

IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFREY SCOTT DEPENBROCK,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 54112

**FILED**

FEB 03 2010

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.<sup>1</sup> Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

In his petition, appellant raised five claims of ineffective assistance of counsel. To state a claim of ineffective assistance of counsel 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 but for counsel's errors. See Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984); Warden v. Lyons, 100 Nev. 430, 432, 683

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<sup>1</sup>This appeal has 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 Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

P.2d 504, 505 (1984). To establish 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, 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. A petitioner is only entitled to an evidentiary hearing on claims supported by specific facts, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

First, appellant claimed that counsel was ineffective for failing to object to statements by the prosecutor at his entry of guilty plea hearing that "I do not feel comfortable with this deal, who is to say that once we release Mr. Depenbrock he won't take off to California or who knows where." Appellant failed to demonstrate that he was prejudiced. Despite the statements by the prosecutor, the district court accepted the plea agreement, and appellant received the sentence he was informed of in the plea agreement. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that counsel was ineffective for failing to object to his sentence and for allowing him to stipulate to treatment as a habitual criminal pursuant to NRS 207.010(1)(b). Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Appellant was properly sentenced as a large habitual criminal because the State provided proper notice of the habitual criminal allegation and entered three separate certified judgments of conviction into the record at sentencing. Further, appellant stipulated to being

sentenced as a large habitual criminal if he failed to return to the court within 30 days of entering his guilty plea. Appellant failed to return for sentencing. Accordingly, appellant's stipulation to treatment pursuant to NRS 207.010, and ultimate sentencing pursuant to NRS 207.010(1)(b) was proper. See NRS 207.010(1)(b); NRS 207.016; see also Grey v. State, 124 Nev. 110, 123-24, 178 P.3d 154, 163-64 (2008); Hodges v. State, 119 Nev. 479, 484, 78 P.3d 67, 70 (2003). Therefore, the district court did not err in denying this claim.

Third, appellant claimed that counsel was ineffective for failing to explain that the crime of possession of a credit or debit card without the cardholder's consent under NRS 205.690 required proof that the credit card was charged for more than \$100. Appellant further argued that counsel should have explained that because the card he possessed had been previously cancelled, appellant did not have the requisite intent to commit fraud. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. NRS 205.690 does not require proof that a credit card has been used, nor is it relevant that the card has been cancelled. See Moore v. State, 122 Nev. 27, 34-35, 126 P.3d 508, 513 (2006) (upholding a conviction pursuant to NRS 205.690 where the credit card possessed by the defendant was never processed). Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that counsel was ineffective for failing to provide him with a copy of his presentence investigation report until after sentencing. Appellant failed to demonstrate that he was prejudiced. Specifically, appellant failed to allege any statements or facts contained in the report which would have had any effect on the outcome of


appellant's sentencing. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. Therefore, the district court did not err in denying this claim.


Fifth, appellant claimed that counsel was ineffective for failing to file a direct appeal, despite his timely request that counsel do so. Because appellant alleged that he requested an appeal and this claim is not belied by the record on appeal, we conclude that the district court erred in denying this claim without an evidentiary hearing. See Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003) (noting that if a defendant expresses a desire to appeal, counsel is obligated to file a notice of appeal on the defendant's behalf); Mann v. State, 118 Nev. 351, 353-54, 46 P.3d 1228, 1229-30 (2002) (concluding that prejudice is presumed where a defendant expresses a desire to appeal and counsel fails to do so); see also Hargrove, 100 Nev. at 502, 686 P.2d at 225. Accordingly, we remand this case for a limited evidentiary hearing on appellant's appeal deprivation claim.

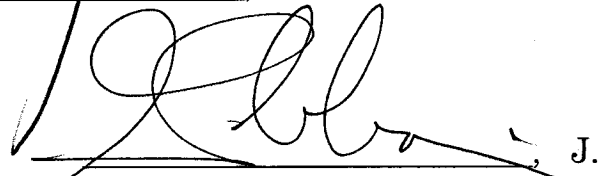
In addition to appellant's claims of ineffective assistance of counsel, appellant also claimed that his guilty plea was involuntary, because after entry of the plea agreement, the State refused to dismiss two additional cases as stipulated to in the plea agreement. If true, this factual allegation might demonstrate that appellant's guilty plea was not knowingly and intelligently entered. See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); Hargrove, 100 Nev. at 502, 686 P.2d at 225. Because this claim is not belied by the record on appeal, we conclude that the district court erred in denying this claim without an evidentiary hearing, and remand this case for a limited evidentiary hearing on this claim.

Finally, appellant also claimed that (1) statements by the prosecutor at the guilty plea hearing were improper; (2) appellant could not stipulate to treatment as a habitual criminal; (3) appellant breached the plea agreement because he only pleaded guilty to count 1 of a two count agreement; (4) the State failed to prove the requisite number of convictions pursuant to NRS 207.010; (5) appellant's initial arrest violated double jeopardy; and (6) appellant breached the plea agreement by failing to return for a 30 day status check and sentencing. These claims were not properly raised in a post-conviction petition for a writ of habeas corpus arising from a conviction based upon a guilty plea. See NRS 34.810(1)(a). Therefore, we conclude that the district court did not err in dismissing these claims. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Gibbons

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