

IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON K. SIMPSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54919

FILED

DEC 13 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 a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Abbi Silver, Judge.

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).

This court directed transmission of a supplemental record on appeal to include transcripts of hearings not included with the original record on appeal filed in this court. The court reporter was unable to reproduce a transcript of the November 26, 2008 hearing. The documents before this court are sufficient for resolution of this appeal, and a transcript of the November 26, 2008 hearing was not necessary to resolve the issues raised by this appeal.

In his petition filed on July 29, 2009, appellant claimed that he received ineffective assistance of counsel. To prove 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.

First, appellant claimed that his trial counsel was ineffective for failing to argue in pretrial habeas corpus proceedings that the legislature did not intend a BB gun to qualify as a deadly weapon under NRS 193.165. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The record belies appellant's claim that trial counsel did not challenge the definition of a deadly weapon as intended by the legislature. Notably, a BB gun qualifies as a deadly weapon. See NRS 193.165(6)(c) (providing that deadly weapon includes those weapons described in NRS 202.265); NRS 202.265(5)(b) (defining a firearm as "any device from which a metallic projectile, including any ball bearing or pellet, may be expelled by means of spring,

gas, air or other force”); see also Funderburk v. State, 125 Nev. ___, ___, 212 P.3d 337, 340 (2009) (recognizing that a BB gun qualifies as a deadly weapon under NRS 193.165). Moreover, appellant received a substantial benefit by entry of his plea to attempted robbery with a deadly weapon as he avoided an additional charge of battery and the possibility of habitual criminal adjudication. Further, the State agreed to the dismissal of district court case number C236880. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel promised him probation and drug court and failed to challenge a breach of the plea agreement when he did not receive probation or drug court. Appellant failed to demonstrate that he was prejudiced. Appellant was not guaranteed probation or drug court as a term of the plea negotiations. Appellant was informed of the potential sentences in the written guilty plea agreement. Appellant affirmatively acknowledged that he was not made any promises beyond those set forth in the plea negotiations. Appellant’s mere subjective belief regarding sentencing was insufficient to invalidate his decision to enter a guilty plea. Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975). Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel failed to bring forth witness statements and exculpatory evidence. Appellant failed to demonstrate that his trial counsel’s performance was deficient or that he was prejudiced. Appellant’s guilty plea obviated the need to bring forth witness statements and exculpatory evidence. To the extent that

appellant was referring to the use of a BB gun, as discussed above, a BB gun does qualify as a deadly weapon under NRS 193.165. To the extent that appellant was referring to the affidavit from the driver of the car, the value of the affidavit is significantly diminished as it is inconsistent with appellant's description of the crime. As discussed above, 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.

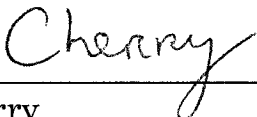
Fourth, appellant claimed that his trial counsel was ineffective for failing to file a direct appeal despite being requested to do so. In its response to the petition, the State conceded that an evidentiary hearing should be conducted on this claim. However, no evidentiary hearing was held. We conclude that the district court erred in denying the petition without conducting an evidentiary hearing on the appeal deprivation claim because appellant's claim, which was not belied by the record, if true would have entitled him to relief. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984); see also Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999). Therefore, we reverse the district court's denial of this claim and remand for an evidentiary hearing on the claim.²

Finally, appellant claimed that his sentence was illegal because a BB gun does not meet the requirements of a deadly weapon. This claim fell outside the scope of claims permissible in a post-conviction

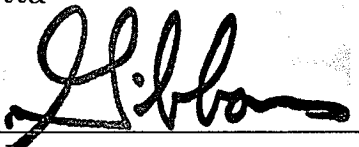
²If the district court determines that appellant was deprived of a direct appeal, the district court should provide the remedy set forth in NRAP 4(c).

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 IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.³


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Abbi Silver, District Judge
Jason K. Simpson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

³We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.