

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONIO RICHARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58857

FILED

MAY 09 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie K. Lindeman*
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; Valorie J. Vega, Judge.

In his petition filed on November 1, 2010, appellant challenged the validity of his plea. He claimed that his plea of guilty should have been withdrawn because the State breached the plea agreement because it did not prove that appellant committed a crime after entering his plea.² Further, he argued that if he was the one who breached the plea agreement, he should have been allowed to withdraw

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 claims that the State breached the plea agreement by arguing for large habitual criminal treatment rather than the small habitual criminal treatment, this is belied by the record. The plea agreement did not limit the State to only arguing for small habitual criminal treatment if appellant breached the plea agreement by committing new crimes after entry of his plea and prior to sentencing. Specifically, the State was allowed to argue for any lawful sentence.

his plea. Appellant failed to demonstrate that the State breached the plea agreement or that his plea should have been withdrawn.

The first inquiry to be made is who breached the guilty plea agreement. If it is apparent that the defendant is to blame for the breakdown of the plea agreement, no evidentiary hearing is necessary to determine who was to blame. Villalpando v. State, 107 Nev. 465, 467-68, 814 P.2d 78, 80 (1991). Further, there are four factors to consider when determining the remedy for a breached plea agreement: (1) “who broke the bargain,” (2) “whether the violation was deliberate or inadvertent,” (3) “whether circumstances have changed between the entry of the plea and sentencing,” and (4) “whether additional information has been obtained that, if not considered, would constrain the court to a disposition that it determines to be inappropriate.” Citti v. State, 107 Nev. 89, 92, 807 P.2d 724, 726 (1991) (quoting Van Buskirk v. State, 102 Nev. 241, 243-44, 720 P.2d 1215, 1216 (1986)). Specific performance of the plea agreement may be allowed “when it will implement the reasonable expectations of the parties without binding the trial judge to a disposition that he or she considers unsuitable under all circumstances.” Id. at 92, 807 P.2d at 726-27 (quoting Van Buskirk, 102 Nev. at 244, 720 P.2d at 1216-17).

In this case it is clear that appellant, rather than the State, is to blame for the breach of the plea agreement. The plea agreement contained a term stating: “I understand that if I fail to appear for the scheduled sentencing date or I commit a new criminal offense prior to sentencing the State of Nevada would regain the full right to argue for any lawful sentence.” Appellant was arrested on two new charges after entering his plea and before sentencing. Further, the district court held a

bail reduction hearing³ where it heard evidence of the crimes from the victim and her daughter, and counsel was able to cross-examine them. The fact of the arrest and the evidence produced at the bail reduction hearing were sufficient to demonstrate that appellant breached the agreement in this case. Moreover, it is clear that the violation was deliberate rather than inadvertent, that the circumstances changed between the entry of the plea and sentencing, and that the district court may have been constrained to a disposition that it determined to be inappropriate. Specific performance of the term of the plea agreement—that the State could argue for any lawful sentence—implemented the reasonable expectations of the parties as that term was specifically stated in the plea agreement. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that he received ineffective assistance of counsel. To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his 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, 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).

³The bail reduction hearing was held after appellant's bail was revoked when he received the new charges.

First, appellant claimed that counsel was ineffective for failing to object to the admission of photographs at sentencing from a different crime than appellant was being sentenced for. Appellant failed to demonstrate that counsel was deficient. One of the terms of appellant's plea agreement stated that if appellant committed another crime between the date the plea was entered and sentencing, the State could argue for any lawful sentence. The photographs were admitted in order to demonstrate that appellant had committed a crime after he entered his plea and prior to sentencing. Counsel is not required to make frivolous objections. Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Therefore, the district court did not err in denying this claim.

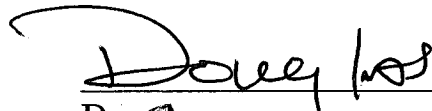
Second, appellant claimed that counsel was ineffective for failing to object to the district court's decision to sentence appellant as a habitual criminal. This claim is belied by the record. Counsel argued against appellant being sentenced as a habitual criminal. To the extent that appellant claimed that counsel was ineffective for failing to object based on the State's failure to file the notice of intent to seek habitual criminal adjudication, appellant failed to demonstrate deficiency because this claim lacks merit. The State did file a notice of intent with the information, and any attempt to object would have been futile. Id. Therefore, the district court did not err in denying this claim.

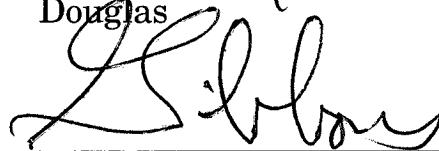
Third, appellant claimed that counsel was ineffective for failing to file a direct appeal after he requested counsel to do so. Appellant failed to demonstrate that counsel was ineffective. The district court conducted an evidentiary hearing on this issue. Counsel testified that appellant did not request that she file an appeal. The district court found this testimony to be credible, and substantial evidence supports this

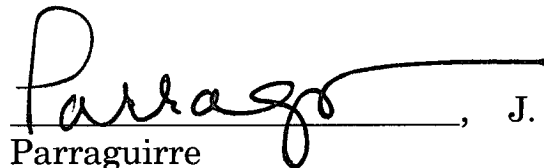
determination. See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). Therefore, the district court did not err in denying this claim.

Next, appellant raised several claims outside the scope of a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a plea of guilty: the State failed to file the notice of intent to seek habitual criminal treatment, the habitual criminal statute is unconstitutional, his sentence is cruel and unusual punishment because the sentence is disproportionate to the crime, his arrest violated the Fourth Amendment, and the district court abused its discretion in sentencing him to the large habitual because the notice of intent was not filed and appellant did not have the requisite qualifying convictions. The district court did not err in denying these claims. See NRS 34.810(1)(a). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Hon. Valorie J. Vega, District Judge
Antonio Richard
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk