

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARC PAUL SCHACHTER,  
Appellant,  
vs.  
ROBERT LEGRAND, WARDEN,  
Respondent.

No. 59326

**FILED**

MAR 30 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *Angela*  
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> Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

In his petition, filed on August 4, 2010, appellant claimed that he received 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 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, the result of the proceedings would have been different. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Both

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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 Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

components of the inquiry must be shown. Strickland v. Washington, 466 U.S. 668, 697 (1984).

First, appellant claimed that counsel was ineffective for failing to object to a statement by a representative of the Department of Parole and Probation that the sentence recommendation in the report filed by the department was a “mistake” because it was drafted by a new employee who did not understand the deviation procedures for someone with a significant criminal history. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. The remarks by the representative were a simple statement of fact, and were not inappropriate. Counsel was not required to make futile objections. See Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Accordingly, the district court did not err in denying this claim.

Second, appellant claimed that counsel was ineffective for telling appellant to keep his comments “short and sweet” at sentencing, and for failing to present mitigating evidence, including appellant’s problems with gambling and substance abuse as well as the difficulty appellant had in obtaining employment. Appellant failed to demonstrate that he was prejudiced. Given appellant’s significant criminal history, appellant failed to demonstrate any reasonable probability of a different result at sentencing had counsel argued that appellant’s persistent gambling and substance abuse problems warranted leniency or had appellant made additional statements. Accordingly, the district court did not err in denying this claim.

Third, appellant claimed that counsel was ineffective for failing to inform the district court that due to the provisions of NRS 213.10885(4) (requiring the parole board to establish guidelines providing

greater punishment for persons with a history of repetitive criminal conduct), appellant was unlikely to be granted parole when he was first eligible. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. The minimum term of imprisonment for a category C felony is one year. NRS 193.130(2)(c). Appellant received a one-to-five-year sentence. Thus, even if the district court had wished appellant to receive his first parole hearing sooner than one year to account for the probable effects of NRS 213.10885(4), it was impossible pursuant to the statutory sentencing scheme.<sup>2</sup> Accordingly, the district court did not err in denying this claim.

In addition to his claims of ineffective assistance of counsel, appellant also claimed that his guilty plea was invalid. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently. 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). Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion. Hubbard, 110 Nev. at 675, 877 P.2d at 521. In determining the validity of a guilty plea, this court looks to the totality of the circumstances. State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. at 271, 721 P.2d at 367.

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<sup>2</sup>While the district court expressed hopes that appellant would be able to eventually complete a term of parole, based on appellant's criminal history, it also appeared that the district court intended appellant to have a lengthy period of supervision. The district court made no statement indicating that it anticipated appellant would be granted parole at the first opportunity.

First, appellant claimed that his guilty plea was not knowing and voluntary because he was misled regarding the minimum term of punishment. Appellant specifically claims he was not informed about the provisions of NRS 213.10885(4), which made it unlikely that he would receive parole when he first became eligible. Under the totality of the circumstances, appellant failed to demonstrate that his plea was not knowingly and intelligently entered. At the plea canvass, appellant indicated that he was aware that the issue of sentencing lay solely in the discretion of the district court, and that he faced a term of imprisonment of up to five years. Accordingly, appellant was aware of the possibility that he could spend up to five years in prison and was willing to take that chance. Appellant also received significant benefit from the entry of his plea: the State agreed to drop two additional felony charges and one gross misdemeanor charge and agreed not to seek habitual criminal treatment pursuant to NRS 207.010.<sup>3</sup> Therefore, the district court did not err in denying this claim.

Second, appellant claimed that the plea agreement was invalid because the State breached the plea agreement. Appellant claims that shortly before his first parole hearing, the State sent the parole board a letter indicating that appellant had a lengthy criminal history. Appellant failed to demonstrate how the State's actions constituted a breach of the plea agreement. The State reserved the right to argue for

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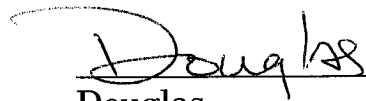
<sup>3</sup>To the extent appellant also argued that counsel was ineffective for failing to inform him of the consequences of NRS 213.10885(4), given these facts, appellant failed to demonstrate any reasonable probability that he would have insisted on going to trial had counsel discussed NRS 213.10885 with him.

the maximum punishment at sentencing and made no promises that they would not later contact the parole board. Accordingly, the district court did not err in denying this claim.

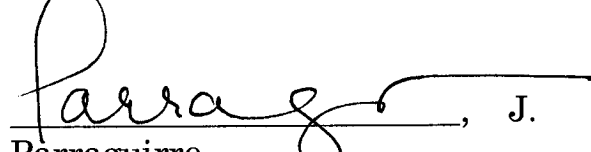
Finally, appellant contended that NRS 213.10885 is unconstitutional. This claim fell outside the type of claims permissible in a post-conviction petition for a writ of habeas corpus challenging the validity of a judgment of conviction and sentence resulting from the entry of a guilty plea. See NRS 34.810(1)(a). Accordingly, the district court did not err in denying this claim.

For the reasons stated above, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Connie J. Steinheimer, District Judge  
Marc Paul Schachter  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk