IN THE SUPREME COURT OF THE STATE OF NEVADA

JORGE PENA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53213

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's post-conviction petition for writ of habeas corpus. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

On November 9, 2005, the district court convicted appellant, pursuant to a guilty plea, of lewdness with a child under the age of 14 years. The district court sentenced appellant to serve a term of life in prison with the possibility of parole after 10 years. No direct appeal was filed.

Appellant challenges the district court's determination that trial counsel was not ineffective when, to obtain mitigating evidence for sentencing, he obtained a psychological evaluation instead of a psychosexual evaluation of appellant. To successfully establish a claim of ineffective assistance of counsel, appellant must demonstrate that trial counsel was deficient and that, as a result, appellant was prejudiced. Strickland v. Washington, 466 U.S. 668, 687 (1984). To establish prejudice, appellant must demonstrate a reasonable probability that, but for trial counsel's deficiency, he would have been granted a lesser sentence. See id. at 694. If appellant fails to satisfy either prong of

Strickland, his entire claim fails. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). We conclude that appellant has not demonstrated that trial counsel was ineffective.

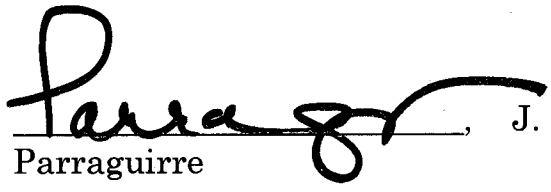
Appellant argues that had trial counsel obtained the proper type of evaluation, the district court would have sentenced him to a lesser term of 2 to 20 years instead of life in prison. However, such a sentence was not possible. Appellant committed the crime for which he was convicted between September 2005 and October 2005. Effective July 1, 2005, the statute under which appellant was prosecuted was amended such that the minimum sentence possible was life in prison with the possibility of parole after 10 years. 2005 Nev. Stat. ch. 507, § 33, at 2877, and § 45, at 2890. Appellant received the minimum sentence under the statute, and there was no reasonable probability that appellant could have received a lesser sentence.

Even if a lesser term were available to appellant, he has not demonstrated that trial counsel was ineffective. The record belies appellant's contention that, had the sentencing court been provided with the psychosexual evaluation, appellant would have been sentenced to the lesser term. The same court that sentenced appellant also heard his petition for writ of habeas corpus. That court found the psychosexual evaluation to be mitigating only in the broadest sense of the word and that it confirmed that appellant had received the appropriate sentence. The district court's ruling thus clearly demonstrates there was no reasonable probability that appellant would have received any lesser sentence were it available.

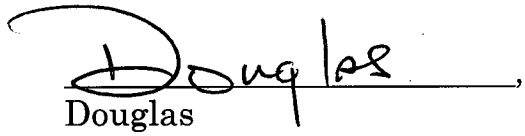
Appellant has not proven that trial counsel was ineffective in failing to procure a psychosexual evaluation in preparation for

sentencing.[1] Accordingly, we conclude that the district court did not err in denying this claim. We therefore

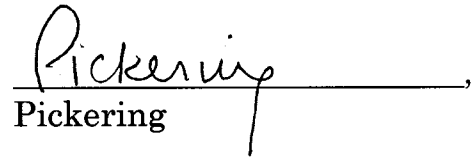
ORDER the judgment of the district court AFFIRMED.



_____, J.
Parraguirre



_____, J.
Douglas



_____, J.
Pickering

cc: Hon. Brent T. Adams, District Judge
Mary Lou Wilson
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[1]To the extent that appellant challenges the district court's denial of his motions for reconsideration, such an order is not appealable. See Castillo v. State, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990) (right appeal to exists only where granted by a statute or court rule); Phelps v. State, 111 Nev. 1021, 1022, 900 P.2d 344, 344 (1995) ("[N]o statute or court rule provides for an appeal from an order denying a motion for reconsideration."). Further, to the extent that the motions to reconsider were amendments or additional supplements to the original motion, the record does not reflect that appellant was granted permission to file the documents as required by NRS 34.750(5).