

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRECK WARDEN SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55472

FILED

JUL 15 2010

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

ORDER OF AFFIRMANCE

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; Michael Villani, Judge.

In his petition filed on October 1, 2009, appellant claimed that he received ineffective assistance of trial and appellate counsel. To prove a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that there was a reasonable probability of a different outcome. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). In order to prove prejudice

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).

sufficient to invalidate the decision to enter a guilty plea, a petitioner must demonstrate that there is a reasonable probability 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, 58-59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). In order to prove prejudice regarding the performance of appellate counsel, a petitioner must demonstrate 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, 466 U.S. at 697.

First, appellant claimed that his trial counsel was ineffective for advising him to enter a guilty plea, which included a stipulation to large habitual criminal treatment. Appellant further claimed that he did not understand the guilty plea. Appellant failed to demonstrate that he was prejudiced. Appellant received a substantial benefit by entry of his guilty plea as he avoided seven additional counts in this case. Further, this case was part of a plea package involving other district court cases and the State agreed not to oppose concurrent time between the cases. Appellant informed the district court that he had read the guilty plea agreement in its entirety and acknowledged understanding the terms of the plea agreement. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective at sentencing for stipulating that the State had presented proof of the prior convictions although they were not properly filed. Appellant further claimed that trial counsel should have objected to the district court's apparent acceptance of the prior judgments of conviction simply

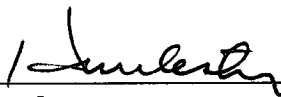
because other district court judges had accepted the priors. Appellant failed to demonstrate that he was prejudiced. The State mistakenly sent the original certified copies of the prior judgments of conviction to appellant's counsel, who wrote on those copies. The parties agreed at sentencing that the copies of the originals would be used. Because the error regarding the prior judgments did not affect appellant's substantial rights, appellant cannot demonstrate that there was a reasonable probability of a different outcome at sentencing. See NRS 178.598. Appellant did not demonstrate that any of the prior judgments of conviction were constitutionally infirm. Therefore, the district court did not err in denying this claim.

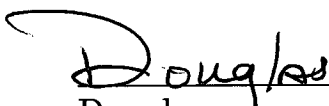
Third, appellant claimed that his trial counsel was ineffective for failing to argue against large habitual criminal treatment. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. Appellant stipulated to large habitual criminal treatment as part of the negotiations. Moreover, despite the negotiations, trial counsel did present arguments in mitigation. Therefore, the district court did not err in denying this claim.


Fourth, appellant claimed that his trial counsel was ineffective for failing to argue that the habitual criminal statute is unconstitutional, and failing to raise a selective prosecution argument. Appellant failed to demonstrate that trial counsel's performance was deficient. Appellant failed to demonstrate that the habitual criminal statute was unconstitutional or that the State had chosen to selectively prosecute him as a habitual criminal. Appellant's seven prior convictions qualified him as a habitual criminal. NRS 207.010(1)(b). Therefore, the district court did not err in denying this claim.

Next, appellant claimed that his appellate counsel was ineffective for failing to argue: (1) the habitual criminal notice was not properly filed, (2) the habitual criminal proceedings were infirm, (3) the habitual criminal statute was unconstitutional, (4) the district court erred in accepting infirm prior judgments of conviction, (5) the State selectively prosecuted appellant as a habitual criminal, and (6) the district court abused its discretion in adjudicating appellant a large habitual criminal. Appellant failed to demonstrate that any of these issues had a reasonable probability of success on appeal. Therefore, we conclude that the district court did not err in denying these claims. Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

²We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Michael Villani, District Judge
Breck Warden Smith
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk