

IN THE SUPREME COURT OF THE STATE OF NEVADA

HOWARD ELLIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52635

FILED

AUG 18 2009

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

ORDER OF AFFIRMANCE IN PART AND
DISMISSING APPEAL IN PART

This is a proper person appeal from orders of the district court denying a motion to withdraw a guilty plea and a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

On January 26, 2007, the district court convicted appellant, pursuant to a guilty plea, of one count of burglary. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve a term of 72 to 180 months in the Nevada State Prison. This court affirmed the judgment of conviction and sentence on direct appeal. Ellis v. State, Docket No. 48914 (Order of Affirmance, August 31, 2007). The remittitur issued on September 25, 2007.

Motion to Withdraw a Guilty Plea

On July 7, 2008, appellant filed a proper person motion to withdraw a guilty plea in the district court. The State opposed the motion.

On August 5, 2008, the district court denied the motion. On October 20, 2008, appellant filed a notice of appeal in the district court.

This court's preliminary review of this portion of the appeal reveals a jurisdictional defect. Appellant's notice of appeal was filed after the expiration of the thirty-day appeal period prescribed by NRAP 4(b). "[A]n untimely notice of appeal fails to vest jurisdiction in this court." Lozada v. State, 110 Nev. 349, 352, 871 P.2d 944, 946 (1994). Because we lack jurisdiction to consider this portion of this appeal, we dismiss the appeal in part.

Post-Conviction Petition for a Writ of Habeas Corpus

On July 7, 2008, 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 October 2, 2008, the district court denied two of the grounds raised in appellant's petition, and on October 13, 2008, the district court entered a final order denying the remaining claims. This appeal followed.

Defective Claims

In his petition, appellant first claimed: (1) the prosecutor committed misconduct in violation of various constitutional rights, (2) no direct evidence was presented at the preliminary hearing in violation of various constitutional rights, (3) obstruction of justice because pages were allegedly missing from discovery which may have contained exculpatory

information in violation of various constitutional rights, (4) the district court failed to consider the entire case record at sentencing in violation of various constitutional rights, (5) the district court erred in granting the State's motion to admit prior bad acts in violation of various constitutional rights, (6) the district court erred in adjudicating appellant a habitual criminal and failing to dismiss counts 2 and 3, (7) the district court erred in denying a motion for new counsel based on allegations of ineffective assistance of counsel, (8) the police failed to obtain a witness statement from Donna Callahan and/or failed to turn over the witness statement of Callahan, (9) the police failed to read him his rights prior to requesting consent for a search, (10) appellant did not consent to the search, and (11) the district court was biased. These claims fell outside the scope of claims permissible in post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea. NRS 34.810(1)(a). Thus, we conclude that the district court did not err in denying these claims.

Second, appellant claimed that the State made misleading statements during the hearing on the presentence motion to withdraw a guilty plea and the district court erred in denying the presentence motion to withdraw a guilty plea. An order denying a presentence motion to withdraw a guilty plea is reviewable on direct appeal from the judgment of conviction as an intermediate order in the proceedings. See NRS 177.045; Hart v. State, 116 Nev. 558, 562 n.2, 1 P.3d 969, 971 n.2 (2000) (citing Hargrove v. State, 100 Nev. 498, 502 n.3, 686 P.2d 222, 225, n.3 (1984)).

This court has stated repeatedly that "claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings." See 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). Because these claims could have been raised on direct appeal, we conclude that appellant waived these claims. Further, because these claims challenged the district court's decision to deny the presentence motion and the State's opposition to the motion, these claims 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). Therefore, we conclude that the district court did not err in denying these claims.

Third, appellant challenged this court's decision on direct appeal. Appellant further claimed that this court failed to provide an expeditious review of a motion to dismiss counsel and denied appellant permission to file documents in proper person. Such challenges may not be raised in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea. Id. Therefore, we conclude that the district court did not err in denying these claims.

Fourth, appellant challenged his classification, his placement in disciplinary confinement, his treatment in prison, and the grievance process at the prison. This court has "repeatedly held that a petition for [a] writ of habeas corpus may challenge the validity of current

confinement, but not the conditions thereof." Bowen v. Warden, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984); see also Sandin v. Conner, 515 U.S. 472, 484 (1995) (holding that liberty interests protected by the Due Process Clause will generally be limited to freedom from restraint which imposes an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life). Because these claims challenged the conditions of confinement, we conclude that the district court did not err in denying these claims.

Ineffective Assistance of Counsel Claims

Appellant raised numerous claims of 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 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 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). In order to demonstrate prejudice to invalidate the decision to enter a guilty plea, a petition must demonstrate 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, 58-59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and

resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). 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.

Preliminary Hearing

First, appellant claimed that his trial counsel was ineffective at the preliminary hearing for failing to object to hearsay and “an admission in record.” Appellant further claimed that trial counsel failed to call witnesses to offer testimony and failed to investigate the allegedly missing pages in the arrest report for exculpatory evidence. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. Appellant failed to support these claims with any specific facts regarding the “admission in record,” identify the witnesses, describe the potential testimony of the witnesses, or describe what further investigation would have revealed. See Hargrove, 100 Nev. 498, 686 P.2d 222. Appellant failed to demonstrate that there was a reasonable probability that he would not have pleaded guilty absent trial counsel’s alleged deficiencies. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to object to the joining of separate offenses to show a common scheme or plan. Appellant failed to demonstrate that his trial counsel's performance was deficient. Appellant was charged with burglary involving a victim's residence located at 4141 North Decatur, an attempted burglary involving a victim's residence located at 4048 North Decatur, and grand larceny for items taken from the victim's residence located at 4141 North Decatur. The offenses were committed on June 9, 2006. Under NRS 173.115(2), the State may charge two or more offenses in the same information, with a separate count for each offense, if the offenses are "[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan." At the preliminary hearing, the victim of the attempted burglary described appellant's attempt to gain entry to her home. After his attempt to gain entry to her home, the victim of the attempted burglary observed appellant kick in the door and enter the neighbor's residence. A child of the victim of the burgled residence testified that she observed appellant outside the residence before the door was kicked open. The victim of the burgled residence testified about items taken from the residence. The facts presented at the preliminary hearing amply demonstrated a common plan or scheme given the identification of appellant by the victims, the time span involved, the geographic proximity, and the conduct described. Thus, appellant failed to demonstrate that any such motion would have been successful and further failed to demonstrate that there was a

reasonable probability that he would not have pleaded guilty and would have insisted on going to trial. Therefore, we conclude that the district court did not err in denying this claim.

Guilty Plea

Third, appellant claimed that his trial counsel was ineffective for failing to adequately explain that the district court could depart from an alleged agreement of the parties to small habitual criminal adjudication and a term of 72 to 150 months. Appellant further claimed that trial counsel failed to inform the court that the sentence agreed to by the parties was a term of 72 to 150 months as reflected in the State's opposition to his presentence motion to withdraw a guilty plea. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The written plea agreement set forth that the parties agreed to a recommended sentence of 6 to 15 years (72 to 180 months). Appellant's trial counsel informed the district court during the plea canvass that the parties stipulated to a term of 6 to 15 years. Appellant affirmatively acknowledged that this was his understanding of the plea agreement. The State's description of the term as 72 to 150 months in the opposition to the presentence motion to withdraw a guilty plea was a typographical error. Appellant failed to demonstrate that there was a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial in view of these facts. Therefore, we conclude that the district court did not err in denying these claims.

Fourth, appellant claimed that his trial counsel was ineffective for failing to have the written guilty plea agreement reflect that counts 2 and 3 would be dismissed. Appellant failed to demonstrate that he was prejudiced. During the plea canvass, the district court inquired if the negotiations included the dismissal of these counts, and the parties agreed that the negotiations included the dismissal of these counts. Appellant failed to demonstrate that there was a reasonable probability that he would have not have pleaded guilty and would have insisted on going to trial under these circumstances. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for “tricking” him into entering a guilty plea. It appears that this claim was based on appellant’s belief that prior felony convictions cannot be used for habitual criminal adjudication if those prior felony convictions are remote in time or nonviolent. Appellant failed to demonstrate that his trial counsel’s performance was deficient or that he was prejudiced. NRS 207.010 makes no specific allowance for stale or nonviolent prior felony convictions. Tillema v. State, 112 Nev. 266, 271, 914 P.2d 605, 608 (1996). Appellant received a benefit by pleading guilty as he avoided the possibility of being convicted of two additional charges and large habitual criminal adjudication. Therefore, we conclude that the district court did not err in denying this claim.

Presentence Motion to Withdraw a Guilty Plea

Sixth, appellant claimed that trial counsel was ineffective for failing to present argument on the issues, failing to provide a written memorandum regarding the issues, and failing to address the State's opposition. Appellant failed to demonstrate that he was prejudiced. Appellant failed to provide any specific facts regarding these claims and failed to demonstrate that had trial counsel taken further action that there was a reasonable probability that the district court would have found merit to the motion. Therefore, we conclude that the district court did not err in denying this claim.

Seventh, appellant claimed that trial counsel was ineffective for failing to investigate his medical records to establish that he was taking a medication for a heart condition at the time he entered his guilty plea. Appellant claimed that he was under the influence at the time he entered his plea. Appellant failed to demonstrate that he was prejudiced. In signing the written guilty plea, appellant affirmatively acknowledged that he was not under the influence of any drug that impaired his ability to understand the proceedings. Appellant's trial counsel further signed a document that to his knowledge appellant was not under the influence of any drugs. Appellant failed to demonstrate that the medication rendered him incompetent to enter a guilty plea as the record indicates that he answered all questions put to him appropriately during the canvass. See Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983) (recognizing that the test for incompetency is whether the defendant has

sufficient present ability to consult with his attorney with a reasonable degree of rational understanding and whether the defendant has a rational as well as factual understanding of the proceedings against him). Therefore, we conclude that the district court did not err in denying this claim.

Sentencing

Eighth, appellant claimed that his trial counsel was ineffective for failing to object to the imposition of sentencing because his guilty plea agreement was illegal. It appears that appellant believed the guilty plea agreement was illegal because it set forth the recommended sentence as 72 to 180 months, rather than a sentence of 72 to 150 months, and failed to indicate that counts 2 and 3 were to be dismissed. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The plea was valid for the reasons discussed earlier. Further, the State represented in the proceedings below that counts 2 and 3 were dropped. Appellant failed to demonstrate a reasonable probability of a different result had trial counsel objected as he received the sentence the parties agreed to during negotiations. Therefore, we conclude that the district court did not err in denying this claim.

Ninth, appellant claimed that his trial counsel was ineffective for failing to challenge the 2002 Nevada conviction because the plea in that case was allegedly breached. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Even assuming that a defendant may raise this type of challenge to a prior

felony judgment of conviction used for enhancement purposes, appellant failed to demonstrate that the 2002 Nevada conviction was constitutionally infirm. Dressler v. State, 107 Nev. 686, 697-98, 819 P.2d 1288, 1295-96 (1991). Thus, appellant failed to demonstrate by a reasonable probability that any challenge to this conviction would have resulted in a favorable ruling. Notably, the State presented at least four additional, qualifying judgments of conviction that were constitutionally valid on the face of the documents. Id. NRS 207.010(1)(a) requires only presentation of two prior felony judgments of conviction for small habitual criminal adjudication. Therefore, we conclude that the district court did not err in denying this claim.¹

Tenth, appellant claimed that his trial counsel failed to argue that there was a conflict of interest. Appellant appeared to argue that this argument should have been raised because appellant set forth allegations of ineffective assistance of counsel in his presentence motion. Appellant failed to demonstrate that an actual conflict of interest adversely affected trial counsel's performance. Strickland, 466 U.S. at 692; Cuyler v. Sullivan, 446 U.S. 335 (1980); Leonard v. State, 117 Nev. 53, 63, 17 P.3d

¹We note that appellant raised the underlying claim on direct appeal. This court considered and rejected his arguments. Because this court has considered and rejected the merits of the underlying claim, appellant cannot demonstrate prejudice.

397, 404 (2001). Therefore, we conclude that the district court did not err in denying this claim.

Appellate Issues

Eleventh, appellant claimed that counsel was ineffective for failing to file a notice of appeal despite being requested to do so. Appellant failed to demonstrate any prejudice. Appellant had a direct appeal in this court. The agent who filed the notice of appeal is irrelevant in such circumstances. Therefore, we conclude that the district court did not err in denying this claim.

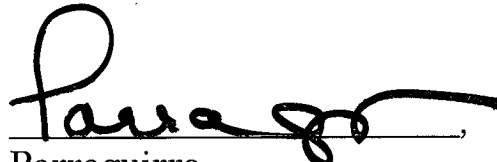
Twelfth, appellant claimed that his appellate counsel was ineffective for sending him the fast track statement five months after this court's decision. Appellant failed to demonstrate that this caused prejudice in the appeal. Therefore, we conclude that the district court did not err in denying this claim.

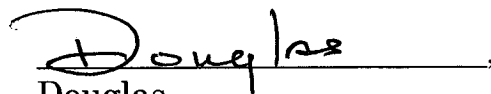
Thirteenth, appellant appeared to claim that appellate counsel should have argued that there was a conflict of interest. Appellant failed to demonstrate that an actual conflict of interest adversely affected appellate counsel's performance. Id. Therefore, we conclude that the district court did not err in denying this claim.

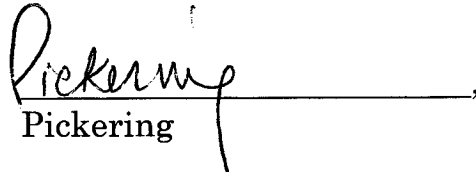
Conclusion

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 in part and we DISMISS the appeal in part.²

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Howard Ellis
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

²We 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.