IN THE SUPREME COURT OF THE STATE OF NEVADA

RUDELPHO ANTONIO AGUAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57782

FILED

NOV 17 2011

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus and a post-conviction petition for a writ of habeas corpus filed pursuant to Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994). Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Direct Appeal Claims

Appellant first claims that NRAP 3C is unconstitutional. We need not address this claim, because appellant fails to support it with cogent argument or relevant authority. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Moreover, as a separate and independent ground to deny relief, this court has held that NRAP 3C is constitutional. Wood v. State, 115 Nev. 344, 352, 990 P.2d 786, 791 (1999).

Appellant next claims that the Lozada remedy results in unjustified delay in the appeals process and thus, pursuant to George v. State, 122 Nev. 1, 127 P.3d 1055 (2006), he is entitled to a new trial. Appellant fails to demonstrate that he is entitled to relief. In George, the district court's error resulted in such a long delay of the appeal that trial transcripts and evidence were destroyed so that the appellant was unable to effectively prosecute his appeal. Id. at 4, 127 P.3d at 1057. In contrast,

while appellant here complains of a delay in his appeal, he cites to no facts that indicate his ability to prosecute his appeal has been hindered. Further, while appellant urges this court to replace the Lozada remedy with a "delayed appeal" option favored in other jurisdictions, he fails to state how the delay occasioned by that process would be an improvement over any delay occasioned by the Lozada remedy. To the extent appellant complains that he must show what he would have raised in the direct appeal in order to qualify for the Lozada remedy, he is in error. Lozada, 110 Nev. at 357, 871 P.2d at 949; see generally Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999) (recognizing that the Lozada remedy is available in guilty-plea cases).

Appellant also claims that the district court abused its discretion when it sentenced appellant to consecutive terms while relying upon suspect evidence and without taking into consideration evidence of mitigation. Appellant does not state what "suspect evidence" he believes the district court relied on. Further, his claim in mitigation—that counsel failed to advise the district court that he had advised his client to waive suppression issues in exchange for the plea—is in direct conflict with appellant's post-conviction claim that counsel was ineffective for failing to advise him of the suppression issue. Because appellant fails to support his claims with cogent argument or relevant authority, we decline to consider them. Maresca, 103 Nev. at 673, 748 P.2d at 6. To the extent that appellant claims that the sentence imposed in this case was excessive, possibly in violation of the Eighth Amendment, we note that the sentence imposed was within the statutory limits, NRS 453.3385(1); NRS 202.350; NRS 193.130, and appellant fails to demonstrate that the sentence is so unreasonably disproportionate to the offense that it shocks the conscience. Allred v. State, 120 Nev. 410, 420-21, 92 P.3d 1246, 1253-54 (2004),

limited on other grounds by Knipes v. State, 124 Nev. 927, 192 P.3d 1178 (2008).

For the foregoing reasons, we affirm the denial of the Lozada petition.

Post-Conviction Claims

On appeal from the denial of his November 26, 2008, petition, appellant first argues that the district court erred in denying his claim of ineffective assistance of trial counsel. To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate (a) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness and (b) resulting prejudice in 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 v. Washington, 466 U.S. 668, 697 (1984).

Appellant argues that the district court erred in concluding that counsel was not ineffective for failing to move to suppress appellant's incriminating statements or physical evidence seized as the result of an illegal search. Appellant failed to demonstrate deficiency or prejudice because he failed to demonstrate that the motion to suppress would have succeeded. See Kirksey, 112 Nev. at 990, 923 P.2d at 1109. Appellant did not contend that the officer would not have obtained a search warrant but for his illegal entry, and the search warrant affidavit contained sufficient information from a source independent of the illegal searches to support probable cause to issue a search warrant. See Murray v. United States, 487 U.S. 533, 540 (1988). Moreover, appellant was granted an evidentiary hearing on his claims yet failed to present any evidence to the district

court that, but for counsel's alleged deficiency, he would not have pleaded guilty but would have insisted on going to trial. We therefore conclude that the district court did not err in denying these claims.

Appellant next argues that the district court erred in dismissing his claim that his guilty plea was involuntary because the drugs seized did not belong to appellant, the district court did not first hear testimony from trial counsel, and appellant would have gone to trial had counsel discussed with him possible defense strategies. Appellant failed to carry his burden of proof at the evidentiary hearing. See Means v. State, 120 Nev. 1001, 1018, 103 P.3d 25, 36 (2004). First, the record does not support appellant's claim that the drugs did not belong to him. During his guilty plea colloquy, appellant answered in the affirmative when asked whether he had done what the drug-trafficking count alleged. His testimony at the evidentiary hearing did not contradict this; rather he testified only that he had told the police that the drugs were not his. Second, appellant failed to call trial counsel to testify and cannot now assign error to the district court for failing to consider evidence that appellant did not present. Finally, appellant presented no evidence as to what he would have done had counsel discussed defense strategies. We therefore conclude that the district court did not err in denying this claim.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

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