

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES KEOHOKALOLE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 54097

CHARLES KEOHOKALOLE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 54872

FILED

MAY 07 2010

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY: *H. Angood*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

These are proper person appeals from orders of the district court denying a motion to modify or correct illegal sentence and a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge. We elect to consolidate these appeals for disposition.<sup>1</sup> NRAP 3(b).

Docket No. 54097

In his motion filed on May 13, 2009, appellant claimed that the State overstated the victim's injuries at the sentencing hearing and

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<sup>1</sup>These appeals have 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 Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

that his sentence was based on an assumption that he had rammed the victim's vehicle. Appellant also claimed that the presentence investigation report overstated the victim's injuries and erroneously stated that he had 9 convictions, when in fact he had 8 prior convictions. Based upon our review of the record on appeal, we conclude that the district court did not err in denying the motion because appellant failed to demonstrate that the district court relied upon material mistakes about his criminal record that worked to his extreme detriment, and appellant failed to demonstrate that his sentence was facially illegal or the district court was without jurisdiction. Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

Docket No. 54872

In his petition filed on August 11, 2009, appellant raised several claims of ineffective assistance of trial counsel. To show that trial counsel was ineffective, appellant 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 was a reasonable probability of a different result 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). To show prejudice to invalidate the decision to enter a guilty plea, appellant must demonstrate that he 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.

Appellant claimed that his trial counsel's case load was too heavy to provide effective assistance and that trial counsel was unprepared and sought multiple delays as a result. Appellant failed to demonstrate that he was prejudiced. Appellant failed to describe what actions trial counsel should have taken during the representation, and thus, he failed to demonstrate that there was a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial. Trial counsel announced he was ready at calendar call before trial was to begin. Appellant received a benefit by pleading guilty in that he avoided an additional charge of battery with a deadly weapon causing substantial bodily harm. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective because he was unable to answer questions about discovery and failed to provide advice regarding a possible defense to the charges. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to set forth what questions his counsel was unable to answer about discovery and how this impacted his decision to enter a guilty plea. During the sentencing hearing, trial counsel mentioned having reviewed the discovery. In pleading guilty, appellant acknowledged that trial counsel had discussed possible defenses. Further, as stated above, appellant received a benefit by entry of his guilty plea. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for conceding he should be treated as a habitual criminal during the sentencing hearing. Appellant failed to demonstrate that his trial

counsel's performance was deficient or that he was prejudiced. In entering his guilty plea, appellant stipulated to habitual criminal treatment, but the parties retained the right to argue about whether he should be adjudicated a large or small habitual criminal, the length of the sentence, and whether the sentence should be concurrent or consecutive. There is simply no support in the record for appellant's assertion that trial counsel's argument was without consent given the terms of the plea negotiations. Further, the State noticed and presented proof of 4 prior felony convictions. Although the State argued for large habitual criminal treatment, in contrast to appellant's trial counsel's argument for small habitual criminal treatment, the district court imposed small habitual criminal treatment and imposed concurrent terms. Appellant failed to demonstrate a reasonable probability of a different outcome at sentencing had trial counsel made any different argument. Therefore, the district court did not err in denying this claim.

Next, appellant raised several claims of ineffective assistance of appellate counsel.<sup>2</sup> Similar to the requirements to show trial counsel was ineffective, a petitioner must demonstrate that appellate counsel's performance was deficient, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. Kirksey,

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<sup>2</sup>To the extent that appellant raised any of the underlying claims discussed in this section independent from his claims of ineffective assistance of appellate counsel, those 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).

112 Nev. at 998, 923 P.2d at 1114. Both prongs need not be addressed. Strickland, 466 U.S. at 697.

First, appellant claimed that his appellate counsel was ineffective in failing to argue that the State failed to properly file notice of habitual criminality. Appellant failed to demonstrate that appellate counsel was deficient or that he was prejudiced. The State filed an amended information prior to entry of the plea, which included notice of habitual criminality and set forth 4 prior felony convictions. NRS 173.095; NRS 207.016(2). Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that only one count could be treated under NRS 207.010. Appellant failed to demonstrate that appellate counsel was deficient or that he was prejudiced. NRS 207.010 permits each count to be treated under its provisions. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his appellate counsel was ineffective for failing to argue that he could not stipulate to habitual criminal treatment. Appellant failed to demonstrate that appellate counsel was deficient or that he was prejudiced. There was no error relating to the small habitual criminal adjudication as appellant stipulated in the plea agreement to being sentenced as a habitual criminal, the State amended the information to include notice of its intent to seek habitual criminal adjudication and set forth 4 prior felony convictions, the presentence report described at least two prior felony convictions, the prior felony convictions were presented to the district court and filed as part of the record, and appellant never challenged the existence or

constitutional validity of the prior convictions at the sentencing hearing. Hodges v. State, 119 Nev. 479, 484-85, 78 P.3d 67, 70 (2003). Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his appellate counsel was ineffective for failing to argue that it was an abuse of discretion to adjudicate him a habitual criminal because the prior convictions involved stale and non-violent property crimes. Appellant failed to demonstrate that appellate counsel was deficient or that he was prejudiced. NRS 207.010 makes no specific allowance for stale or trivial prior felony convictions. See Tillema v. State, 112 Nev. 266, 271, 914 P.2d 605, 608 (1996). Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court did not make a decision it was just and proper to adjudicate him a habitual criminal. Appellant failed to demonstrate that appellate counsel was deficient or that he was prejudiced. The district court considered the arguments of the parties and the prior convictions were presented for the court's review. Appellant had a sufficient number of qualifying prior felony convictions for small habitual criminal treatment. NRS 207.010(1)(a). Therefore, the district court did not err in denying this claim.

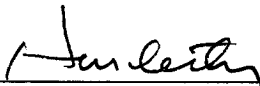
Sixth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court erred in denying a motion to continue for him to consider the plea negotiations. Appellant failed to demonstrate that appellate counsel was deficient or that he was prejudiced. The district court allowed appellant time to consult with his counsel off the record when the subject of plea negotiations came up at calendar call the day before trial, but the district court did not abuse its

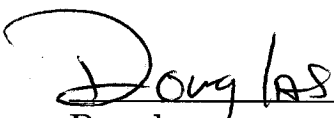
discretion in declining to grant more time. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that his counsel was ineffective for failing to file his notice of direct appeal and a case appeal statement. Regardless of who filed the notice of appeal and case appeal statement, appellant litigated a direct appeal with the assistance of counsel. Keohokalole v. State, Docket No. 50891 (Order of Affirmance, September 18, 2008). Therefore, the district court did not err in denying this claim.

Finally, appellant claimed that his due process rights were violated because he was not advised of the decisions in various post-conviction motions. This claim fell outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based on a guilty plea. NRS 34.810(1)(a). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Kathy A. Hardcastle, District Judge  
Charles Keohokalole  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk