

IN THE SUPREME COURT OF THE STATE OF NEVADA

MALCOLM J. WILSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52837

MALCOLM J. WILSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52990

FILED

OCT 13 2009

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

ORDER OF AFFIRMANCE

Docket No. 52837 is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Docket No. 52990 is a proper person appeal from an order of the district court denying a motion for sentence modification. Eighth Judicial District Court, Clark County; John S. McGroarty, Valorie Vega, Judges. We elect to consolidate these appeals for disposition. NRAP 3(b).

On July 30, 2007, the district court convicted appellant, pursuant to a guilty plea, of one count of battery constituting domestic violence with the use of a deadly weapon. The district court sentenced appellant to serve a term of 4 to 10 years in the Nevada State Prison. The district court provided appellant with 56 days of credit for time served. No direct appeal was taken. On November 20, 2007, the district court entered an amended judgment of conviction providing appellant with 92 days of

credit for time served. Appellant filed a number of unsuccessful motions challenging his judgment of conviction in the district court.

Docket No. 52837

On May 22, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a response. 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 January 26, 2009, the district court denied appellant's petition. This appeal followed.

In his petition, 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, 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 petitioner 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). 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.

First, appellant claimed that his trial counsel was ineffective for coercing his guilty plea. Specifically, appellant claimed that his trial counsel informed him if he did not accept the plea negotiations he would go to trial on the original charges, which included kidnapping. Appellant

claimed that his trial counsel further indicated that he did not want to take the case to trial. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. In entering his guilty plea, appellant affirmatively acknowledged that his guilty plea was freely and voluntarily given and not the product of any threats. In signing his guilty plea agreement, which appellant acknowledged reading, signing and understanding, appellant acknowledged discussing the elements of the charges, the possible defenses and strategies, and consequences of the plea. Appellant was originally charged with battery constituting domestic violence with the use of a deadly weapon (a knife), first-degree kidnapping, battery constituting domestic violence with the use of a deadly weapon (a broom), and battery with substantial bodily harm (hitting and/or pushing and/or choking). Trial counsel's candid advice regarding the potential outcome at trial is not deficient. Appellant received a substantial benefit by pleading guilty and avoiding the original charges. Under these facts, appellant failed to demonstrate a reasonable probability that 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.

Second, appellant claimed that his trial counsel was ineffective for informing appellant that he was "80% sure" that appellant would receive probation if he accepted the plea negotiations. Appellant failed to demonstrate that he was prejudiced. The district court personally canvassed appellant about the potential penalties he faced by entry of his guilty plea and expressly informed appellant that sentencing decisions were left to the district court and that no one could promise probation, leniency, or other special treatment. Appellant affirmatively acknowledged that this was his understanding. In view of the benefit

received by pleading guilty, appellant failed to demonstrate that there was a reasonable probability that 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.

Third, appellant claimed that his trial counsel was ineffective for failing to inform him that he could receive more time than stipulated to in the plea agreement. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. In exchange for his guilty plea to one count of battery constituting domestic violence with the use of a deadly weapon, the State did not pursue the remainder of the original charges and retained the right to argue at sentencing. A stipulated sentence was not a part of the plea agreement. Rather, appellant was correctly informed of the potential sentencing range for his offense in the written plea agreement and during the plea canvass. Appellant failed to demonstrate a reasonable probability that 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.

Fourth, appellant claimed that his trial counsel was ineffective for failing to meet with appellant and discuss the case or strategy. Appellant further claimed that trial counsel was ineffective for failing to provide him with discovery. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. In signing the written guilty plea agreement, appellant acknowledged that he had discussed the case, the potential defenses and defense strategy, and any circumstances in his favor with his trial counsel. Appellant failed to specifically identify any strategies not discussed with his trial counsel, or the discovery not provided. Appellant failed to demonstrate that there

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

Fifth, appellant claimed that his trial counsel was ineffective for failing to dispute the deadly weapon enhancement. Specifically, appellant claimed that the knife used was a 3-inch pocket knife and that such a knife is not a deadly weapon as a matter of law. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. NRS 193.165 includes in the definition of a deadly weapon, "[a]ny weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death." 1995 Nev. Stat., ch. 455, § 1, at 1431. Whether the knife described by appellant was a deadly weapon would have been a matter for the trier of fact, the jury, and appellant waived his right to a jury trial by entry of his guilty plea. As discussed earlier, appellant received a substantial benefit by entry of his guilty plea in avoiding the original charges. Appellant failed to demonstrate that there was a reasonable probability that he would not have entered a guilty plea 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.

Sixth, appellant claimed that his trial counsel was ineffective for failing to make any statements in his defense at sentencing. Appellant claimed that his trial counsel should have objected to the victim's statements at sentencing and cross-examined the victim to show that she lacked credibility. He further claimed that his trial counsel failed to inform him that the victim would be speaking at sentencing, which prevented him from adequately preparing his statements in allocution.

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel argued for probation and presented mitigating arguments on appellant's behalf. NRS 176.015(3) permits the victim to appear at sentencing and "[r]easonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution." Appellant did not provide any specific arguments that the victim's statements exceeded these boundaries. Appellant failed to articulate what arguments in allocution he was prevented from making at sentencing because he was unaware that the victim would be present or that this lack of information regarding victim-impact testimony had a reasonable probability of altering the outcome of the sentencing hearing. Therefore, we conclude that the district court did not err in denying these claims.

Seventh, appellant claimed that his trial counsel was ineffective for not timely providing appellant a copy of the presentence investigation report. The only factual dispute identified by appellant related to a 2002 Ohio domestic violence conviction. Appellant claimed that the conviction should not have been considered because it involved his sister and because he did not have counsel when he entered his guilty plea in that case. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant personally addressed the district court at sentencing. Appellant did not demonstrate that the Ohio conviction was palpable or highly suspect evidence. Silks v. State, 92 Nev. 91, 545 P.2d 1159 (1976). Appellant further failed to demonstrate that the district court relied upon this prior conviction in sentencing appellant in the instant case. Thus, he failed to demonstrate that there was a reasonable probability of a different

outcome in the proceedings. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed: (1) he was never allowed to view the State's evidence in violation of his due process rights, (2) the district court and district attorney presumed the knife to be a deadly weapon, (3) the justice court improperly allowed the victim to make a statement which caused his own-recognizance release request to be denied, (4) he was not provided a timely copy of the presentence investigation report, (5) no documents were presented to support the restitution amount, (6) the district attorney influenced the district court at sentencing with conjecture, opinion, and disparaging information, and (7) counsel failed to provide appellant with the case files in this case. 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.

Finally, appellant claimed that the district attorney withheld evidence favorable to the defense in violation of Brady v. Maryland, 373 U.S. 83 (1963). Appellant failed to provide any specific facts in support of this claim, and thus, the district court did not err in denying this claim. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Accordingly, having considered the entire record on appeal, we affirm the order of the district court denying the petition.

Docket No. 52990

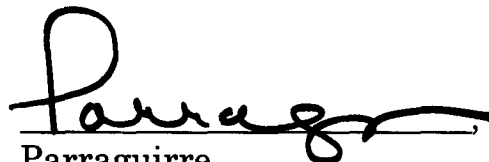
On October 1, 2008, appellant filed a proper person motion for sentence modification in the district court. On November 24, 2008, and on December 23, 2008, the district court denied appellant's motion without prejudice because appellant had failed to serve a copy of the motion on the

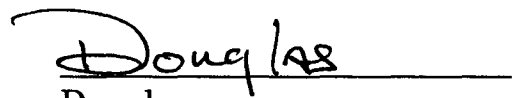
State. We conclude that the district court did not err in denying the motion because of the lack of service, and we affirm the order of the district court denying the motion without prejudice.

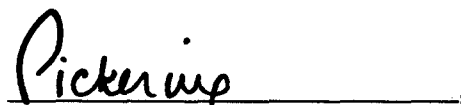
Conclusion

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 Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgments of the district court AFFIRMED.¹

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

¹We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in these matters, 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: Chief Judge, Eighth Judicial District
Hon. John S. McGroarty, Senior Judge
Hon. Valorie Vega, District Court Judge
Malcolm J. Wilson
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk