

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAUL CARDONA, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58635

FILED

FEB 08 2012

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

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; Jerome T. Tao, Judge.

In his petition, filed on February 5, 2011, appellant raised several claims 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

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).

shown. Strickland v. Washington, 466 U.S. 668, 697 (1984). To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that, if true and not repelled by the record, would entitle him to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

First, appellant claimed counsel was ineffective for failing to move to dismiss count two on the grounds that appellant could not be convicted of conspiracy with the use of a deadly weapon. Appellant failed to demonstrate deficiency or prejudice. Appellant's factual assertions were belied by the record as he was not charged with conspiracy with the use of a deadly weapon, but rather with conspiracy to commit robbery (count one) and robbery with the use of a deadly weapon (count two). We therefore conclude that the district court did not err in denying this claim.

Second, appellant claimed that counsel was ineffective for failing to move to dismiss count two on the grounds that a conviction for both conspiracy to commit robbery and robbery with the use of a deadly weapon violated the Double Jeopardy Clause. Appellant failed to demonstrate deficiency or prejudice. Such a dual conviction does not violate the Double Jeopardy clause because each crime requires proof of an element which the other does not. Blockburger v. United States, 284 U.S. 299, 304 (1932); compare Nunnery v. Dist. Ct., 124 Nev. 477, 480, 186 P.3d 886, 888 (2008) (holding that conspiracy is “an agreement between two or more persons for an unlawful purpose” (quoting Bolden v. State, 121 Nev. 908, 912, 124 P.3d 191, 194 (2005))) with NRS 200.380(1) (defining robbery as the “unlawful taking of personal property from the person of another, or in the person’s presence, against his or her will, by means of force or violence or fear of injury”) and NRS 193.165 (providing enhanced

sentencing when certain crimes are committed with the use of a deadly weapon). We therefore conclude that the district court did not err in denying this claim.

Third, appellant claimed that counsel was ineffective for failing to advise him that the sentence for which he negotiated was illegal, thus rendering his guilty plea invalid. Specifically, appellant claimed that the State stipulated that his sentence for robbery would run concurrent to that for its attendant deadly weapon enhancement and that counsel should have known that the State could not do so. Appellant failed to demonstrate prejudice. Appellant acknowledged in his written guilty plea agreement and during his plea colloquy that the deadly weapon enhancement was to run consecutive to robbery. We therefore conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that counsel was ineffective for failing to call mitigating witnesses at the sentencing hearing. Appellant failed to demonstrate deficiency or prejudice. Appellant failed to support this claim with specific factual allegations that, if true, would have entitled him to relief, such as who the witnesses were, what they would have said, or how their testimony would have affected the outcome of his sentencing. We therefore conclude that the district court did not err in denying this claim.

Finally, appellant claimed that counsel was ineffective for failing to file a direct appeal despite a specific demand from appellant that counsel do so. The district court did not hold an evidentiary hearing on this claim. Appellant's claim was not belied by the record and, if true, would have entitled him to relief pursuant to NRAP 4(c). We therefore

conclude that the district court erred in denying the petition without conducting an evidentiary hearing on this claim.²

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

Cherry, J.
Cherry

Pickering, J.
Pickering

Hardesty, J.
Hardesty

cc: Hon. Jerome T. Tao, District Judge
Raul Cardona, Jr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²Appellant also claimed that the district court should have ordered a new presentence investigation report, that the State violated the guilty plea agreement, and that appellant was denied credit for time served. Appellant's claims were outside the scope permissible in a post-conviction petition for a writ of habeas corpus arising out of a conviction pursuant to a guilty plea. NRS 34.810(1)(a). We therefore conclude that the district court did not err in denying these claims.