

IN THE SUPREME COURT OF THE STATE OF NEVADA

KYLE TYLER DOMINA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57556

FILED

JUL 13 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. W. [Signature]*
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; Donald M. Mosley, Judge.

In his petition filed on August 11, 2010, appellant claimed that he received ineffective assistance of trial 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 Strickland). In order to demonstrate prejudice to invalidate a guilty plea, a petitioner must demonstrate that there is a

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).

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 pressured him into waiving his preliminary hearing and taking the plea deal offered by the State. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant was personally canvassed about the waiver of the preliminary hearing. In entering his guilty plea, appellant affirmatively acknowledged that no one was forcing him to enter a plea, that he was entering a plea freely, and that he had read and understood the plea agreement. Appellant failed to set forth any facts demonstrating that he was pressured into accepting the plea negotiations in the instant case. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to file a motion to suppress an allegedly tainted identification procedure, failing to file a motion to view new evidence, and failing to adequately research the case. Appellant failed to set forth any specific facts in support of these claims, and thus, 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 these claims.

Third, appellant claimed that trial counsel was ineffective for failing to adequately communicate with him. Appellant failed to demonstrate that he was prejudiced as he failed to demonstrate that there

was a reasonable probability that with further communication he would not have entered a guilty plea and would have insisted on proceeding to trial. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective in advising him that he would receive 2 concurrent terms of 28 to 72 months. Appellant failed to demonstrate that he was prejudiced. The plea agreement informed appellant of the potential penalties and the fact that sentencing decisions were left to the discretion of the district court. Appellant was personally canvassed about the potential penalties he faced by entry of his guilty plea to assault with a deadly weapon and robbery and that sentencing was up to the district court. Appellant's mere subjective belief regarding sentencing was insufficient to invalidate his decision to enter a guilty plea. Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975). 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 file a motion to continue sentencing because the judge at sentencing was different than the judge who accepted the guilty plea. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel filed a motion to continue sentencing. Dieudonne v. State, 127 Nev. ___, ___, 245 P.3d 1202, 1205-07 (2011) (holding no right to be sentenced by the judge who accepted the plea absent an express agreement or indication by the defendant that the plea was entered with that expectation). 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 timely provide him with a copy of his presentence investigation report, particularly because the presentence investigation report contained an error about whether he had served a prior prison term. Appellant failed to demonstrate that he was prejudiced. When the district court repeated the mistake in the report at the sentencing hearing, appellant's trial counsel informed the district court that the information was incorrect. Appellant's trial counsel presented a sentencing memorandum for the district court's consideration prior to sentencing which detailed his past troubles and his amenability to turning his life around. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had he received the presentence investigation report earlier. Therefore, we conclude that the district court did not err in denying this claim.

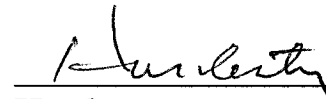
Seventh, appellant claimed that his trial counsel was ineffective for failing to file a notice of appeal on his behalf. Although trial counsel did not file a notice of appeal from the judgment of conviction, appellant filed his own notice of appeal. Appellant litigated his direct appeal with the assistance of counsel. Domina v. State, Docket No. 53664 (Order of Affirmance, September 24, 2009). Because appellant was not deprived of a direct appeal due to trial counsel's failure to file the notice of appeal, we conclude that the district court did not err in denying this claim.

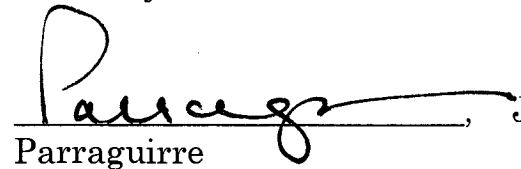
Next, appellant claimed that his sentence was based on materially false statements at sentencing and his sentence was cruel and unusual punishment. These claims were outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus

challenging a judgment of conviction based upon a guilty plea. NRS 34.810(1)(a). Therefore, we conclude that the district court did not err in denying these claims. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Saitta


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Donald M. Mosley, District Judge
Kyle Tyler Domina
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk