

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALVIN MOZCO RODRIGUEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58977

FILED

JAN 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *H. Angasul*
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; Valerie Adair, Judge.

In his petition filed on September 17, 2010, appellant claimed that he received ineffective assistance of counsel. To prove that trial counsel was ineffective, appellant 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 was a reasonable probability of a different result in the proceedings. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984). To prove prejudice to invalidate the

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).

decision to enter a guilty plea, appellant must demonstrate that he 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). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697. A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel by a preponderance of the evidence, Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004), and the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, appellant claimed that his trial counsel was ineffective for promising him concurrent sentences and advising him to enter a guilty plea that had no benefit to appellant. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel testified at the evidentiary hearing that he did not promise appellant concurrent sentences. The guilty plea agreement did not contain a promise of concurrent sentences. Rather, the State retained the right to argue at sentencing and appellant was informed in the written guilty plea agreement and during the plea canvass that the district court had discretion to impose concurrent or consecutive sentences. In entering his guilty plea, appellant affirmatively acknowledged that his decision to enter a guilty plea was not motivated by any promises not contained in the written guilty plea agreement. Appellant's mere subjective belief regarding sentencing was insufficient to

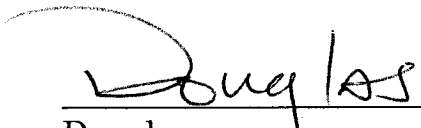
invalidate his decision to enter a guilty plea. Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975). Further, appellant received a substantial benefit by entry of his guilty plea to second-degree kidnapping as he avoided a more serious charge of first-degree kidnapping with a deadly weapon and additional charges of conspiracy to commit kidnapping, attempted robbery with the use of a deadly weapon, and battery with use of a deadly weapon. Therefore, we conclude that the district court did not err in denying this claim.


Second, appellant claimed that his trial counsel was ineffective for failing to request concurrent sentences at sentencing. Appellant failed to demonstrate that his counsel's performance was deficient in this regard as the record reflects that trial counsel did request concurrent sentences. Therefore, we conclude that the district court did not err in denying this claim.

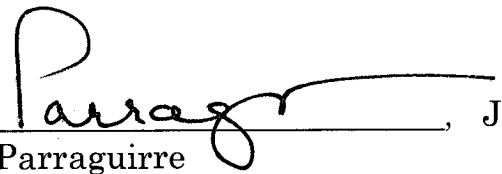
Third, appellant claimed that his trial counsel was ineffective for failing to file an appeal despite being requested to do so. Appellant failed to demonstrate that his trial counsel's performance was deficient. Trial counsel testified that he was not asked to file an appeal. At the conclusion of the hearing, after hearing appellant's testimony, the district court stated that it believed the testimony of appellant's trial counsel and

denied the claim.² The record supports the finding of the district court. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

²The district court stated that trial counsel had no duty to file an appeal because there were not any nonfrivolous grounds to raise on direct appeal. This statement incorrectly summarized trial counsel's duty: when a client has requested an appeal, trial counsel has a duty to file a notice of appeal and prejudice is presumed when trial counsel fails to file the notice of appeal after requested to do so. Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003). The existence of nonfrivolous grounds for an appeal implicates trial counsel's duty to inform a client about the right to a direct appeal—a duty different from the duty to file a notice of appeal when requested to do so. Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999). Nevertheless, because trial counsel testified that appellant did not request a direct appeal and because the district court found this testimony to be credible, we affirm the decision of the district court to deny appellant's claim that he was deprived of a direct appeal due to the ineffective assistance of counsel. See Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding that a correct result will not be reversed simply because it is based on the wrong reason).

cc: Hon. Valerie Adair, District Judge
Alvin Mozco Rodriguez
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk