

IN THE SUPREME COURT OF THE STATE OF NEVADA

AMRITA A. SANZARI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58917

FILED

DEC 07 2011

TRACEE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Anderson*
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; Doug Smith, Judge.

In his petition filed on November 30, 2010, appellant claimed that he received ineffective assistance of 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 reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings

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).

²Appellant amended his petition twice. To the extent that appellant raised any of his claims independently of his claims of ineffective assistance of counsel, 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 on a guilty plea. NRS 34.810(1)(a).

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 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, 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 that his trial counsel was ineffective for failing to object to the district court's treatment of his attempted theft as a felony when the State failed to establish the monetary amount. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant was originally charged with burglary, a felony, and entered a guilty plea to attempted theft, an offense that could be treated as a felony or as a gross misdemeanor. In entering his guilty plea, appellant acknowledged that the district court could treat the offense as either a felony or a gross misdemeanor. Appellant's entry of a guilty plea waived the State's burden of proof. Further, we note that appellant's counsel did ask the district court to treat the offense as a gross

misdemeanor. 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 object to a mistake in the presentence report that was repeated by the district court at sentencing about the number of felony convictions and the number of incarcerations. Appellant failed to demonstrate that he was prejudiced. Appellant's trial counsel did explain that the instant offense occurred two years earlier and while the investigation was ongoing, appellant committed new offenses and was convicted in three new cases. Appellant corrected the district court regarding the number of prison terms served. The district court considered appellant's criminal history as a whole, which included revocation of probation, in determining that appellant's offense was to be treated as a felony and that he was to serve a prison term. Appellant failed to demonstrate by a reasonable probability that had trial counsel objected further that the district court's sentencing decision would have been different. Therefore, we conclude that the district court did not err in denying this claim.³

Third, appellant claimed that his trial counsel was ineffective for failing to file an appeal despite being requested to do so. Appellant failed to demonstrate by a preponderance of the evidence that he asked trial counsel to file an appeal. Although appellant testified that he sent a letter asking for an appeal, trial counsel testified that he was not asked to

³To the extent that appellant claimed that his trial counsel was ineffective for failing to have the instant offense decided before the other three cases, appellant failed to demonstrate that his trial counsel's performance was deficient and that he was prejudiced.

file an appeal before the expiration of the 30-day appeal period. Therefore, we conclude that the district court did not err in denying this claim.⁴

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Gibbons, J.
Gibbons

Pickering, J.
Pickering

cc: Hon. Doug Smith, District Judge
Amrita A. Sanzari
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁴To the extent that appellant claimed that his trial counsel failed to inform him of the right to appeal, appellant failed to demonstrate that he was prejudiced. Ignoring the inconsistency with the claim discussed above, we note that the written guilty plea agreement informed appellant of the limited right to appeal. Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).