

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAMIEN RIVERO,  
Appellant,  
vs.  
WARDEN, ELY STATE PRISON, E.K.  
MCDANIEL,  
Respondent.

No. 52597

FILED

APR 24 2009

TRACIE 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 a post-conviction petition for a writ of habeas corpus. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge.

On May 16, 2005, the district court convicted appellant, pursuant to a guilty plea, of one count of battery by a prisoner in lawful custody. The district court sentenced appellant to serve a term of 24 to 60 months in the Nevada State Prison. The district court ordered this sentence to be run consecutively to all previously imposed sentences. The judgment of conviction was affirmed on direct appeal. Rivero v. State, Docket No. 45338 (Order of Affirmance, October 20, 2005). The remittitur issued on November 15, 2005.

On December 15, 2005, 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 September 30, 2008, the district court denied appellant's petition. This appeal followed.

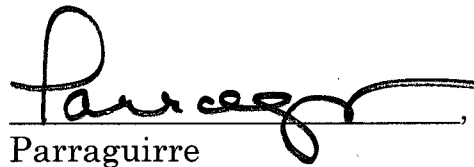
In his petition, appellant contended that he received ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that there was a reasonable probability of a different outcome in the proceedings. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). 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.

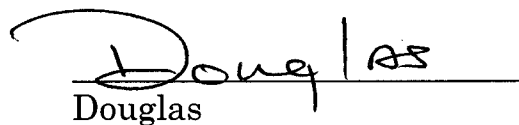
Appellant claimed that trial counsel was ineffective at the sentencing hearing and that this caused the district court to decline to impose the instant sentence concurrent with the sentence imposed in a district court case included in global plea negotiations. Appellant claimed that trial counsel's statement that the incident, his striking of a correctional officer in the face with a closed fist, happened as a result of the correctional officer's failure to follow proper restraint procedure, which frightened appellant. Appellant claimed that instead his trial counsel should have argued that appellant had to strike the correctional officer because the correctional officer chose not to follow procedure and deliberately provoked the incident and that appellant suffered injury to his face when he was subdued by correctional officers. Appellant failed to demonstrate that he was prejudiced. The district court stated at sentencing that it was imposing the sentence as pronounced because the instant case and the companion case that was part of the plea negotiations represented appellant's second and third felony offenses for battery by a prisoner. The district court emphasized that the violent activities

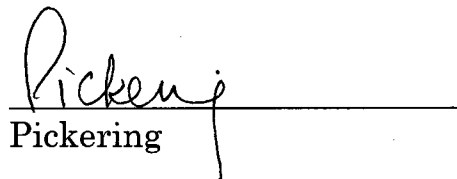
appellant continued to engage in were prolonging his incarceration. Appellant failed to demonstrate that there was a reasonable probability of a different outcome at sentencing had trial counsel provided different arguments at sentencing. Therefore, we conclude that the district court did not err in denying this claim.

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.<sup>1</sup>

 J.  
Parraguirre

 J.  
Douglas

 J.  
Pickering

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<sup>1</sup>We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Steve L. Dobrescu, District Judge  
Damien Rivero  
Attorney General Catherine Cortez Masto/Carson City  
Attorney General Catherine Cortez Masto/Reno  
White Pine County Clerk