

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTAE ANTWON SCOTT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52548


DONTAE ANTWON SCOTT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52601

FILED

AUG 24 2009

ORDER OF AFFIRMANCE

TRACE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

These are proper person appeals from orders of the district court denying in part a post-conviction petition for a writ of habeas corpus filed in district court case numbers C209530 and C198260. Eighth Judicial District Court, Clark County; Lee A. Gates, David B. Barker, Judges. We elect to consolidate these appeals for disposition. NRAP 3(b).

On November 22, 2004, appellant entered a guilty plea to one count of conspiracy to commit murder and one count of attempted murder with the use of a deadly weapon with the intent to promote or further gang activity in district court case number C198260. Pursuant to negotiations, appellant would only be eligible for probation on the latter count if he rendered substantial assistance by testifying against two of his

codefendants. Consequently, the matter of sentencing was continued for approximately 3 years.¹ On November 9, 2007, the district court sentenced appellant to serve a term of 24 to 72 months for the conspiracy count and two consecutive terms of 24 to 96 months for the attempted murder count. The district court imposed the latter terms to run concurrently with the former term. The district court provided appellant with 1,227 days of credit for time served and imposed a fee of \$150 for DNA testing. The district court further ordered that this sentence would run consecutively to the sentence imposed in district court case number C209530. The judgment of conviction memorializing the decision was entered on November 19, 2007. No direct appeal was taken.

On January 4, 2005, during the time that appellant was released from custody at the detention center, appellant committed additional offenses and was formally charged with two counts of burglary while in possession of a firearm, one count of conspiracy to commit robbery, one count of robbery, one count of robbery with the use of a deadly weapon, and one count of attempted robbery with the use of a deadly weapon in district court case number C209530. Subsequently, on December 23, 2005, the district court convicted appellant, pursuant to a guilty plea, of one count of burglary in district court case number C209530. The district court sentenced appellant to serve a term of 24 to

¹It appears that appellant was not in custody during the entire three-year period, but rather, was released from the detention center for a period of time on his own recognizance/and or house arrest. Notably, it was during this period that appellant committed the offense charged in district court case number C209530.

96 months in the Nevada State Prison. No credit for time served was awarded as credit was applied to district court case number C198260. The district court ordered that appellant pay a \$150 DNA testing fee. This court affirmed the judgment of conviction on direct appeal. Scott v. State, Docket No. 46533 (Order of Affirmance, May 2, 2006). The remittitur issued on May 30, 2006.

On June 2, 2008, appellant filed a proper person document labeled, "First Amendment Petition . . . Writ of Habeas Corpus . . . or alternative Motion to Correct Illegal Sentence" in the district court designating both district court cases and raising claims relating to both district court cases.² In district court case number C209530, the State filed a motion to dismiss the petition. In district court case number C198260, the State filed an opposition to the petition. Appellant filed replies to both the motion to dismiss and the opposition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. The district court construed the petition to be a post-conviction petition for a writ of habeas corpus, and on September 22, 2008, and on September 24, 2008, the district court entered written orders denying the petition in both cases, however, the district court acknowledged that appellant should only pay

²Appellant was represented by Mr. James Hartsell and Ms. Amy Chelini in district court case number C209530. Appellant was represented by Mr. James Buchanan II in district court case number C198260.

one DNA testing fee and granted the petition in part in district court case number C209530 to remove this provision.³ These appeals followed.⁴

Claims Relating to District Court Case Number C209530

Relating to district court case number C209530, appellant claimed: (1) his trial counsel was ineffective for failing to have the judgment of conviction in district court number C209530 state that the sentence imposed was to run concurrently with the terms yet to be imposed in district court case number C198260 in order to prevent the district court from imposing consecutive sentences in district court case number C198260; (2) his trial counsel was ineffective for failing to ensure that the judgment of conviction set forth 334 days of credit for time served in district court case number C209530; (3) he was denied the effective assistance of counsel on direct appeal because only one issue was raised

³Among the many claims raised, appellant claimed he should not have to pay for DNA testing twice.

⁴Because appellant challenged his conviction and sentence, we conclude that the district court properly construed appellant's petition as a post-conviction petition for a writ of habeas petition. See NRS 34.724(2)(b) (stating that a post-conviction petition for a writ of habeas corpus "[c]omprehends and takes the place of all other common-law, statutory or other remedies which have been available for challenging the validity of the conviction or sentence, and must be used exclusively in place of them"). To the extent that appellant claimed his sentence was illegal, appellant failed to demonstrate that his sentence was facially illegal or that the district court lacked jurisdiction in these matters. See Edwards v. State, 112 Nev. 704, 918 P.2d 321 (1996). Appellant's reliance upon NRS 34.185, relating to prior restraints of free speech, was misplaced.

and because of the chilling effect on representation caused by NRAP 3C (the Fast Track Program); and (4) appellant appeared to claim that his guilty plea was breached and/or invalid because he did not receive concurrent time with district court case number C198260. Appellant noted that pursuant to his plea agreement in C209530 the State agreed not to oppose concurrent time with C198260. However, the delay in sentencing in district court case number C198260 caused the sentences imposed in district court case number C198260 to be imposed after the sentence imposed in district court case number C209530.

The petition was filed more than two years after this court issued the remittitur from his direct appeal. Thus, the petition as it relates to district court case number C209530 was untimely filed. See NRS 34.726(1). Appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice. See id.

In his reply to the motion to dismiss, appellant claimed that the procedural time bar may not be applied because it has been applied inconsistently in the past. This claim is patently without merit and does not provide cause to excuse the delay in filing the petition. State v. Dist. Ct. (Riker), 121 Nev. 225, 236, 112 P.3d 1070, 1077 (2005) (observing that this court does not arbitrarily "ignore[] procedural default rules" and that "any prior inconsistent application of statutory default rules would not provide a basis for this court to ignore the rules, which are mandatory"). The procedural time bar set forth in NRS 34.726 applies to this petition.

In reading the entirety of appellant's petition and reply, it appears that there is an implicit argument made that appellant could not have raised claims relating to the concurrent sentences between the district court cases, claims 1 and 4, until after the judgment of conviction

in district court case number C198260 was entered in 2007 setting forth that the sentences between the cases would be served consecutively.⁵ This court has recognized that a petitioner may demonstrate good cause to raise a procedurally defaulted claim if the factual basis for that claim was not reasonably available within the one-year period. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Arguably, the factual basis for claims 1 and 4, the entry of the judgment of conviction in district court case number C198260, was not reasonably available within the one-year period that expired May 30, 2007, as the judgment of conviction in district court case number C198260 was not entered until November 19, 2007. Even assuming that entry of the 2007 judgment of conviction in district court case number C198260 provided good cause for raising claims 1 and 4, appellant failed to demonstrate that he would be unduly prejudiced by the denial of his petition as procedurally time barred because his claims for relief lacked merit.

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 fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984). Further, a petitioner must demonstrate a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and

⁵Appellant provided no good argument, explicit or implicit, for his failure to raise claims 2 and 3 in a timely petition. Thus, the district court properly determined that these claims were procedurally time barred and without good cause. NRS 34.726(1).

would have insisted on going to trial. See Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Kirksey v. State, 112 Nev. 980, 988, 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, 466 U.S. at 697. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994). In determining the validity of a guilty plea, this court looks to the totality of the circumstances. State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. at 271, 721 P.2d at 367.

First, appellant claimed that his trial counsel was ineffective for failing to have the judgment of conviction in district court number C209530 state that the sentence imposed was to run concurrently with the terms yet to be imposed in district court case number C198260 in order to prevent the district court from imposing consecutive sentences in district court case number C198260.

Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Although appellant entered his guilty plea in district court case number C198260 before he had even committed the offense in district court case number C209530, appellant was sentenced first in district court case number C209530. The decision of whether to run a subsequent sentence concurrently or consecutively lies with the district court judge presiding over the last-in-time sentencing hearing. NRS 176.035(1). Thus, even assuming that trial counsel had requested and the district court judge in district court case number C209530 included language regarding that judge's intentions for

concurrent sentences between the cases, that language would not have been binding on the district court judge in district court case number C198260.⁶ Further, appellant failed to demonstrate absent this alleged error that he would not have entered a guilty plea in district court case number C209530 as he received a substantial benefit by entry of his guilty plea. In exchange for his plea of guilty to a single count of burglary, the State did not pursue the firearms enhancement for the count he pleaded guilty to and agreed to dismiss one additional count of burglary while in possession of a firearm, one count of conspiracy to commit robbery, one count of robbery, one count of robbery with the use of a deadly weapon, and one count of attempted robbery with the use of a deadly weapon. Thus, because the claim lacked merit, appellant failed to demonstrate he would be unduly prejudiced by denial of his petition as procedurally time barred.

Second, appellant appeared to claim that his guilty plea was breached and/or invalid because he did not receive concurrent time with district court case number C198260. Appellant failed to carry his burden of demonstrating his plea was invalid in district court case number C209530. A careful review of the record on appeal reveals that there was no promise as part of the plea negotiations that appellant would receive concurrent time between the district court cases. Rather, in the written

⁶Any statements made by the parties or the district court judge at the sentencing hearing in district court case number C209530 do not implicate the validity of the plea because those statements occurred after appellant had decided to accept the plea and had entered a guilty plea in district court case number C209530.

guilty plea agreement and during the plea canvass, the plea negotiation was represented to include a term that the State would not oppose concurrent time between the cases. The State did not oppose concurrent time. Further, in entering his guilty plea, appellant represented that there was not a promise made which was not included in the negotiations, and appellant acknowledged that the decision of whether to impose concurrent or consecutive time was left within the discretion of the district court. Appellant's mere subjective belief as to a potential sentence is insufficient to invalidate his guilty plea as involuntary and unknowing. Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975). Further, as noted above, appellant received a substantial benefit by entry of his guilty plea. Thus, because the claim lacked merit, appellant failed to demonstrate he would be unduly prejudiced by denial of his petition as procedurally time barred.

For the reasons discussed above, we conclude that the district court did not err in determining that the petition was procedurally time barred and without good cause, and we affirm the order of the district court denying the petition as it related to district court case number C209530.

Claims Relating to District Court Case Number C198260

Relating to district court case number C198260, appellant claimed: (1) his plea was invalid because he was told he could receive probation if he rendered substantial assistance, which was an illegal promise; (2) his trial counsel was ineffective for failing to have a copy of the plea agreement in district court case number C209530 at sentencing in order to cause the district court to impose the sentences between the cases to run concurrently; and (3) the plea agreement in district court case number C209530 controlled, and thus, the district court did not have the

right to impose consecutive sentences. Notably these claims were timely filed as they were raised within one year from entry of the judgment of conviction in district court case number C198260. NRS 34.726(1).

First, appellant claimed that his plea was invalid because he was told he could receive probation if he rendered substantial assistance, which was an illegal promise and could not be carried out because the codefendants entered guilty pleas. Appellant failed to carry his burden of demonstrating that his plea was invalid. This provision was not illegal as NRS 193.168 specifically provides for consideration of substantial assistance in these types of offenses. 1991 Nev. Stat., ch. 403, § 2, at 1057 (providing that probation is generally not available for this enhancement, but permitting the district court to consider reducing or suspending the sentence if the district court finds that the defendant rendered substantial assistance). Appellant and his trial counsel argued for consideration of substantial assistance at sentencing in district court case number C198260 despite the fact that the codefendants had entered guilty pleas. Appellant argued that the State had never contacted him for substantial assistance and he was willing during the period the matter was continued. The district court rejected the request for probation not because substantial assistance had not been rendered but because of the serious nature of the offense in this case—a shooting in a school parking lot in which the victim died as a result of the gunshot wounds. This term in the plea negotiations only rendered appellant eligible for probation and did not contain a promise or guarantee of probation if the circumstances were met. Appellant was informed in the plea agreement that sentencing matters were left within the district court's discretion. Under these facts,

appellant failed to demonstrate that his plea was invalid, and we conclude that the district court did not err in denying this claim.⁷

Second, appellant claimed that his trial counsel was ineffective for failing to have a copy of the plea agreement in district court case number C209530 at sentencing in order to cause the district court to impose the sentences between the cases to run concurrently. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. As stated earlier, the district court judge in this case was not bound by the plea agreement in district court case number C209530. Further, trial counsel strenuously argued for concurrent time, and the State did not oppose concurrent time between sentences. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel presented the plea agreement in district court case number C209530 at sentencing. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed the plea agreement in district court case number C209530 controlled, and thus, the district court did not have the right to impose consecutive sentences. This claim fell outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea. NRS 34.810(1)(a). Moreover as a separate and independent ground to deny relief, appellant claim's was without merit. There was nothing in

⁷It is further noteworthy that appellant was informed that if he committed another crime prior to sentencing, the State of Nevada regained the full right to argue for any lawful sentence.

the plea agreement in district court case number C209530 that would cause it to be binding on the district court in district court case number C198260. Therefore, we conclude that the district court did not err in denying this claim.

For the reasons discussed above, we affirm the order of the district court denying the petition as filed in district court case number C198260.⁸

Claim Challenging Actions by Nevada Department of Corrections

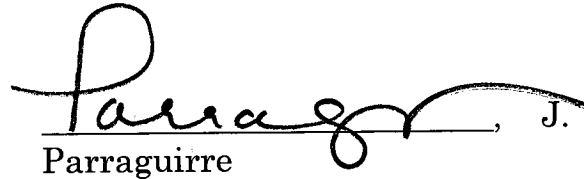
Finally, appellant claimed that the Nevada Department of Corrections erred in structuring his sentences. Specifically, appellant claimed that the Department should not have him serving the sentence imposed in district court case number C209530 first, and that the Department erred in considering the sentence imposed in district court case number C198260 as running consecutively to the sentence imposed in district court case number C209530. This claim should not have been raised in the same petition challenging the validity of the judgments of conviction. NRS 34.738(3). Further, as a separate and independent ground to deny relief, appellant failed to demonstrate any error on the part of the Department. The sentence structure complained of by appellant is the sentence structure dictated by the judgments of conviction as imposed. Therefore, the district court did not err in denying this claim.

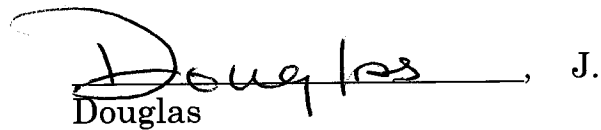
Conclusion

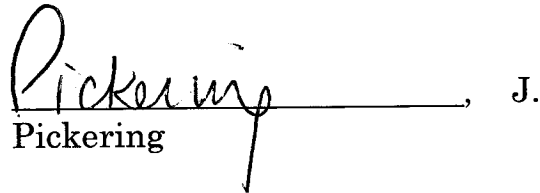
⁸To the extent that appellant argued there was cumulative error, this claim lacks merits as he failed to demonstrate error.

Having reviewed the records 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 judgments of the district court AFFIRMED.

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Hon. David B. Barker, District Judge
Eighth Judicial District Court Dept. 8, District Judge
Dontae Antwon Scott
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk