IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMIERL DEVINE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59942

FILED

JUL 25 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY D. 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 September 23, 2011, appellant claimed that he received ineffective assistance of trial 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). In order to demonstrate prejudice sufficient to invalidate the decision to enter a guilty plea, a petitioner

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

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 his trial counsel failed to address a violation of his Miranda rights.[2] Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced because the record indicates that appellant re-initiated the conversation with the police after invoking his right to an attorney and the cessation of the interview. See Edwards v. Arizona, 451 U.S. 477, 484-85 (1981). Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel failed to prepare a defense for trial and failed to maintain contact with appellant. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant failed to identify the defense that he believed counsel should have pursued, the people that counsel should have interviewed, and the evidence that further investigation would have uncovered. Appellant failed to demonstrate that further contact would have had a reasonable probability of altering his decision to enter a guilty plea. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel failed to inform him about a plea offer made by the State prior to the preliminary hearing

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[2]Miranda v. Arizona, 384 U.S. 436 (1966).

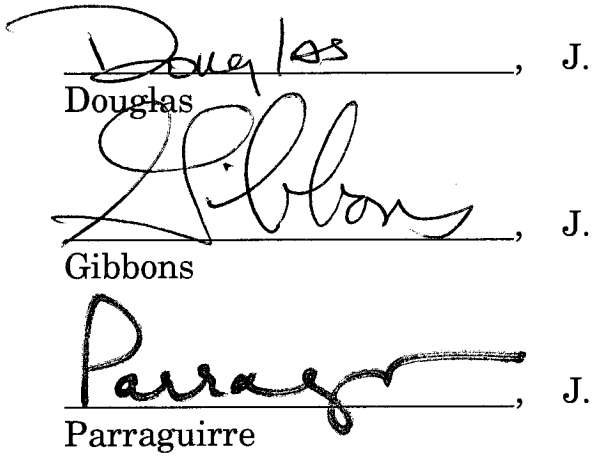
for a term of one to six years. Appellant asserted that evidence of this offer is in the State's file but that he was never informed by his counsel of this offer and appellant indicated that he would have been receptive to such an offer.

The Supreme Court has recognized that defense counsel has a duty to communicate formal plea offers and that to demonstrate prejudice a petitioner must demonstrate a reasonable probability that he would have accepted the more favorable plea offer but for counsel's deficient performance and that the plea would have been entered without the State's canceling it or the district court's refusing to accept it. Missouri v. Frye, ___ U.S. ___, 132 S. Ct. 1399, 1409 (2012).

Based upon our review of the record on appeal, we reverse the district court's decision to deny this claim without an evidentiary hearing. A petitioner is entitled to an evidentiary hearing if he raises a claim supported by specific facts, which if true, would have entitled him to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). The record is silent and does not belie appellant's claim that there was a plea offer of one to six years. Appellant has indicated that if such an offer had been made and presented to him that he would have accepted the offer rather than pleading to the three original charges. There is no indication from the record whether the State would have cancelled the offer if it had been accepted prior to the preliminary hearing and there is no indication that the district court would have refused to accept the plea. Therefore,

we reverse the district court's decision to deny this claim and remand for an evidentiary hearing.[3] 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.[4]



_____, J.
Douglas

_____, J.
Gibbons

_____, J.
Parraguirre

cc: Hon. Michelle Leavitt, District Judge
Jamierl Devine
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[3]Upon remand, the district court may exercise its discretion to consider the factors set forth in NRS 34.750(1) and appoint post-conviction counsel.

[4]We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.