

IN THE SUPREME COURT OF THE STATE OF NEVADA

DOUGLAS L. GASHER, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59483

FILED

DEC 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *T. Malone*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

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; Michelle Leavitt, Judge.

In his petition filed on February 1, 2011, 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

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

1102, 1107 (1996). Both components of the inquiry must be shown. Strickland v. Washington, 466 U.S. 668, 697 (1984).

First, appellant claimed that trial counsel was ineffective for failing to object to his prior convictions because the State might not have provided the court with certified copies. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced because he failed to support this claim with specific facts that, if true, entitled him to relief. Hargrove v. State, 100 Nev. 498, 503-03, 686 P.2d 222, 225 (1984). Further, trial counsel stated at the sentencing hearing that he reviewed the prior convictions and determined that they were valid. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to object to the fact that the State did not file the notice of intent to seek habitual criminal treatment in the charging document. This claim is belied by the record. The notice of intent was filed in the charging document and trial counsel is not ineffective for failing to file futile motions. Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Therefore, the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to challenge the district court's adjudication of him as a habitual criminal. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Appellant failed to appear for his first sentencing hearing and committed a new offense while released on his own recognizance. Prior to the new sentencing hearing, appellant and the State negotiated the sentence under the small habitual criminal statute and agreed that appellant would be sentenced to 7 to 18 years and his sentence would run concurrent to the sentence imposed in another case.

Because the sentence was negotiated, trial counsel was not deficient for failing to argue against habitual criminal treatment. Further, trial counsel did argue against habitual criminal treatment in the sentencing memorandum filed prior to sentencing. Appellant also failed to demonstrate a reasonable probability of a different outcome at sentencing had trial counsel argued against habitual criminal treatment at sentencing. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective for failing to timely file the sentencing memorandum. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. The memorandum was filed two days prior to the sentencing hearing. The district court acknowledged at the evidentiary hearing that two days was plenty of time to review the sentencing memorandum prior to sentencing. Further, given appellant's failure to appear at his first sentencing hearing, the fact that he committed new offenses, and the negotiated sentence, appellant failed to demonstrate a reasonable probability of a different outcome had trial counsel filed the memorandum earlier. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to require the district court to hold a separate hearing for the habitual criminal adjudication pursuant to NRS 207.016. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. NRS 207.016 does not require a separate hearing from the sentencing hearing to impose the habitual criminal enhancement. Further, appellant failed to demonstrate a reasonable probability of a different outcome at sentencing had trial counsel moved for a separate hearing. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel was ineffective for failing to object to or move the court to correct appellant's illegal sentence. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Appellant's sentence was facially legal, see NRS 207.010(1)(a), and appellant failed to demonstrate that the district court lacked jurisdiction to sentence him. Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). Because the sentence was legal, appellant failed to demonstrate a reasonable probability of a different outcome at sentencing had trial counsel moved to correct the sentence. Therefore, the district court did not err in denying this claim.


Seventh, appellant claimed that trial counsel was ineffective for failing to challenge the habitual criminal statutes as violating Apprendi v. New Jersey, 530 U.S. 466 (2000). Appellant failed to demonstrate that counsel was deficient. This court has held that NRS 207.010 does not violate Apprendi, O'Neill v. State, 123 Nev. 9, 16, 153 P.3d 38, 43 (2007), and trial counsel is not deficient for failing to make futile objections. Donovan, 94 Nev. at 675, 584 P.2d at 711. To the extent that appellant argued that trial counsel was ineffective for failing to challenge the district court's use of the PSI during sentencing, appellant failed to demonstrate that the PSI contained facts that increased the penalty. A PSI informs the district court on factors to consider when determining a sentence within the penalty range. It does not increase the potential penalty. Therefore, the district court did not err in denying this claim.

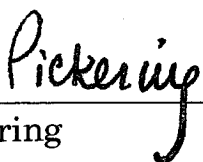
Finally, appellant claimed that trial counsel was ineffective for failing to file an appeal after he requested counsel to file one. This court has held that counsel has a duty to file an appeal when requested to do so.

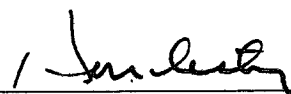
Toston v. State, 127 Nev. ___, ___, 267 P.3d 795, 800 (2011). Failure to file an appeal when requested is deficient performance for purposes of proving ineffective assistance of counsel. Lozada v. State, 110 Nev. 349, 354-57, 871 P.2d 944, 947-49 (1994). When a petitioner has been deprived of the right to appeal due to counsel's deficient performance, prejudice may be presumed. Id. at 357, 871 P.2d at 949.

At the evidentiary hearing held in this case, trial counsel testified that appellant probably did ask him to file an appeal. He testified that he probably told appellant there were no non-frivolous claims to raise on appeal. Trial counsel did not testify that appellant then decided to abandon the appeal. Because the record before this court demonstrates that appellant requested trial counsel to file an appeal and there is no evidence that appellant decided to abandon the request, we cannot affirm the district court's decision to deny this claim. Because we conclude that appellant was deprived of a direct appeal, the district court shall provide appellant with the remedy set forth in NRAP 4(c). Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Saitta


_____, J.
Pickering


_____, J.
Hardesty

cc: Hon. Michelle Leavitt, District Judge
Douglas L. Gasher, Jr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk