

IN THE SUPREME COURT OF THE STATE OF NEVADA

SCOTT BLUETHMAN A/K/A LARRY
FORSYTHE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53411

FILED

NOV 05 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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; Kathy A. Hardcastle, Judge.

On September 15, 2008, the district court convicted appellant, pursuant to a guilty plea, of one count of attempted larceny. The district court sentenced appellant to serve a term of 19 to 48 months in the Nevada State Prison. No direct appeal was taken.

On November 10, 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 and 34.770, the district court declined to appoint counsel to represent appellant or to

conduct an evidentiary hearing. On February 12, 2009, the district court denied appellant's petition. This appeal followed.¹

In his petition, appellant claimed that he received ineffective assistance of trial 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.

¹On November 10, 2008, appellant also filed a petition for a writ of coram nobis to correct the name on the judgment of conviction; appellant asserted his true name was Larry James Forsythe. The district court did not err in denying the relief sought.

We further note that appellant filed a reply to the State's opposition after the district court had orally denied the petition. We conclude that pursuant to NRS 34.750(5) the district court did not abuse its discretion in failing to consider the reply.

First, appellant claimed that his trial counsel was ineffective for failing to file any pretrial motions. Appellant claimed that a motion to dismiss and a motion for discovery should have been filed. Appellant failed to demonstrate that trial counsel's performance deficient or that he was prejudiced. Appellant failed to specifically identify the grounds for a motion to dismiss, and consequently, appellant failed to demonstrate that such a motion would have had been meritorious. To the extent that appellant claimed trial counsel was ineffective for failing to obtain a criminal history report for appellant, appellant failed to demonstrate that there was a reasonable probability that he would not have entered a guilty plea in the instant case had trial counsel obtained a criminal history report. Appellant otherwise failed to identify what was not discovered or accessible to his trial counsel in the State's files or demonstrate that there was a reasonable probability that he would not have entered a guilty plea in the instant case absent the failure to file a motion for discovery. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to "cross-examine" the State's evidence to look for inconsistencies. The only inconsistency specifically identified was the fact that the discovery documents stated that the money appellant took from the undercover detective's pocket included twenty one-dollar-bills whereas the presentence investigation report stated that it was a single twenty-dollar-bill. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's guilty plea obviated the need for trial counsel to "cross-examine" any inconsistencies in the

evidence. More importantly, a presentence investigation report is not an evidentiary document for trial; it is prepared after a guilty plea or jury verdict. NRS 176.135. Appellant failed to demonstrate that there was a reasonable probability that he would not have entered a guilty plea based on the alleged deficiencies. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to pursue an entrapment defense. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's guilty plea obviated the need for trial counsel to pursue a defense to the charge. In entering his guilty plea, appellant acknowledged that he had discussed defenses, defense strategies and any circumstances in his favor with his counsel.

Further, the success of an entrapment defense was highly questionable in this case, making the risks of trial much greater. An entrapment defense consists of two elements: the State presenting the opportunity to commit a crime and a defendant who is not predisposed to commit the act. Miller v. State, 121 Nev. 92, 95, 110 P.3d 53, 56 (2005). In this case, the police report indicates that the police were conducting a street operation, in which an undercover detective posed as a "plausible alternative victim to persons that are predisposed to commit crimes of opportunity like robbery and larceny from [the] person." The undercover detective, leaning against the wall of a building, had a roll of money in his breast pocket behind a pack of cigarettes—the money was not "blatantly obvious to passerbys," but required effort to discover. Appellant approached the undercover detective and asked for a cigarette, which was

given to him. An unknown male in the area, coming to the detective's aid, approached appellant and told him to leave the undercover detective alone. After a verbal altercation with the unknown male, appellant left the scene, and the unknown male left shortly after determining that the undercover detective was safe. Appellant then returned, asked for another cigarette, and removed the money from the undercover detective's pocket. Appellant was arrested and read his rights. Appellant told the detective interviewing him that he took the money to secure it for "Jeremy," the name he gave for the undercover detective. Under these facts, 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.

Fourth, appellant claimed that trial counsel was ineffective for failing to seek a continuance for the sentencing hearing despite the fact that appellant asked for a continuance. Appellant did not show up for the sentencing hearing and was later apprehended for failure to appear. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to set forth any grounds for a motion for continuance or demonstrate that such a motion would have been meritorious. Appellant attempted to explain the FTA at the sentencing hearing. Appellant failed to demonstrate a reasonable probability of a different outcome had the sentencing hearing been continued. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to provide evidence that he was the "Good Samaritan" in the

situation. Appellant further claimed that he was an eyewitness to an armed robbery in the area on an unrelated case and was helping the police in that case. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. To the extent that appellant was referring to evidence to negate the charge of attempted larceny, appellant entered a guilty plea to that charge, obviating the need for trial counsel to present such evidence. To the extent that appellant was referring to mitigating facts to discuss at sentencing, appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel included these points. Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel was ineffective for advising him to enter a guilty plea to an unknown sentence. It appears that appellant believed that trial counsel should only have advised him to enter a guilty plea if he was guaranteed a particular sentence and guaranteed to have his offense treated as a gross misdemeanor. Appellant failed to demonstrate that he was prejudiced. Appellant was informed at the plea canvass and in the written guilty plea agreement that the offense could be treated as either a gross misdemeanor or a felony, and the penalties for each were set forth in the written guilty plea agreement. Appellant was informed that matters of sentencing were left in the discretion of the district court. Therefore, we conclude that the district court did not err in denying this claim.²

²To the extent that appellant claimed that trial counsel was ineffective in advising appellant how to answer the questions during the
continued on next page . . .

Seventh, appellant appeared to claim that trial counsel was ineffective for failing to correct errors in his presentence investigation report. Appellant appeared to indicate the number of felonies was wrongly listed at two, when he only committed one prior felony. Appellant failed to demonstrate prejudice. Trial counsel and appellant made arguments regarding the criminal history in the presentence investigation report. Appellant failed to demonstrate that there was a reasonable probability of a different outcome at sentencing had trial counsel made any further arguments. Therefore, we conclude that the district court did not err in denying this claim.

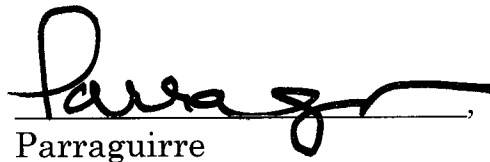
Finally, appellant raised the following statements as grounds for relief: (1) substantial assistance, (2) extraordinary circumstances, (3) mistaken assumption, (4) due process of law, and (5) cruel and unusual punishment. These claims fell outside the scope of claims permissible in a post-conviction 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.

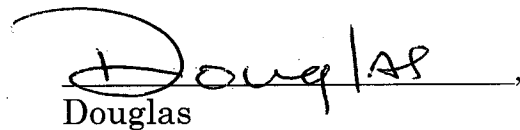
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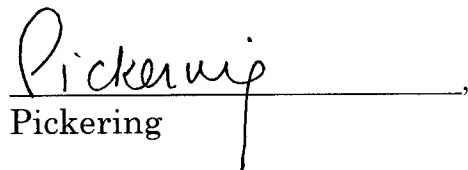
plea canvass, appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that any question was answered untruthfully or that he was advised to answer untruthfully. Appellant further failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel not provided advice in answering the questions at the plea canvass.

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.³

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Hon. Kathy A. Hardcastle, District Judge
Scott Bluethman
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

³We 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.