

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL CABRERA,

No. 34990

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

JUL 12 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus.

On July 21, 1998, the district court convicted appellant, pursuant to a guilty plea, of one count of second degree murder and one count of attempted murder with the use of a deadly weapon. The district court sentenced appellant to life in prison with the possibility of parole after 10 years and two consecutive terms of 84 to 210 months in prison, to be served concurrently with the life sentence. Appellant did not pursue a direct appeal.

On July 19, 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 October 1, 1999, the district court denied the petition. This appeal followed.

In his petition, appellant alleged that trial counsel provided ineffective assistance by failing to develop a defense, investigate and interview witnesses, seek discovery from the State, obtain expert witnesses, communicate with appellant, and file a motion in limine to exclude evidence.

Our review of the record reveals that appellant failed to support these claims with specific factual allegations that would, if true, entitle appellant to relief.¹ For example, appellant failed to identify any witnesses that counsel failed to interview or what information additional investigation would have revealed. Appellant also failed to specify what evidence counsel should have sought to exclude through a motion in limine. The other claims suffer from similar deficiencies. Because appellant failed to support these claims with sufficient factual allegations, we conclude that the district court did not err in rejecting them.

Appellant next alleged that trial counsel provided ineffective assistance by failing to challenge the probable cause determination. We conclude that trial counsel was not deficient in this respect because the State presented sufficient evidence at the preliminary hearing to support the justice court's finding of probable cause to bind appellant over on charges of murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon. Accordingly, we conclude that appellant was not entitled to relief on this claim.²

Appellant also alleged that trial counsel provided ineffective assistance by failing to file a motion to suppress his statements to police based on an alleged Miranda³

¹See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

²See Strickland v. Washington, 466 U.S. 668, 687, 697 (1984) (holding that test for ineffective assistance of counsel is (1) whether counsel's performance was deficient, and (2) whether that deficient performance prejudiced the defense, and explaining that the reviewing court need not consider both prongs of test if petitioner makes insufficient showing on either prong).

³Miranda v. Arizona, 384 U.S. 436 (1966).

violation. Based on our review of the preliminary hearing transcript, we conclude that trial counsel was not deficient in this respect. An officer, who was fluent in Spanish, testified that he advised appellant of his Miranda rights in Spanish before both interviews and that appellant understood and waived his rights. Given this testimony, trial counsel did not fall below an objective standard of reasonableness by failing to file a motion to suppress appellant's statements.⁴ We therefore conclude that appellant is not entitled to relief on this claim.⁵

Appellant further alleged that trial counsel provided ineffective assistance by failing to inform appellant of his right to appeal and by failing to perfect an appeal. Based on our review of the record, we conclude that both contentions lack merit.

First, the guilty plea memorandum informed appellant of his limited right to appeal the judgment of conviction. In Davis v. State,⁶ we held that such information is sufficient to advise a defendant of his right to appeal, and we rejected an ineffective assistance claim similar to appellant's claim. Accordingly, we conclude that appellant's claim that trial counsel was ineffective for failing to inform him that he had a right to appeal lacks merit.

⁴See Strickland, 466 U.S. at 687.

⁵Appellant also raised the alleged Miranda violation as an independent claim of error. Appellant waived that claim by entering a guilty plea. See Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975). Moreover, the claim falls outside 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). We have addressed the merits of the alleged Miranda violation only to the extent necessary to resolve appellant's ineffective assistance claim.

⁶115 Nev. 17, 19, 974 P.2d 658, 659 (1999).

Second, the burden was on appellant to indicate to his trial counsel that he wished to pursue an appeal.⁷ As we explained in Davis, an attorney does not have an obligation to obtain a client's consent not to file an appeal "where the client does not express a desire to challenge the proceedings."⁸ In this case, appellant has not alleged that he asked counsel to file an appeal and that his counsel disregarded that request. Accordingly, we conclude that appellant has not demonstrated that his counsel was ineffective for failing to file a direct appeal.

In his petition, appellant also alleged that the State withheld evidence in violation of Brady v. Maryland.⁹ Appellant, however, failed to make any specific factual allegations in support of his Brady claim.¹⁰ Additionally, appellant failed to assert the Brady violation in the context of an ineffective assistance claim or a challenge to the validity of his guilty plea. Accordingly, this claim falls outside of the narrow scope of claims that may be raised in a post-conviction petition challenging a judgment of conviction based on a guilty plea.¹¹ For these reasons, we conclude that appellant is not entitled to relief.

Finally, appellant alleged that his guilty plea was invalid because it was coerced by the prosecutor and defense counsel and because appellant did not have a full understanding of the charges and the consequences of his plea. We conclude that both claims are belied by the record.

⁷Id. at 20, 974 P.2d at 660.

⁸Id.

⁹373 U.S. 83 (1963).

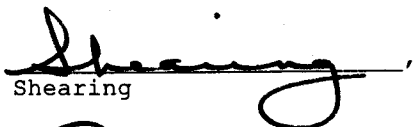
¹⁰See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

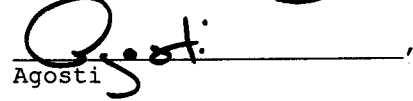
¹¹NRS 34.810(1)(a).

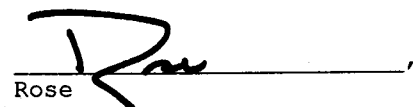
Appellant had the assistance of an interpreter at the plea canvass. At that time, appellant acknowledged that the plea agreement was explained to him through an interpreter and that he had understood and signed the agreement. Appellant also acknowledged that he had discussed the charges with his attorney. The district court canvassed appellant regarding the possible sentences, the court's sentencing discretion, the rights that appellant waived by pleading guilty, and the facts supporting the charges. Additionally, the district court established that appellant was entering his plea freely and voluntarily and that the plea was not coerced by any threats, promises, or rewards. We therefore conclude that appellant's challenge to the validity of the guilty plea lacks merit.

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.¹² Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Shearing


_____, J.
Agosti


_____, J.
Rose

cc: Hon. Ronald D. Parraguirre, District Judge
Attorney General
Clark County District Attorney
Daniel Cabrera
Clark County Clerk

¹²See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).