle him to relief. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). In


particular, appellant failed to demonstrate how appellant should have been defended, what motions should have been filed, what investigation was not done, or how the evidence of his upbringing and mental stability was mitigating. Appellant failed to demonstrate a reasonable probability of a different outcome had trial counsel performed differently in this case. Therefore, the district court did not err in denying this claim.


In addition to appellant's ineffective assistance of counsel claims, appellant claimed that the district court erred by failing to inform appellant that he had the right to a jury determination on the deadly weapon enhancement. This claim is more properly suited for direct appeal. Because the district court determined that appellant was deprived of his right to appeal and appellant is currently pursuing his remedy under that determination, we decline to address this issue at this time.

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.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. James M. Bixler, District Judge
Ricky I. Nelson
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk