

IN THE SUPREME COURT OF THE STATE OF NEVADA

REGINALD MCDONALD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 53663

**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 February 29, 2008, the district court convicted appellant, by a plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), of one count of battery with the use of a deadly weapon resulting in substantial bodily harm and one count of coercion with the use of a deadly weapon. The district court sentenced appellant to serve a term of 72 to 180 months and two consecutive terms of 28 to 72 months in the Nevada State Prison. No direct appeal was taken.

On September 23, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant filed an amended petition. The State opposed the petition. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. On May 8, 2009, after conducting an evidentiary hearing, 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 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 in the proceedings. Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984). In order to demonstrate prejudice sufficient to invalidate the decision to enter a guilty plea, a petitioner must demonstrate 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. 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 v. Washington, 466 U.S. at 697.

First, appellant claimed that his trial counsel was ineffective for failing to obtain and share discovery and failing to adequately investigate the case. Appellant claimed that he provided his trial counsel with names of witnesses and addresses, and although the services of an investigator were used, the investigator failed to adequately pursue the investigation. Appellant claimed that these failures caused trial counsel to fail to produce evidence and witnesses and exculpatory pictures to demonstrate that the victim's testimony at the grand jury proceedings was inflated, contrived and perjured. Finally, he claimed that trial counsel failed to interview or contact the victim after learning her whereabouts.

Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Appellant failed to set forth any specific facts in support of these claims. Aside from a reference to allegedly exculpatory photographs, not described by appellant, appellant failed to indicate what discovery was not obtained or shared. Appellant failed to specifically identify the evidence that a more thorough investigation would have uncovered. Appellant received a substantial benefit by entry of his plea in the instant case as he avoided going to trial and the risk of a greater sentence on the original charges.<sup>1</sup> Appellant failed to demonstrate that there was a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial had trial counsel shared discovery or performed a more thorough investigation. Therefore, we conclude that the district court did not err in denying these claims.

Second, appellant claimed that trial counsel failed to discuss any kind of defense strategies and was not familiar with the facts of the case. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. In signing the written guilty plea

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<sup>1</sup>Appellant was originally charged with one count of battery with the use of a deadly weapon resulting in substantial bodily harm, one count of first-degree kidnapping with the use of a deadly weapon resulting in substantial bodily harm, one count of battery constituting domestic violence with substantial bodily harm, one count of battery with the intent to commit a crime with the use of a deadly weapon, one count of first-degree kidnapping resulting in substantial bodily harm, two counts of attempted murder, and one count of preventing or dissuading a witness from testifying or producing evidence.

agreement, appellant acknowledged that he had discussed possible defenses and defense strategies with his counsel. Appellant failed to set forth any facts demonstrating that trial counsel was not familiar with the case. Appellant failed to demonstrate a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial had trial counsel further discussed defense strategies. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that trial counsel failed to file pretrial motions after being requested to do so. The only pretrial motion specifically identified by appellant was a motion to dismiss the indictment because he was not provided notice of the grand jury proceedings. Sheriff v. Marcum, 105 Nev. 824, 783 P.2d 1389 (1989). Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Appellant failed to set forth any facts relating to the grand jury notice. Any error regarding the grand jury notice occurred prior to entry of his plea. Appellant failed to demonstrate that there was a reasonable probability of a different outcome in the proceedings had trial counsel filed a pretrial motion to dismiss. As noted earlier, appellant received a substantial benefit by entry of his guilty plea. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel coerced him into entering a guilty plea. Specifically, appellant claimed that trial counsel: (1) essentially told him that he could not get a fair trial because of his race and the victim's race; (2) told him that he would get a sentence of life without the possibility of parole if he went to trial; (3) told him that he would not receive the maximum sentence; (4) told appellant that the

prosecutor agreed to remain silent at sentencing even though the plea agreement stated that the prosecutor retained the right to argue; and (5) told him to take the deal because the prosecutor was leaving and if the prosecutor were replaced by a younger person that person would have something to prove. Appellant further claimed that the investigator contacted two of his witnesses to have them convince appellant to enter a guilty plea because he could receive probation if he entered a guilty plea. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. In entering his plea, appellant acknowledged that his plea was not the product of any threats or promises not contained in the plea agreement and that sentencing decisions were left to the discretion of the district court. Accurate and candid advice regarding the outcome of a trial is not deficient. Appellant failed to demonstrate that there was a reasonable probability that he would not have entered a plea in this case absent trial counsel's performance. 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 advise him that the State of Nevada does not "actually recognize or utilize the true purpose or context of Alford." Appellant appeared to suggest that the true and only purpose of the decision in Alford was to shield a defendant from a harsher sentence. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. As discussed earlier, appellant received a substantial benefit by entry of his guilty plea and avoided the possibility of a harsher penalty

had he gone to trial on the original charges. Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective in regards to sentencing. Appellant claimed that trial counsel told him not to say anything so as not to make the judge angry and told him not to talk to the Department of Parole and Probation in regards to the preparation of the presentence investigation report. This latter advice resulted in a biased report with numerous discrepancies. Finally, appellant claimed that he gave trial counsel a letter he had written to the judge for proofreading, but that she never returned the letter to him. Appellant failed to demonstrate that he was prejudiced. Trial counsel informed the district court at sentencing that she had advised appellant not to discuss his version of events with the Department of Parole and Probation and that appellant misunderstood that to mean not to cooperate with the Department. She further informed the district court that she had contacted the Department regarding the report and she discussed the tenor of the comments. Trial counsel discussed appellant's criminal history and presented mitigating factors for the district court's consideration. Appellant failed to demonstrate that there was a reasonable probability of a different outcome in this case had trial counsel performed differently. Therefore, we conclude that the district court did not err in denying this claim.

Seventh, appellant claimed that trial counsel ignored him after sentencing after he attempted to ask her to explain what had happened. When he did get hold of her on the telephone, he asserted that trial counsel told him that he must have made the judge upset. Appellant

failed to demonstrate that this exchange with counsel affected the outcome of the proceedings in any fashion. Therefore, we conclude that the district court did not err in denying this claim.

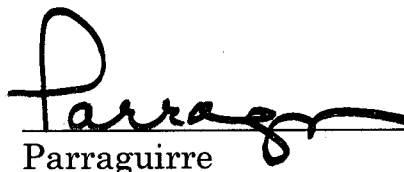
Eighth, appellant claimed that trial counsel failed to advise him about the right to appeal and failed to file an appeal despite the fact that he requested an appeal be filed. Appellant failed to demonstrate that his trial counsel's performance was deficient. The written guilty plea agreement correctly informed appellant of the limited right to appeal the conviction. Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999). At the evidentiary hearing, trial counsel testified that she had discussed the limited right to appeal with appellant. Trial counsel further testified that she had two conversations with appellant after sentencing because appellant was upset with the sentence that he had received. Trial counsel informed appellant that he had three options: a direct appeal, withdrawal of the plea, or petition for a writ of habeas corpus challenging trial counsel's performance. Trial counsel testified that she explained to him that she did not see any viable issues for an appeal. Trial counsel testified that appellant chose to pursue the latter options and did not ask her to file an appeal at the conclusion of their conversation. The district court determined that appellant had not asked trial counsel to file an appeal in this case. Substantial evidence supports that conclusion. Riley v. State, 110 Nev. 638, 878 P.2d 272 (1994). Therefore, we conclude that the district court did not err in denying this claim.

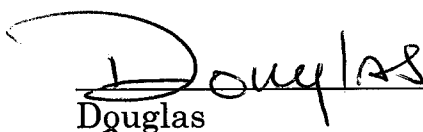
Finally, appellant claimed that he was deprived of access to the courts because the prison lost the records that trial counsel had sent to him. This claim did not challenge the validity of the guilty plea or the

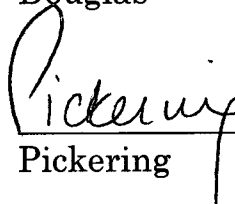
effective assistance counsel, and thus, was improperly raised in a petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea. NRS 34.810(1)(a).

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.

 J.  
Parraguirre

 J.  
Douglas

 J.  
Pickering

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