

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN HALL, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52637

FILED

APR 14 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY J. Alvarado
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. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On January 16, 2008, the district court convicted appellant, pursuant to a guilty plea, of one count of conspiracy to commit robbery, one count of robbery with the use of a deadly weapon, and one count of second-degree kidnapping with the use of a deadly weapon. The district court sentenced appellant to serve a term of 12 to 48 months for the conspiracy count, a concurrent term of 24 to 120 months for robbery with a consecutive term of 18 to 72 months for the deadly weapon enhancement, and a concurrent term of 24 to 120 months for kidnapping with a consecutive term of 18 to 72 months for the deadly weapon enhancement. No direct appeal was taken.

On June 25, 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, the district court

declined to appoint counsel to represent appellant. On October 9, 2008, after conducting an evidentiary hearing, the district court denied the petition. This appeal followed.

In the habeas proceedings, appellant claimed that he received ineffective assistance of counsel. 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 was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability 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). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland v. Washington, 466 U.S. 668, 697 (1984).

First, appellant claimed that his trial counsel was ineffective for failing to challenge imposition of the deadly weapon enhancement. Appellant claimed that the district court should have conducted a hearing on whether a BB gun or pocket knife satisfied the inherently dangerous weapon test set forth in NRS 193.165. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant entered a guilty plea to using a deadly weapon in the commission of robbery and second-degree kidnapping. Thus, imposition of the deadly weapon enhancement was appropriate. Blakely v. Washington, 542 U.S. 296 (2004) (stating that precedent makes it clear that the statutory maximum that may be imposed is the maximum

sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant). Appellant admitted during the plea canvass that a gun or knife had been used in the commission of the crimes. Appellant's claim that a BB gun would not qualify under NRS 193.165 was without merit. NRS 193.165 (6)(c) includes as a definition of a deadly weapon a weapon described in NRS 202.265. NRS 202.265(5)(b) defines a firearm to include, "[a]ny device from which a metallic projectile, including any ball bearing or pellet, may be expelled by means of spring, gas, air or other force." A BB gun is such a weapon. Further, the police report indicate the witnesses described a handgun and not a BB gun. Moreover, appellant received a substantial benefit by entry of his guilty plea as he was originally charged with six counts of conspiracy to commit robbery, two counts of robbery with an older victim enhancement, four counts of robbery with the use of a deadly weapon, one count of first-degree kidnapping, one count of battery with the intent to commit a crime, and one count of burglary while in possession of a firearm. In exchange for his guilty plea to one count each of conspiracy to commit robbery, robbery with the use of a deadly weapon, and second-degree kidnapping, the State agreed not to oppose concurrent time between counts and agreed not to file charges on two incidents occurring on September 26, 2007, and on September 27, 2007. Therefore, we conclude that the district court did not err in denying this claim.¹

¹To the extent that appellant claimed that the district court failed to conduct a hearing on the deadly weapon enhancement, this claim fell
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Second, appellant claimed that his trial counsel misrepresented the penalty. Appellant claimed that his trial counsel told him that he would get a sentence of three to eight years, but that he received a sentence in excess of this. Appellant claimed that his trial counsel never gave him a copy of the plea agreement to obfuscate the potential penalties. Appellant failed to demonstrate that he was prejudiced. Appellant was informed in the written plea agreement and during the plea canvass of the potential penalties and that sentencing was in the discretion of the district court. Appellant acknowledged reading and understanding the plea agreement during the plea canvass. Trial counsel testified that she informed appellant that the absolute minimum that he could receive was three years if everything was imposed concurrently, but that it was unlikely that he would receive the minimum. Trial counsel further denied informing appellant that eight years was the maximum sentence that he would receive. 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). Therefore, we conclude that the district court did not err in denying this claim.²

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outside the scope of claims permissible. See NRS 34.810(1)(a).

²To the extent that appellant claimed that his guilty plea was not knowingly or intelligently entered, appellant failed to carry his burden of demonstrating that his plea was invalid for the reasons discussed above.

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Third, at the evidentiary hearing, appellant claimed that trial counsel was ineffective for failing to file a written motion for house arrest prior to sentencing. Appellant failed to demonstrate that he was prejudiced. In light of the substantial benefit received, appellant failed to demonstrate that the failure to file a motion for house arrest would have had a reasonable probability of altering his decision to enter a guilty plea. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, at the evidentiary hearing, appellant claimed that his trial counsel was ineffective for waiving the preliminary hearing. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel testified that there was an extraordinary amount of evidence against appellant, including his partial confession, his codefendants' confessions and eyewitness identification. Appellant failed to demonstrate that he would not have entered a guilty plea and would have insisted on going to trial but for the waiver of the preliminary hearing. Therefore, the district court did not err in denying this claim.

Fifth, at the evidentiary hearing, appellant claimed that his trial counsel was ineffective for failing to specifically describe the

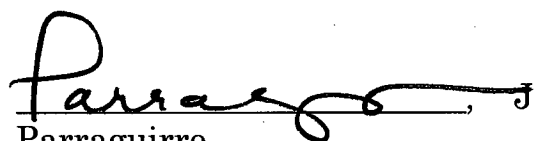
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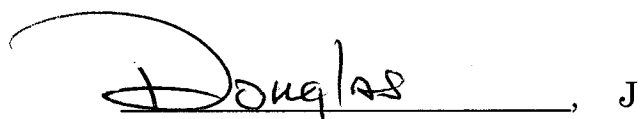
See State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

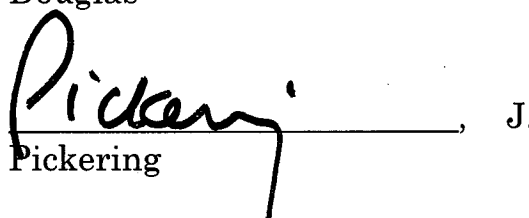
discovery. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel testified that appellant was given copies of everything available. Appellant failed to demonstrate that but for counsel's performance he would not have entered a guilty plea and would have insisted on going to trial. 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.


Parraguirre


Douglas


Pickering

cc: Hon. Donald M. Mosley, District Judge
Kevin Hall Jr.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk