

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 56420

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

No. 56421 ✓

**FILED**

DEC 09 2010

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

ORDER OF AFFIRMANCE

These are proper person appeals from an order of the district court denying a post-conviction petition for a writ of habeas corpus filed in two district court cases.<sup>1</sup> Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

In his petition filed on December 3, 2009, appellant claimed that he received ineffective assistance of trial counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's

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<sup>1</sup>These appeals have been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the records are sufficient for our review and briefing is unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

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, the outcome of the proceedings would have been different. 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 demonstrate prejudice to invalidate 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). Both components of the inquiry must be shown. Strickland, 466 U.S. at 697.

First, appellant claimed that trial counsel was ineffective for advising appellant to enter a guilty plea because appellant did not understand he would not be allowed to argue for a lesser sentence and because he did not receive a benefit. Appellant failed to demonstrate that he was prejudiced. Appellant addressed the district court at sentencing with mitigating statements and told the district court that he understood the district court had the "broadest range of judicial discretion" in sentencing decisions. The written guilty plea agreements, which appellant acknowledged reading and understanding, informed appellant of the terms of the stipulation. Appellant further received a substantial benefit as he avoided possible conviction on numerous other offenses. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for allowing him to enter a guilty plea when he did not know that by stipulating to large habitual criminal treatment that he was agreeing to

being treated as a habitual criminal. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. At the plea canvass, the terms of the negotiations, which were memorialized in the written plea agreements, were set forth—including the term that he was agreeing to stipulate to a large habitual criminal treatment with a sentence of life in prison. In light of the benefit he received, appellant failed to demonstrate that he would not have entered a guilty plea in the instant cases. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for allowing him to enter a guilty plea when he did not know he was giving up his right to a jury trial and the right to confront his accusers. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. The written guilty plea agreements informed appellant of the constitutional rights waived by entry of the guilty plea. Appellant acknowledged reading and understanding the contents of the plea agreements. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective for failing to address the district court at sentencing or argue for a lesser sentence. Appellant failed to demonstrate that he was prejudiced because he stipulated to the imposition of life sentences. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to object to the unconstitutionality of the habitual criminal statute and to the State's selective prosecution of appellant as a habitual criminal. Appellant failed to demonstrate that trial counsel's performance was

deficient or that he was prejudiced. Appellant failed to demonstrate that the habitual criminal statute was unconstitutional or that he was selectively prosecuted. Notably, appellant had at least seven prior felony convictions. Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel was ineffective for failing to object to infirm prior judgments of conviction. Appellant failed to provide any specific facts in support of this claim. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Consequently, he failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that he received ineffective assistance of appellate counsel. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, 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. Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). Both components of the inquiry must be shown, Strickland, 466 U.S. at 697.

Appellant claimed that appellate counsel should have argued that "habitual criminality" was not properly filed before the district court, the habitual criminal proceedings were infirm, the habitual criminal statute is unconstitutional, the district court abused its discretion in accepting infirm judgments of conviction, the State engaged in selective prosecution, the district court abused its discretion in failing to choose

small habitual criminal treatment, and the habitual criminal statute is vague and ambiguous. Appellant failed to demonstrate that any of these arguments had a reasonable likelihood of success on appeal. Therefore, we conclude that the district court did not err in denying these claims. Accordingly, we

ORDER the judgments of the district court AFFIRMED.<sup>2</sup>

Cherry, J.  
Cherry

Saitta, J.  
Saitta

Gibbons, J.  
Gibbons

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

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<sup>2</sup>We deny as moot the motion to consolidate the appeals.