

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN KIRSCHBAUM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59434

FILED

MAY 09 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY H. Ingosol
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; Kathleen E. Delaney, Judge.

In his petition filed on June 7, 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, the outcome of the proceedings 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

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).

invalidate the decision to enter a guilty plea, a petitioner 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 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 properly challenge the kidnapping charges² as redundant and for failing to explain redundancy to appellant. Appellant failed to demonstrate prejudice. Appellant did not claim that but for counsel's errors, he would not have pleaded guilty but would have insisted on going to trial. Further, appellant received significant benefits in pleading guilty: The State dropped the deadly weapon enhancements in two of the charges to which appellant pleaded, dismissed one of appellant's three other pending felony cases, and agreed not to seek habitual criminal status that could have carried penalties of life without the possibility of parole. We therefore conclude that the district court did not err in denying these claims.

Second, appellant claimed counsel was ineffective for failing to investigate, prior to entering into plea negotiations, appellant's mental

²Appellant referred to "kidnapping charges" and thus appears to have been referring to the single count of kidnapping as well as the single count of attempted kidnapping.

state at the time he committed the crimes. Appellant further claimed that had counsel done so, he would have discovered that appellant's psychological conditions would have provided an insanity or incompetence defense or resulted in convictions for lesser-included offenses. Appellant failed to demonstrate deficiency or prejudice as he failed to support these claims with specific facts that, if true, would have entitled him to relief. Incompetence is not a defense, and appellant did not allege that he was "in a delusional state such that he [could not] know or understand the nature and capacity of his act [] or . . . that the act [was] not authorized by law." Finger v. State, 117 Nev. 548, 576, 27 P.3d 66, 84-85 (2001). Further, not only did appellant fail to identify any lesser-included offenses, but he did not explain how their existence would have affected his decision to plead guilty in light of the substantial benefit he received in exchange for his guilty plea. We therefore conclude that the district court did not err in denying these claims.

Third, appellant claimed counsel was ineffective for failing to ensure that appellant's guilty plea was entered into knowingly, voluntarily and intelligently in light of appellant having been on psychotropic medications at the time. Appellant failed to demonstrate deficiency or prejudice as he failed to support this claim with specific facts that, if true, would have entitled him to relief. He did not state whether counsel was aware at the time of the guilty plea that appellant was medicated or that, if counsel was aware, appellant gave counsel any reason to believe that the medications would have affected his guilty plea. The mere fact that appellant was being medicated for mental health issues did not itself render his plea invalid. Cf. Ybarra v. State, 103 Nev. 8, 13, 731 P.2d 353, 356-57 (1987) (noting that the majority of courts hold that competency

may be attained through the use of medication). Notably, appellant did not allege or demonstrate that he was incompetent to enter a guilty plea or, more specifically, that he did not understand the nature of the charges against him or that he was unable to assist counsel. Calvin v. State, 122 Nev. 1178, 1182-83, 147 P.3d 1097, 1100 (2006); see also Dusky v. U.S., 362 U.S. 402 (1960). We therefore conclude that the district court did not err in denying this claim.

Fourth, appellant claimed counsel was ineffective for failing to lay a foundation for “the eyewitness expert’s testimony” or to consult with the expert and for failing to consult with a fingerprint or DNA expert regarding a soda bottle that would have pointed to a third suspect in the crimes. Appellant failed to demonstrate deficiency or prejudice as he failed to support these claims with specific facts that, if true, would have entitled him to relief. Appellant did not identify the “eyewitness expert” or what his testimony would have been. Further, appellant did not explain how the expert or the existence of a third defendant would have affected his decision to enter a guilty plea. We therefore conclude that the district court did not err in denying these claims.

Fifth, appellant claimed counsel was ineffective for failing to meaningfully test the deadly weapon enhancements. Appellant failed to demonstrate deficiency or prejudice as he failed to support this claim with specific facts that, if true, would have entitled him to relief. As evidence of his claim, appellant pointed to a statement in his sentencing memorandum asserting that the State would concede that some, if not all, of the guns used in the crime spree were toys. Appellant, who was charged in three other temporally related cases involving burglaries or robberies, some of which were armed, did not claim that the gun used in

the instant crimes was a toy gun. We therefore conclude that the district court did not err in denying this claim.

Sixth, appellant claimed counsel was ineffective for failing to prepare appellant for or to present any mitigation evidence at the sentencing hearing. Appellant failed to demonstrate deficiency or prejudice. His claims that counsel did not prepare appellant or call any witnesses were bare and naked as he did not say how counsel could have better prepared him, what witnesses counsel should have called, what their testimony would have been, or how any of the above would have changed the outcome at sentencing. His remaining claims—that no mitigation evidence was presented, that he received a sentence of twenty years to life, and that the alleged triggerman received a lesser sentence—are repelled by the record. We therefore conclude that the district court did not err in denying these claims.

Seventh, appellant claimed counsel was ineffective for failing to object to a change in presiding judges between the change of plea and sentencing. Appellant failed to demonstrate deficiency or prejudice as his claim was belied by the record: The same judge took appellant's plea and sentenced him. We therefore conclude that the district court did not err in denying this claim.

Eighth, appellant claimed counsel was ineffective for failing to explain to him the post-judgment relief available, causing him to miss important filing deadlines. Appellant failed to demonstrate deficiency or prejudice. Notably, trial counsel withdrew and was replaced with a new, court-appointed appellate counsel prior to the deadline for filing a direct appeal. Moreover, appellant filed a timely direct appeal and post-conviction petition for a writ of habeas corpus and thus failed to

demonstrate a reasonable probability of a different outcome had he known of the deadlines earlier. We therefore conclude that the district court did not err in denying this claim.

Finally, appellant claimed that the above claims cumulatively amounted to ineffective assistance of trial counsel. Because this court has determined that appellant failed to demonstrate deficiency on all but the redundancy claim and that he failed to demonstrate prejudice for that claim, appellant cannot demonstrate cumulative error. We therefore conclude that the district court did not err in denying this claim.

Appellant also claimed that he received ineffective assistance from appellate counsel. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate (a) that counsel's performance was deficient in that it fell below an objective standard of reasonableness and (b) resulting prejudice in that the omitted issue would have a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. at 998, 923 P.2d at 1114. Appellate counsel is not required to—and will be most effective when he does not—raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Both components of the inquiry must be shown. Strickland, 466 U.S. at 697.

First, appellant claimed counsel was ineffective for improperly challenging his guilty plea on direct appeal and for not advising him on the proper vehicle for doing so. Appellant failed to demonstrate prejudice because the instant petition—in which appellant has challenged the validity of his guilty plea—was a proper vehicle. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986), as limited by Smith v. State, 110 Nev.

1009, 1010-11 n.1, 879 P.2d 60, 61 n.1 (1994). We therefore conclude that the district court did not err in denying this claim.

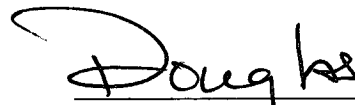
Second, appellant claimed counsel was ineffective for failing to communicate with appellant and seek his input during the appeal. Appellant failed to demonstrate prejudice as he failed to support these claims with specific facts that, if true, would have entitled him to relief. Appellant failed to state what additional claims counsel could have raised or how additional communication would have led to a reasonable probability of success on appeal. We therefore conclude that the district court did not err in denying these claims.


Third, appellant claimed counsel was ineffective for failing to communicate with and advise appellant after this court affirmed appellant's conviction on direct appeal. Specifically, appellant claimed counsel failed to discuss with appellant the possibility of a petition for rehearing or for en banc reconsideration, explain how the issuance of a remittitur from the direct appeal would trigger State and federal habeas deadlines and what those deadlines were, provide him with post-conviction legal forms, advise him of appellate claims that were available but not raised and of possible ineffective-assistance claims, or provide him with the trial and appellate records. Appellant failed to demonstrate deficiency or prejudice as he failed to support these claims with specific facts that, if true, would have entitled him to relief. Appellant failed to identify claims that he would have raised in a petition for rehearing or for en banc reconsideration. Appellant also failed to identify what federal filing deadlines he may have missed and, in light of his timely post-conviction habeas petition, how he was prejudiced by any lack of forms or records. Moreover, appellant failed to demonstrate a reasonable

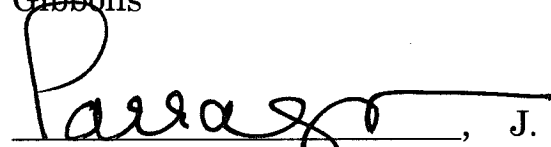
probability of success had counsel acted in the manner appellant suggested. We therefore conclude that the district court did not err in denying these claims.

Finally, appellant claimed that the above claims cumulatively amounted to ineffective assistance of appellate counsel. Although appellant alleged sufficient facts of deficiency on his claims of failure to communicate and of raising a futile invalid-guilty-plea claim, he failed to demonstrate prejudice for the reasons stated above. We therefore conclude that the district court did not err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Hon. Kathleen E. Delaney, District Judge
John Kirschbaum
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk