

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER LITWIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57362

FILED

JUL 13 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *H. Anderson*
DEPUTY CLERK

ORDER OF AFFIRMANCE AND DIRECTING CORRECTION OF
JUDGMENT OF CONVICTION

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; Jackie Glass, Judge.

In his petition, appellant claimed that he received ineffective assistance of counsel. To prove ineffective assistance of 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 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

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).

Strickland). To demonstrate prejudice 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). Both components of the inquiry must be shown, Strickland, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings regarding ineffective assistance of counsel but review the court's application of the law to those facts de novo. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, appellant claimed that trial counsel was ineffective for advising appellant that he did not qualify for large habitual criminal treatment and for advising appellant that he had talked to the prosecutor about drug treatment and probation. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's eight prior felony convictions qualified appellant for large habitual criminal treatment at sentencing. NRS 207.010(1)(b). The written guilty plea agreement informed appellant of the possibility of large habitual criminal treatment and the potential sentences he faced. Appellant was personally canvassed about his understanding of the potential sentences he faced with large habitual criminal treatment. In pleading guilty, appellant acknowledged that he had not been made any promises and that he understood that sentencing decisions were left to the

district court. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for advising him to enter a guilty plea to the crime of burglary because the State, appellant alleged, would not have been able to prove the element of intent and for advising a guilty plea without investigating the prior convictions the State intended to use at sentencing. Appellant failed to demonstrate that he was prejudiced. The record contains facts that would have supported the element of intent had the matter gone to trial as appellant was observed removing the sensor tag from a pair of sunglasses in a department store with wire cutters, initially leaving the store without the glasses but confronting a loss prevention officer outside the store about being followed, and returning to the store to take the sunglasses without payment. NRS 205.060(1). A qualifying number of prior convictions were set forth in the charging information. NRS 207.010(1)(b). Further, appellant received a benefit by entry of his guilty plea as he avoided trial on two additional charges—one of those charges exposed appellant to an additional habitual criminal enhancement. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to have him evaluated for competency. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that at the time he entered his guilty plea he did not have the ability to understand the nature of the criminal charges, to understand the nature and purpose of the court proceedings, or to aid and assist his counsel with a reasonable

degree of rational understanding. See NRS 178.400(2); see also Dusky v. United States, 362 U.S. 402 (1960); Melchor-Gloria v. State, 99 Nev. 174, 660 P.2d 113 (1983). Therefore, we conclude that the district court did not err in denying this claim.²

Fourth, appellant claimed that his trial counsel was ineffective for failing to challenge the habitual criminal adjudication on the grounds that NRS 207.010 is vague, ambiguous, unconstitutional and contrary to federal precedent. Appellant failed to demonstrate that his trial counsel's performance was deficient as he failed to demonstrate that NRS 207.010 was constitutionally infirm. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to object to the State's use of prior convictions during the sentencing hearing that were not set forth in the charging information. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The "violent" prior conviction alluded to by appellant in his petition was set forth in the notice of habitual criminality filed by the State approximately two months before the sentencing hearing.³ There was no error in not including the prior

²To the extent that appellant claimed that he should have been evaluated for competency prior to sentencing, appellant likewise failed to demonstrate that he was not competent.

³Only two convictions were added to the notice—a 1990 conviction for armed robbery and a 1998 conviction for theft. The original charging information contained seven prior felony convictions, including a 1990
continued on next page . . .

conviction in the original information under these circumstances. See NRS 207.016(2). Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to object that the convictions added to the notice were constitutionally infirm and inaccurate and failing to prepare for sentencing by reviewing the prior convictions. Appellant failed to provide any facts supporting these claims, and thus, he failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that his trial counsel was ineffective for failing to review the presentence investigation report and for failing to have a new one prepared when the State indicated that the presentence report was not completely accurate. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to identify any errors in the presentence investigation report. To the extent that appellant referred to the statement at sentencing regarding the accuracy of the report, the State's contention at sentencing was that the report did not sufficiently describe appellant's offenses—facts that were not mitigating or beneficial to appellant. Appellant failed to demonstrate by a reasonable probability

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Illinois conviction for conspiracy to commit armed robbery and attempt armed robbery.

that he would have received a different sentence had trial counsel objected to the report or insisted on a new report. Therefore, we conclude that the district court did not err in denying this claim.

Eighth, appellant claimed that his trial counsel was ineffective for failing to object to the fact that the habitual criminal notice was not properly filed. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to provide any facts supporting this claim, and the record indicates that the State filed notice in the original charging information and in a separate notice of intention to seek habitual criminal treatment filed approximately two months before sentencing. NRS 207.016(2). Therefore, we conclude that the district court did not err in denying this claim.

Ninth, appellant claimed that his trial counsel was ineffective for failing to present mitigating evidence, including a letter from a treatment program willing to accept appellant. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel submitted a sentencing memorandum, which contained mitigating facts. The sentencing memorandum further referred to appellant's acceptance into an in-patient treatment program. Appellant failed to demonstrate by a reasonable probability that he would have received a different sentence had trial counsel made additional mitigation arguments. Therefore, we conclude that the district court did not err in denying this claim.

Tenth, appellant claimed that trial counsel was ineffective for failing to move to withdraw the guilty plea when the State allegedly breached the plea agreement by introducing a violent prior conviction not

set forth in the original charges. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced as he failed to demonstrate a breach of the plea agreement. As discussed earlier, the State introduced one additional violent felony conviction in the notice of habitual criminality filed two months before sentencing. The State retained the right to argue at sentencing, and the filing of the notice was timely in the instant case. NRS 207.016(2). Therefore, we conclude that the district court did not err in denying this claim.

Eleventh, appellant claimed that counsel was ineffective for failing to file a direct appeal despite being asked to do so. Appellant failed to demonstrate by a preponderance of the evidence that he asked counsel to file an appeal. Trial counsel testified at the evidentiary hearing that he was not contacted by appellant after sentencing, but that if he had been asked he would have filed an appeal.⁴ Substantial evidence supports the district court's findings that counsel was not asked to file an appeal, and thus, we conclude that the district court did not err in denying this claim.


Twelfth, appellant claimed that the above errors constituted cumulative error. However, as appellant failed to demonstrate that trial

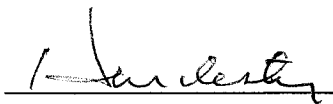
⁴Although appellant testified that he left a message for counsel after sentencing on trial counsel's voice mail, trial counsel testified that he did not receive a message and that no one checked his messages for him. The district court did not find credible appellant's testimony that a woman that appellant could not name called appellant after listening to the message on trial counsel's voice mail.

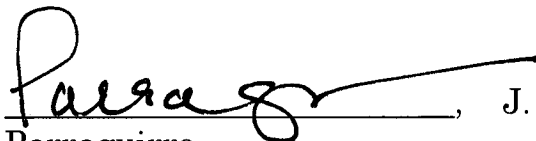
counsel was ineffective, he failed to demonstrate cumulative error.

Finally, we note that our review of the record indicates a typographical error in the judgment of conviction. Appellant entered a guilty plea to and was sentenced for the crime of burglary. However, the judgment of conviction sets forth the crime as larceny. We direct the district court to enter a corrected judgment of conviction setting forth the correct offense. NRS 176.565. Accordingly, we

ORDER the judgment of the district court AFFIRMED AND REMAND this matter to the district court for correction of the judgment of conviction.⁵


_____, J.
Saitta


_____, J.
Hardesty


_____, J.
Parraguirre

⁵We 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. Jackie Glass, District Judge
Christopher Litwin
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk