

IN THE SUPREME COURT OF THE STATE OF NEVADA

JONATHAN D. SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52806

FILED

MAY 07 2010

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.¹ Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

In his petition, appellant raised two claims of ineffective assistance of trial counsel. To prove 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 of a different outcome but for counsel's errors. See Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984); Warden v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984). The court need not address both components of the

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

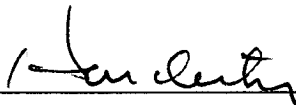
inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697.

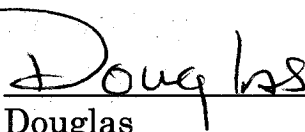
First, appellant claimed that counsel was ineffective for refusing to file a direct appeal. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. “[A]n attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction.” Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994); see Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999). “The burden is on the client to indicate to his attorney that he wishes to pursue an appeal.” Davis, 115 Nev. at 20, 974 P.2d at 660. At the evidentiary hearing, counsel testified that appellant did not ask him to file a direct appeal, and the district court found this testimony to be credible. Substantial evidence supports the district court’s finding that appellant did not request a direct appeal. See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). Therefore, the district court did not err in denying this claim.


Second, appellant claimed that counsel was ineffective for failing to object to his being sentenced as a habitual criminal based on the State’s failure to file the requisite allegation of habitual criminality pursuant to NRS 207.016(2). Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. In Grey v. State, this court concluded that the district court’s authority to impose a habitual criminal sentence is “clearly premis[ed] . . . on the State’s filing of an allegation of habitual criminality” pursuant to NRS 207.016(2), regardless of whether a defendant disputes his status as a habitual criminal. 124 Nev. 110, ___, 178 P.3d 154, 163-64 (2008); see also Hodges v. State, 119 Nev. 479, 78 P.3d 67 (2003).

However, despite appellant's allegations, we conclude that in this case, appellant received sufficient notice of the State's intent to seek treatment as a habitual criminal. Counsel for appellant, in appellant's presence, indicated at the waiver of preliminary hearing that appellant intended to enter a guilty plea to one count of burglary, and that he would stipulate to treatment as a small habitual criminal. When questioned by the district court, appellant indicated that he had discussed this deal with his attorney, and wished to accept it. The guilty plea agreement, signed by appellant and filed in the district court, indicated that appellant stipulated to treatment under the small habitual criminal statute. The presentence investigation report indicated that appellant had been convicted of two prior felonies and listed possible sentence terms under the small habitual criminal statute. Pursuant to NRS 207.010(1)(a), the State properly admitted two prior judgments of conviction into the record at sentencing. Therefore, we conclude that appellant received appropriate notice of the State's intent to seek treatment as a small habitual criminal, and that counsel was not deficient for failing to object at sentencing under the circumstances in this case. Therefore, the district court did not err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Jonathan D. Smith
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk