IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRY ALLEN BURTON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 34736

FILED

JAN 18 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's post-conviction petitions for writs of habeas corpus.

On December 20, 1994, the district court convicted appellant, pursuant to a guilty plea, of one count of robbery of a person aged 65 years or more. The district court sentenced appellant to serve two consecutive terms of nine years in the Nevada State Prison. Appellant did not file a direct appeal.

On November 14, 1995, and December 2, 1997, appellant filed proper person post-conviction petitions for writs of habeas corpus in the district court arguing, among other things, that his counsel was ineffective for failing to file a direct appeal on his behalf. Specifically, appellant stated, "I asked my attorney Harry Kuehn to appeal the [decision] because I didn't know how too [sic]. He advised me that I only had 60 days to appeal. He did not do so." On December 22, 1995, and January 21, 1998, the district court denied appellant's petitions. Appellant appealed the denial of his petitions, and this court remanded the matter to the district court to conduct an evidentiary hearing on appellant's claim that he was deprived of a direct appeal without his consent.[1] Burton v. State, Docket Nos. 28089, 31803, 32225 (Order of Remand, April 21, 1999).

[1]This court further determined that the district court did not err in denying appellant's remaining contentions.

After appointing counsel, receiving affidavits from appellant's trial counsel and appellant, and conducting an evidentiary hearing, the district court denied appellant's petitions. This appeal followed.

A claim of ineffective assistance of counsel presents a mixed question of law and fact and is therefore subject to independent review. State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). However, a district court's factual finding regarding a claim of ineffective assistance of counsel is entitled to deference so long as it is supported by substantial evidence and is not clearly wrong. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

In denying his petitions, the district court concluded that appellant failed to establish that his counsel was ineffective for failing to file an appeal. Based upon our review of the record on appeal, and giving the appropriate deference to the district court's factual findings, we conclude that the district court did not err. The district court found that appellant's counsel had met with appellant before and after sentencing and at no time did appellant "inquire about the possibility of an appeal nor [express] a desire to file one." The district court found that after sentencing, appellant's counsel met with appellant. At this time, appellant asked about the possibility of having his sentence reduced, and appellant's counsel explained that the court could not modify his sentence after judgment absent the district court's misunderstanding or misapplication of the facts of the case. The district court specifically rejected appellant's argument that his inquiry about modification of his sentence was equivalent to requesting an appeal. These findings are supported by substantial evidence in the record on appeal.

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), cert. denied, 423 U.S. 1077 (1976). Accordingly, we affirm the order of the district court.

It is so ORDERED.[2]

Shearing, J.

Agosti, J.

Leavitt, J.

cc: Hon. John P. Davis, District Judge
Attorney General
Esmeralda County District Attorney
Jerry Allen Burton
Esmeralda County Clerk

[2]We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.