

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN FRASER DIEHL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 34753

FILED

JUN 13 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. S. [Signature]*
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Appellant was convicted, pursuant to a guilty plea, of driving under the influence with two prior convictions. The district court sentenced appellant to a prison term of twenty-four to sixty months and ordered appellant to pay a \$2,000.00 fine and a \$25.00 administrative fee.

Appellant first contends that the district court erred in denying his post-conviction petition because his trial counsel was ineffective. In his petition, appellant argued that his trial counsel failed to inform him of his right to appeal. After an evidentiary hearing, the district court determined that appellant's claims were without merit. The district court's factual findings in this regard are entitled to deference on appellate review. See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). After a review of the record on appeal, we conclude that the district court did not err. Therefore, appellant's contention is without merit.

Next, appellant argues that the district court erred in dismissing three claims from the post-conviction petition

without an evidentiary hearing. First, in the post-conviction petition, appellant contended that the plea agreement was not enforced. We first note that "claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings." *Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled on other grounds by *Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999). Here, appellant failed to raise this issue on direct appeal, and thus, this argument has been waived. Moreover, even if the claim was properly raised, the record belies appellant's contention because the State recommended the sentence it agreed to recommend. See *Hargrove v. State*, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "factual allegations belied or repelled by the record" do not require an evidentiary hearing). Appellant's only complaint appears to be that the district court did not follow the recommendation and gave appellant a longer prison term. As appellant was informed in the plea memorandum and in the oral canvass, the district court is not bound to follow the State's sentence recommendation. Therefore, the district court did not err in dismissing this claim without a hearing.

Appellant's second post-conviction claim dismissed without a hearing was that an officer from the Division of Parole and Probation was allowed to testify at sentencing regarding appellant's prior convictions, including an alcohol-related incident where appellant accidentally shot and seriously wounded an individual. Again, appellant failed to raise this issue on direct appeal, and therefore, it is considered waived. See *Franklin*, 110 Nev. at 752, 877 P.2d at 1059. Even assuming, arguendo, that the issue was properly before the court, we conclude that appellant's contention lacks merit because the information presented by the Division

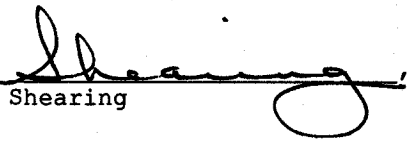
was not based on "impalpable or highly suspect evidence." Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). Thus, this claim is also repelled by the record.

Appellant's third post-conviction claim that was dismissed without a hearing involved the validity of a prior DUI conviction. Appellant contended that he was not convicted of DUI in 1996. However, the district court properly dismissed this claim because it did not challenge the validity of appellant's guilty plea or allege ineffective assistance of counsel. See NRS 34.810(1)(a).

Having considered appellant's contentions and concluded they are without merit, we

ORDER this appeal dismissed.


Maupin J.


Shearing J.


Becker J.

cc: Hon. Peter I. Breen, District Judge
Attorney General
Washoe County District Attorney
Marc P. Picker
Washoe County Clerk