

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID MICHEL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57829

FILED

MAR 07 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angela*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order denying a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.

In his petition filed on June 25, 2010, appellant claimed that he received ineffective assistance of trial counsel.² 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

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).

²To the extent that appellant raised any of the underlying claims independently from his ineffective assistance of counsel claims, those 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). To the extent that appellant sought to modify his sentence, appellant failed to demonstrate that the district court relied on a material mistake of fact about his criminal record that worked to his extreme detriment. Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

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). To demonstrate prejudice 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 trial counsel failed to request a continuance at sentencing, investigate and object to errors in the presentence investigation report. Specifically, appellant claimed that the presentence investigation report mistakenly set forth 6 prior prison terms, mislabeled the instant offense as escape with a deadly weapon causing substantial bodily harm when no weapon or harm occurred, and falsely stated that he had failed to appear in this case. Appellant failed to demonstrate that his trial counsel's performance was deficient and that he was prejudiced. At the sentencing hearing, appellant's trial counsel did object to the mislabeling of the instant offense and informed the court that

no weapon or harm had occurred in the instant case. Appellant failed to demonstrate that the failure-to-appear information was incorrect in the instant case or that it was relied upon by the court. Appellant's criminal history included eleven prior felony convictions, and appellant failed to demonstrate that the total number of prison terms imposed was incorrect.³ In imposing the sentence, the district court judge, reflecting on appellant's criminal history, stated "the greatest predictor of future behavior is past behavior." Appellant failed to demonstrate that a request for a continuance, any further investigations or objections would have had a reasonable probability of altering the outcome at sentencing. Therefore, we conclude that the district court did not err in denying this claim.

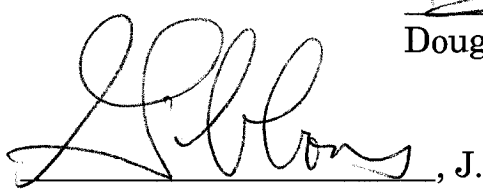
Second, appellant claimed that trial counsel was ineffective for failing to present mitigating arguments and testimony at sentencing. Appellant failed to demonstrate that his trial counsel's performance was deficient and that he was prejudiced. Appellant's trial counsel did present the argument that five of the eleven prior felony convictions were traffic-related offenses. Trial counsel further presented the court with letters from appellant's family members. Appellant failed to demonstrate that further mitigating arguments would have had a reasonable probability of altering the outcome at sentencing in this case. Therefore, we conclude that the district court did not err in denying this claim.

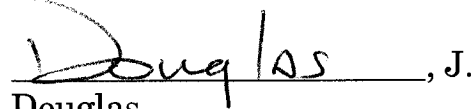
Finally, appellant claimed that his trial counsel was ineffective for failing to inform him about the right to appeal or file an appeal on his behalf. To the extent that appellant claimed his trial

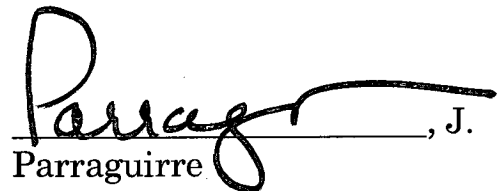
³The information in the record appears to indicate that while six prison terms may have been imposed, many of these terms were imposed to be served concurrently with other terms.

counsel was ineffective for failing to advise him of the right to appeal, appellant failed to demonstrate that his counsel was ineffective. Notably, appellant was informed of his limited right to appeal in the written guilty plea agreement. Davis v. State, 115 Nev. 17, 19, 974 P.2d 658, 659 (1999). Further, there is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to pursue a direct appeal unless the defendant inquires about an appeal or there exists a direct appeal claim that has a reasonable likelihood of success. Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999); see also Roe v. Flores-Ortega, 528 U.S. 470 (2000). Appellant did not allege that he asked counsel to file a direct appeal and failed to demonstrate that there existed a direct appeal claim that had a reasonable likelihood of success. Therefore, we conclude that the district court did not err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁴


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Parraguirre

⁴We 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. Valorie J. Vega, District Judge
David Michel
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk