

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 35114

WENDELL FREEMAN,

Appellant,

vs.

WARDEN, LOVELOCK CORRECTIONAL  
CENTER, JACKIE CRAWFORD,

Respondent.

**FILED**

MAY 10 2000

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

ORDER DISMISSING APPEAL

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

The district court convicted appellant, pursuant to a guilty plea, of robbery and sentenced appellant to thirty-six (36) to one hundred eighty (180) months in prison. Appellant filed an untimely notice of appeal, which this court dismissed for lack of jurisdiction. See Freeman v. State, Docket No. 31308 (Order Dismissing Appeal, April 2, 1998).

Appellant subsequently filed a proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel, conducted an evidentiary hearing and denied the petition. This appeal followed.

Appellant contends that trial counsel provided ineffective assistance by advising appellant to plead guilty to robbery because the facts underlying the original charge of robbery with the use of a deadly weapon would not have supported a conviction for that offense. We conclude that appellant's contention lacks merit.

A claim of ineffective assistance of counsel presents a mixed question of law and fact and is therefore subject to

independent review. *State v. Love*, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). However, a district court's factual findings regarding a claim of ineffective assistance are entitled to deference so long as they are supported by substantial evidence and are not clearly wrong. See *Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a defendant must demonstrate that: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. See *Hill v. Lockhart*, 474 U.S. 52 (1985); *Strickland v. Washington*, 466 U.S. 668 (1984); *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102 (1996). "Deficient" assistance of counsel is representation that falls below an objective standard of reasonableness. Strickland, 466 U.S. at 688. In order to demonstrate prejudice where a conviction is based on a guilty plea, a defendant must demonstrate a reasonable probability that, but for counsel's errors, appellant would not have pleaded guilty and would have insisted on going to trial. Hill, 474 U.S. at 59. The court need not consider both prongs of the Strickland test if the defendant makes an insufficient showing on either prong. Strickland, 466 U.S. at 697.

We conclude that the district court did not err in rejecting appellant's claim of ineffective assistance. The district court considered appellant's testimony regarding the facts underlying the offense. What appellant fails to acknowledge is that the court found that testimony to be incredible. Moreover, appellant fails to mention that he testified that he never informed his trial counsel that he left the property in the store. With this testimony in mind and considering the testimony presented at the preliminary

hearing, we conclude that trial counsel's advice that appellant should plead guilty to robbery to avoid a deadly weapon enhancement and/or habitual criminal enhancement did not fall below an objective standard of reasonableness.<sup>1</sup> See Strickland, 466 U.S. at 689 (explaining that counsel's performance must be evaluated from counsel's perspective at the time and without "distorting effects of hindsight").<sup>2</sup>

Appellant next contends that trial counsel failed to advise him of his right to a direct appeal or to discuss potential direct appeal issues with appellant. See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994). We conclude that this contention also lacks merit.

The district court found "no sufficient reason to believe that [trial counsel] deviated from his custom [of informing client's of their right to appeal] in the instant case." Appellant fails to demonstrate clear error in this factual finding. Accordingly, appellant failed to demonstrate that he was not informed of his right to a direct appeal. Moreover, even assuming that trial counsel did not inform appellant of his right to a direct appeal, appellant has failed to demonstrate that under the circumstances of this

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<sup>1</sup>To the extent that appellant also contends that counsel's advice was deficient because the screwdriver and automobile were not deadly weapons, we disagree. Trial counsel litigated and lost a motion to dismiss on this issue. Thus, the deadly weapon enhancement would have gone to the jury. Moreover, appellant pleaded guilty to simple robbery, not armed robbery, and the guilty plea allowed appellant to avoid the possibility of being sentenced as a habitual criminal. Under the circumstances, we conclude that trial counsel's advice did not fall below an objective standard of reasonableness. Accordingly, appellant's claim of ineffective assistance of counsel must fail.



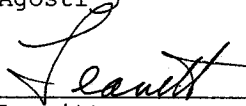
<sup>2</sup>Appellant also contends that he received ineffective assistance when attorney Jennifer Lunt moved to withdraw from representing appellant. We have reviewed this claim and conclude that appellant has failed to meet either prong of the Strickland test.

case, counsel had a duty to do so. See Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999) (holding that "there is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to pursue a direct appeal" and setting forth circumstances under which such advice may be required); see also Roe v. Flores-Ortega, \_\_\_ U.S. \_\_\_, 120 S. Ct. 1029 (2000) (similar).

42

Having considered appellant's contentions and concluded that they lack merit, we

ORDER this appeal dismissed.

  
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Young J.  
  
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Agosti J.  
  
\_\_\_\_\_  
Leavitt J.

cc: Hon. Connie J. Steinheimer, District Judge  
Attorney General  
Washoe County District Attorney  
Karla K. Butko  
Washoe County Clerk