

IN THE SUPREME COURT OF THE STATE OF NEVADA

RALPH DALLAS REBER,

No. 34923

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

JUL 06 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

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.

On June 12, 1998, the district court convicted appellant, pursuant to a guilty plea, of causing the death of another person by driving under the influence, a violation of NRS 484.3795. The district court sentenced appellant to serve a term of 84 to 216 months in the Nevada State Prison. Appellant filed an untimely direct appeal, which this court dismissed for lack of jurisdiction.¹

On June 7, 1999, 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 September 14, 1999, the district court denied appellant's petition. This appeal followed.

¹Reber v. State, Docket No. 33168 (Order Dismissing Appeal, November 11, 1998).

In his petition, appellant contended that trial counsel provided ineffective assistance by failing to advise him of his right to appeal the judgment of conviction and failing to secure the sentence promised in the plea agreement. We conclude that the district court did not err in rejecting these claims.

Our review of the record on appeal reveals that the plea memorandum informed appellant of the scope of his right to appeal, and thereby informed him that he had a right to appeal.² Accordingly, appellant's claim that his counsel was ineffective for failing to inform him that he had a right to appeal lacks merit because appellant was otherwise informed of his right to appeal.³

Moreover, we have held that "there is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to pursue a direct appeal."⁴ Nonetheless, counsel does have an obligation to advise a defendant who pleads guilty of the right to pursue a direct appeal under certain circumstance.⁵ Counsel has such an obligation when the defendant inquires about an appeal or when "the situation indicates that the defendant may benefit from receiving the advice, such as the existence of a direct

²See Davis v. State, 115 Nev. 17, 19, 974 P.2d 658, 659 (1999) (holding that language in NRS 177.015(4), when included in a plea memorandum, is sufficient to inform a defendant of the right to appeal).

³See id.

⁴Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999).

⁵Id.

appeal claim that has a reasonable likelihood of success."⁶ Here, appellant has not alleged that he inquired about an appeal. Moreover, the three direct appeal claims mentioned by appellant were wholly without merit.⁷

First, appellant claimed that the sentence was illegal because he entered his plea with the belief that he would receive a sentence of 43 to 192 months. We have held that such a subjective belief as to the potential sentence, without a promise from the State or indication by the court, is insufficient to invalidate a guilty plea.⁸ The record belies any claim that the State promised a particular sentence or that the court indicated that it would impose a particular sentence. Additionally, the sentence imposed is within the parameters provided by the relevant statute⁹ and is, therefore, a legal sentence.¹⁰ We therefore conclude that this

⁶Id.

⁷Appellant raises these three claims as independent claims of error in his petition. These claims fall outside of the narrow scope of issues that may be raised in a post-conviction petition challenging a judgment of conviction based on a guilty plea. See NRS 34.810(1)(a) (providing that only claims of ineffective assistance of counsel or challenges to validity of guilty plea may be raised in a post-conviction petition challenging a judgment of conviction based on a guilty plea). We address these claims in this decision only to the extent that they are relevant to appellant's claim that trial counsel provided ineffective assistance by failing to advise appellant of his right to a direct appeal.

⁸Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975).

⁹NRS 484.3795(1) (providing for sentence of 2 to 20 years in the state prison).

¹⁰See Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996) (explaining that an "illegal" sentence occurs where "the court goes beyond its authority by acting without jurisdiction or imposing a sentence in excess of the statutory maximum provided" (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985))).

claim would not have had a reasonable likelihood of success on direct appeal.

Second, appellant claimed that the State breached its promise that appellant could serve his sentence in a "DUI" camp. He further argued that an unspecified statute provides that DUI offenders must go to a facility "expressly for DUI offenders." Our review of the record reveals that the State did not make any such promise and that the plea memorandum adequately informed appellant that he would be sentenced to a term in the Nevada State Prison. Moreover, the statute expressly provides that a person convicted of violating the statute shall be sentenced to a term in the state prison. While it further specifies that "[a] person so imprisoned must, insofar as practicable, be segregated from offenders whose crimes were violent and, insofar as practicable, be assigned to an institution or facility of minimum security,"¹¹ it does not provide for a DUI camp or a DUI-offender only facility. We therefore conclude that this claim would not have had a reasonable likelihood of success on direct appeal.

Finally, appellant claimed that the prosecutor failed to advise the court that the parties had agreed to a maximum term of not more than 192 months. This claim is belied by the record. The plea memorandum provides that the State would not recommend a particular sentence, but would be free to argue the facts and circumstances of the offense. The State followed through with this agreement at sentencing. We therefore conclude that this claim would not have had a reasonable likelihood of success on direct appeal.

¹¹NRS 484.3795(1).

Our review of the record further reveals that appellant's second claim of ineffective assistance also lacks merit. As mentioned above, the plea agreement did not include a recommendation for a particular sentence. Moreover, the plea memorandum specifically informed appellant of the range of penalties and that the matter of sentencing was entirely within the district court's discretion. We therefore conclude that appellant cannot demonstrate that trial counsel was deficient for failing to secure a particular sentence.¹²

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.¹³ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Young J.
Young

Leavitt J.
Leavitt

Becker J.
Becker

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General
Clark County District Attorney
Ralph Dallas Reber
Clark County Clerk

¹²See Strickland v. Washington, 466 U.S. 668 (1984) (explaining that defendant challenging effectiveness of counsel must demonstrate that counsel's performance was deficient and that, but for counsel's errors, the outcome of the proceeding would have been different).

¹³See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).