

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAMARR ROWELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54708

FILED

APR 08 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Ingold*
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 a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

In his petition filed on July 8, 2009, appellant asserted that he received ineffective assistance of trial and appellate counsel.² To prove a claim of ineffective assistance of trial 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 that, but for counsel's errors,

¹This 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).

²To the extent that appellant raised any claims independently from his claims of ineffective assistance of counsel, those claims are not cognizable in a post-conviction petition for a writ of habeas corpus challenging the validity of a judgment of conviction based upon a guilty plea. NRS 34.810(1)(a).

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). Similarly, to prove a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that his counsel's performance was deficient and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. 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. 668, 697 (1984).

First, appellant claimed that his trial and appellate counsel were ineffective for failing to challenge the constitutionality of the burglary statute as overbroad and vague. Appellant failed to demonstrate deficiency or prejudice. NRS 205.060 is not unconstitutionally vague or overbroad as the conduct prohibited, entering a building with the intent to commit a felony therein, is sufficiently set forth to provide notice to persons of ordinary intelligence, does not promote arbitrary enforcement, and does not sweep within its sphere other protected activities. Silvar v. Dist. Ct., 122 Nev. 289, 293, 297, 129 P.3d 682, 685, 687 (2006). Thus, appellant failed to demonstrate that this issue would have had a reasonable likelihood of success if challenged prior to entry of plea or on appeal. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that trial and appellate counsel were ineffective for failing to challenge the constitutionality of the grand larceny statute as overbroad and vague. Appellant failed to demonstrate deficiency or prejudice. NRS 205.220 is not unconstitutionally vague or overbroad as the conduct prohibited, intentionally stealing another's personal property with a value in excess of \$250, is sufficiently set forth to

provide notice to persons of ordinary intelligence, does not promote arbitrary enforcement, and does not sweep within its sphere other protected activities. Silvar, 122 Nev. at 293, 297, 129 P.3d at 685, 687. Thus, appellant failed to demonstrate that this issue would have had a reasonable likelihood of success if challenged prior to entry of plea or on appeal. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his appellate counsel was ineffective for failing to seek additional presentence credits.³ Appellant claimed he should have received 153 days of presentence credits for time spent incarcerated from his arrest on July 5, 2007 to his sentencing on December 5, 2007. The district court erred in denying this claim without conducting a hearing on the proper amount of credits in this case. The presentence investigation report, which was relied upon by the district court at sentencing, set forth presentence credits in the amount of 125 days. However, this report was drafted for the original sentencing date of November 7, 2007. The record indicates that sentencing was continued from this date to December 5, 2007. Thus, it appears that appellant may not have received all of his credits, and his appellate counsel would be ineffective for failing to raise this issue on appeal if the underlying claim is true.⁴ NRS 176.055(1). Therefore, we remand this claim to the district court for further consideration.

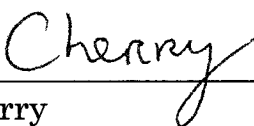
³In answer to question #18, appellant indicated that he did not raise the underlying claim on direct appeal due to the ineffective assistance of counsel.

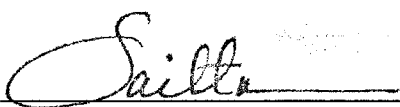
⁴It is not clear if there is some other impediment, such as serving time in another case, that would prevent appellant from getting the additional credits in this case.

Next, appellant challenged the denial of his direct appeal. This challenge cannot be made in a post-conviction petition for a writ of habeas corpus challenging the validity of the judgment of conviction based on a guilty plea. NRS 34.810(1)(a).

Finally, appellant claimed that the judgment of conviction contained a clerical error in that it described the grand larceny conviction as a Category B felony, rather than a Category C felony. The State acknowledged at the sentencing hearing that the grand larceny conviction in this case was a Category C felony. Upon remand, the district court shall correct the judgment of conviction to reflect that the grand larceny count was a Category C felony. 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.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Elissa F. Cadish, District Judge
Lamarr Rowell
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk