

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAY CANTRELL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52941

**FILED**

JUL 15 2010

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

This is a proper person appeal from an order of the district court denying a petition for a writ of a habeas corpus.<sup>1</sup> Eighth Judicial District Court, Clark County; David B. Barker, Judge.

In his petition filed on July 8, 2008, appellant raised numerous 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 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.

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<sup>1</sup>This 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).

State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Both components must be shown. Strickland v. Washington, 466 U.S. 668, 697 (1984).

First, appellant raised numerous claims which were not supported by specific facts, that if true, entitled him to relief. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). These claims included that trial counsel was ineffective for: failing to investigate appellant's claims that he was set up; failing to conduct a pretrial investigation; failing to inspect the stolen items; failing to investigate the effects of seroquil, prozac, and depocoat and whether they would have affected appellant's ability to form the requisite intent; failing to challenge the competency hearing; failing to make visits to appellant while incarcerated; failing to adequately investigate and prepare for trial and sentencing; allowing appellant to plead to the burglaries when his conduct did not constitute burglary; failing to object to the State's untrue statements, and parole and probations' untrue reports; failing to review the PSI with appellant; and failing to correct errors or present mitigating evidence at sentencing. The district court did not err in denying these claims.

Second, appellant claimed that trial counsel was ineffective for failing to challenge the competency report and to make sure that appellant was receiving his medications. Appellant failed to demonstrate that he was prejudiced because he failed to demonstrate that a challenge to the competency reports would have been successful or that he was not receiving his medications. Appellant answered all questions by the court in an appropriate manner. Further, appellant failed to allege that he was unable to "[u]nderstand the nature of the criminal charges against [him]," "[u]nderstand the nature and purpose of the court proceedings," or "[a]id and assist [his] counsel in the defense at any time during the proceedings

with a reasonable degree of rational understanding.” NRS 178.400. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for coercing appellant into pleading guilty, for promising him probation, and for failing to explain the elements of burglary.<sup>2</sup> Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Appellant acknowledged in his guilty plea agreement and during his plea colloquy that he was entering his plea voluntarily and without duress and that no one had promised him a particular sentence. Further, the guilty plea agreement includes the elements for burglary and appellant acknowledged during the plea colloquy that he had discussed the agreement with trial counsel. Therefore, the district court did not err in denying these claims.

Fourth, appellant claimed that trial counsel was ineffective for failing to object to the district court’s alleged error at sentencing regarding appellant’s drug habit. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. The district court noticed that the PSI included statements that appellant had not worked for the last five years

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<sup>2</sup>To the extent that appellant claimed that his plea was not entered voluntarily and knowingly based on the district court’s colloquy, appellant’s claim is without merit. See State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); Bryant v. State, 102 Nev. 268, 271, 721 P.2d 364, 367 (1986). The plea agreement informed appellant of the consequences of the plea. Further, the district court determined that appellant’s plea was voluntary and knowing after examining appellant regarding whether any promises or threats had been made, whether trial counsel reviewed the plea agreement with appellant, and whether appellant understood the agreement. Finally, appellant admitted that he committed the conduct in the information and thereby established the factual basis for the plea. Therefore, the district court did not err in denying this claim.

but had a \$2000-a-month drug habit. The district court asked appellant how he supported this habit, to which appellant responded “stealing, hustling.” Appellant failed to demonstrate that the information the district court relied on in asking this question was impalpable or highly suspect or that it was an improper question. Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). Thus, appellant failed to demonstrate a reasonable probability of a different outcome at sentencing had counsel objected to this question. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to object based on vindictive prosecution because the State threatened him with large habitual criminal adjudication if he went to trial and called him a “dangerous nut case.” Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced because appellant was eligible for the large habitual criminal adjudication, NRS 207.010(1)(b), and appellant failed to demonstrate a reasonable probability of a different outcome had counsel challenged the State’s supposed threats. Therefore, the district court did not err in denying this claim.

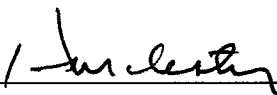
Sixth, appellant claimed that trial counsel was ineffective for allowing appellant to stipulate to habitual offender status. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Appellant did not stipulate to be sentenced under the small habitual criminal statute. Rather, the State was free to argue for sentencing under the small habitual statute and, if it was imposed, the State agreed to not oppose concurrent sentences. Thus, appellant’s claim is belied by the record. See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. Therefore, the district court did not err in denying this claim.

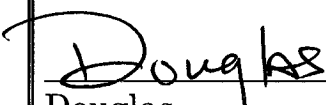
Seventh, appellant claimed that trial counsel was ineffective for failing to argue for probation, a five-year sentence, or for a determinate sentence. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate a reasonable probability of a different outcome had trial counsel specifically argued for probation or a determinate sentence. Appellant had five prior felony convictions and had just been convicted in another case of a crime similar to the crimes charged in this case. Therefore, the district court did not err in denying this claim.

Next, appellant also claimed that counsel was ineffective for failing to file an appeal. This court has held that trial counsel's failure to obtain his client's consent not to pursue a direct appeal when the client expresses a desire to appeal or indicates dissatisfaction with the conviction is unreasonable conduct and prejudice is presumed. Lozada v. State, 110 Nev. 349, 354-58, 871 P.2d 944, 947-49 (1994); Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003). A petitioner must prove the factual allegation underlying his ineffective-assistance-of-counsel claim by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Having reviewed the record in this case, including the evidentiary hearing, we conclude that trial counsel was ineffective for failing to file a notice of appeal on appellant's behalf. Appellant first expressed dissatisfaction in his sentence at the sentencing hearing when he became angry at the end of the hearing. Further, on September 14, 2008, trial counsel filed a motion to withdraw, which he filed along with appellant's motion to withdraw his guilty plea and motion to modify sentence. This motion was filed within the time period for filing a timely notice of appeal from the judgment of conviction. Appellant's outburst at sentencing and his subsequent motions demonstrated by a preponderance of the evidence that he was dissatisfied with his sentence. Thus, trial

counsel's failure to file a notice of appeal on appellant's behalf was unreasonable and prejudice is presumed. Therefore, we reverse the district court's order and remand this matter to the district court to apply NRAP 4(c).<sup>3</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.<sup>4</sup>

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Pickering

<sup>3</sup>Appellant raised several claims in his petition that pursuant to NRS 34.810(1)(a), were outside the scope of a petition for a writ of habeas corpus: the district court erred in sentencing appellant as a habitual criminal, the district court at sentencing improperly concluded that appellant had been stealing for the last five years; the PSI was a "hodge-podge;" the sentence imposed by the district court is excessive and grossly disproportionate and constitutes cruel and unusual punishment; his equal protection rights were violated because the State seeks habitual criminal adjudication disproportionately; the prosecution was selective, vindictive, malicious and an abuse of discretion; and the State denied him due process when seeking the habitual criminal enhancement. In light of our decision in this case, we decline to address these issues.

<sup>4</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. David B. Barker, District Judge  
Jay Cantrell  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk