

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARY JERARD PICKETT,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 58191

**FILED**

OCT 05 2011

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
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.<sup>1</sup> Eighth Judicial District Court, Clark County; David B. Barker, Judge.

In his petition filed on January 27, 2011, 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-

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<sup>1</sup>This 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 Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). To prove prejudice sufficient to invalidate the decision to enter a guilty plea, appellant 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 his trial counsel was ineffective for advising him to enter a guilty plea which included a stipulation to large habitual criminal treatment under NRS 207.010 for the robbery count. Appellant claimed that trial counsel failed to challenge the change in terminology employed to describe the negotiations, failed to adequately investigate the validity of his prior convictions, and failed to adequately advise him of the habitual criminal adjudication process and the potential penalties for habitual criminal adjudication.

Appellant failed to demonstrate that his trial counsel's performance was deficient. Appellant's argument that he was not permitted to enter into a stipulation as a matter of law was incorrect as NRS 207.016(6) permits a court to impose an adjudication of habitual criminality based on a stipulation.<sup>2</sup> See also Hodges v. State, 119 Nev.

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<sup>2</sup>Notably, appellant was provided adequate notice and the State presented proof of five valid prior felony convictions at the sentencing  
*continued on next page . . .*

479, 484, 78 P.3d 67, 70 (2003). No substantive change occurred between the preliminary hearing and the plea canvass in the terminology to describe the plea negotiations. Appellant was further correctly informed of the penalty for large habitual criminal treatment in the written guilty plea agreement and during the plea canvass. Further, appellant failed to demonstrate that he was prejudiced as appellant received a substantial benefit in the instant case. In exchange for a guilty plea to one count of burglary while in possession of a firearm, one count of conspiracy to commit robbery, one count of robbery with a deadly weapon, and one count of possession of a firearm by an ex-felon and a stipulation to large habitual criminal treatment for the robbery count with an agreed upon sentence of ten to twenty-five years, the State agreed to the dismissal of twenty additional felony counts.<sup>3</sup> Therefore, we conclude that the district court did not err in denying this claim.

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*... continued*

hearing. Any error in presenting two additional, invalid prior convictions was harmless as the other five convictions presented, which contain either seals or certification stamps, were more than sufficient for large habitual criminal treatment. NRS 207.010(1)(b); NRS 207.016(5).

<sup>3</sup>In regard to the dismissed counts, appellant faced the possibility of being adjudicated a habitual criminal and life imprisonment for each count.

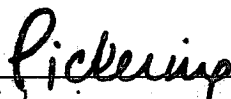
Second, appellant claimed that his trial counsel was ineffective for failing to investigate or present mitigating arguments at sentencing. Appellant failed to demonstrate that he was prejudiced. The district court imposed the sentence that appellant stipulated to receiving. Appellant failed to demonstrate by a reasonable probability that the district court would have dismissed the count of habitual criminality or that he would have received a lesser sentence had trial counsel presented mitigating arguments at sentencing. Therefore, we conclude that the district court did not err in denying this claim.

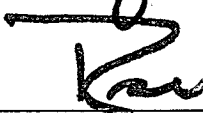
Next, appellant claimed that his plea was invalid because he was not personally canvassed about the habitual criminal adjudication process and any rights he waived by stipulating to large habitual criminal treatment. Appellant further claimed that he felt pressured into accepting the plea due to his co-defendant's acceptance of plea negotiations.


Appellant failed to carry his burden of establishing that the plea was not entered knowingly and intelligently. State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994). Appellant was properly and personally canvassed about the terms of the negotiations and the potential penalties he faced by entry of his plea. In entering his plea, appellant acknowledged that it was being entered voluntarily. Therefore, we conclude that the district court did not err in denying this claim.

Finally, appellant claimed that the district court improperly adjudicated him a habitual criminal for a number of reasons. These challenges were outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based on a guilty plea. NRS 34.810(1)(a). Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>4</sup>

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, Sr. J.  
Rose

  
\_\_\_\_\_, Sr. J.  
Shearing

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<sup>4</sup>The Honorables Robert Rose and Miriam Shearing, Senior Justices, participated in the decision of this matter under general orders of assignment.

We 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. David B. Barker, District Judge  
Cary Jerard Pickett  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk