

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAMIEN N. PATTILLO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 59324

**FILED**

MAY 09 2012

TRACIE K. LINDEMAN  
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DAMIEN N. PATTILLO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 59538

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING IN DOCKET NO. 59324 AND ORDER OF AFFIRMANCE  
IN DOCKET NO. 59538

These are proper person appeals from orders denying a post-conviction petition for a writ of habeas corpus and a motion to correct or modify sentence.<sup>1</sup> Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge. We elect to consolidate these appeals for disposition. NRAP 3(b).

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<sup>1</sup>These appeals have 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).

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In his petition filed on December 15, 2010, appellant claimed that he received ineffective assistance of counsel. 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 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, the 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, 466 U.S. at 697.

First, appellant claimed that trial counsel failed to investigate facts, witnesses, documents and other evidence to determine if there was an applicable defense. Appellant failed to set forth specific facts in support of this claim, and thus, he failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that trial counsel should have investigated his psychological issues to determine if he was competent to enter a guilty plea. Again, appellant failed to set forth specific facts in

support of this claim.<sup>2</sup> Thus, he failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that trial counsel failed to explain the language in the plea agreement that stated that if he failed to appear for the sentencing hearing he was stipulating to small habitual criminal treatment and a sentence of 60 to 150 months. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Appellant affirmatively acknowledged during the plea canvass that he had read and understood the written guilty plea agreement. Appellant was further personally canvassed about his understanding of this term of the plea agreement. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective for advising him to enter a guilty plea that included the stipulation to small habitual criminal treatment if he failed to appear for sentencing. Appellant failed to demonstrate that he was prejudiced. In exchange for his plea in this case, appellant agreed to similar treatment in another pending case and the dismissal of three other cases. Appellant failed to demonstrate that it was reasonably probable that he would not have

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<sup>2</sup>Appellant failed to demonstrate that he was incompetent to enter a guilty plea because he did not demonstrate that he did not have a sufficient ability to consult with his lawyer with a reasonable degree of rational understanding and that he did not have factual understanding of the proceedings against him. NRS 178.400; see also Godinez v. Moran, 509 U.S. 389, 396-97 (1993); Dusky v. United States, 362 U.S. 402, 402 (1960); Riker v. State, 111 Nev. 1316, 1325, 905 P.2d 706, 711 (1995); Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983).

entered a guilty plea in the instant case absent this term. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel failed to properly advise him of the court dates and informed him that he did not need to be present for the first sentencing date. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant was informed at the plea canvass of the sentencing date, time, and department. Further, the district court during the plea canvass informed appellant to go to the Department of Parole and Probation immediately after the plea canvass. Appellant failed to appear for the announced sentencing date and failed to present himself to the Department of Parole and Probation for preparation of the presentence investigation report.<sup>3</sup> At the scheduled sentencing date, trial counsel informed the court that appellant had not been in contact with her and denied telling appellant that he did not have to show up for the first sentencing date. Appellant failed to demonstrate that he was prejudiced by not being informed of the date to hear the motion to quash the warrant. Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel failed to object to the State selectively prosecuting defendant as a habitual criminal when other defendants with similar records are not treated as habitual criminals. Appellant failed to demonstrate that any objection had a reasonable probability of altering the outcome of the proceedings.

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<sup>3</sup>It appears that appellant committed a third violation of the plea agreement as he committed an offense while on OR release.

Therefore, we conclude that the district court did not err in denying this claim.

Seventh, appellant claimed that trial counsel failed to argue for sentencing under the domestic violence statute and failed to present any mitigating evidence at sentencing. Appellant failed to demonstrate that any additional arguments or mitigating evidence at sentencing would have had a reasonable probability of altering the outcome of the proceedings given appellant's stipulation to habitual criminal treatment if he violated the terms of the plea agreement—notably, appellant violated the terms of the plea agreement. Therefore, we conclude that the district court did not err in denying this claim.

Eighth, appellant claimed that trial counsel failed to object to the failure to file a notice of intent to seek habitual criminal adjudication, failure to conduct a hearing on the priors, and failure to present proof of the priors at the sentencing hearing, and trial counsel failed to challenge the constitutionality of the habitual criminal statute. Appellant failed to demonstrate that he was prejudiced. Appellant stipulated to small habitual criminal treatment if he failed to appear for sentencing and failed to appear at the Department of Parole and Probation. Appellant failed to fulfill his obligations under the plea agreement. Appellant provided no argument for how the habitual criminal statute was unconstitutional. Therefore, we conclude that the district court did not err in denying this claim.<sup>4</sup>

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<sup>4</sup>To the extent that appellant claimed that his due process rights were violated because the State failed to file a notice of intent to seek habitual criminal adjudication, the court failed to conduct a hearing on the prior convictions, and the State failed to present proof of the prior

*continued on next page...*

Ninth, appellant claimed that trial counsel failed to file an appeal despite being requested to do so. We conclude that the district court erred in denying the petition without conducting an evidentiary hearing on the appeal deprivation claim because appellant's claim, which was not belied by the record, if true would have entitled him to relief.<sup>5</sup> Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984); see also Toston v. State, 127 Nev. \_\_\_, 267 P.3d 795 (2011). Therefore, we reverse the district court's denial of this claim and remand for an evidentiary hearing on the claim.<sup>6</sup>

Finally, appellant claimed that the court abused its discretion in denying his request for transcripts and motion for appointment of counsel. Appellant failed to demonstrate that the district court abused its

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*...continued*

convictions at sentencing, these 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).

<sup>5</sup>To the extent that appellant claimed that trial counsel failed to advise him of the right to appeal, the district court did not err in denying this claim as the written guilty plea agreement informed appellant of the limited right to appeal. Davis v. State, 115 Nev. 17, 19, 974 P.2d 658, 659 (1999).

To the extent that appellant appeared to claim that trial counsel failed to inform him about post-conviction relief and that this caused him to file a late petition, appellant's claim is without merit. Notably, appellant filed a timely petition.

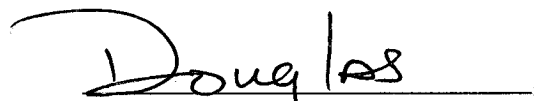
<sup>6</sup>If the district court determines that appellant was deprived of a direct appeal, the district court should provide the remedy set forth in NRAP 4(c).

discretion. NRS 34.750(1); Peterson v. Warden, 87 Nev. 134, 135-36, 483 P.2d 204, 204-05 (1971).

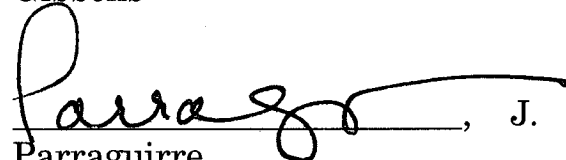
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In his motion filed on August 22, 2011, appellant claimed that the State failed to set forth prior convictions in the information, failed to file a notice of intent to seek habitual criminal adjudication, and failed to present proof of the prior convictions at sentencing. Appellant failed to demonstrate that the district court relied on mistaken assumptions regarding his criminal record that worked to his extreme detriment. See Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). Appellant failed to demonstrate that his sentence was facially illegal and that the district court lacked jurisdiction. See id. We therefore conclude that the district court did not err in denying appellant's motion. Accordingly, we

ORDER the judgments 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.  
Douglas

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

  
\_\_\_\_\_, J.  
Farraguirre

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