

IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY DEE PROCTOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60573

FILED

NOV 15 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
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; David B. Barker, Judge.

In his petition filed on December 13, 2011, 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, petitioner would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart,

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).

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).

First, appellant claimed that counsel was ineffective for allowing him to stipulate to habitual criminal adjudication as part of the plea agreement. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant's argument that he was not permitted to enter into a stipulation as a matter of law is incorrect, as NRS 207.016(6) permits a court to impose an adjudication of habitual criminality based on a stipulation. See Hodges v. State, 119 Nev. 479, 484, 78 P.3d 67, 70 (2003). Further, the information specified the prior felony convictions upon which the State was relying in charging appellant as a habitual criminal, the State presented certified records of three of those prior convictions to the district court, and appellant never challenged the existence or constitutional validity of the prior convictions at the sentencing hearing. See id. at 484-85, 78 P.3d at 70. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that counsel was ineffective for failing to object to the State's untimely notice of intent to seek habitual criminal adjudication. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced, as the underlying claim is belied by the record. Prior to entry of the plea, and more than 15 days before sentencing, the State filed an information that included notice of habitual criminality. NRS 207.016(2). Because the State provided timely notice of intent, counsel could not be ineffective for failing to object

to the notice. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Therefore, the district court did not err in denying this claim.

Third, appellant claimed that counsel was ineffective for not objecting to the district court's failure to hold a hearing on the prior convictions. Appellant failed to demonstrate prejudice, as he did not explain how counsel's failure to object on this basis affected his decision to plead guilty. Furthermore, the record belies his underlying claim, as the district court did in fact hold a hearing and determine that the certified copies of appellant's prior convictions were valid and sufficient to support the enhancement under the small habitual criminal statute. See NRS 207.010(1)(a). Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that counsel was ineffective for not objecting to the district court's failure to first sentence him for the primary offense before adjudicating him a habitual criminal. Appellant failed to demonstrate prejudice, as he did not explain how counsel's failure to object on this basis affected his decision to plead guilty. Furthermore, appellant's underlying claim lacks merit, as there is no requirement that the district court impose a sentence on the primary offense before imposing a habitual criminal sentence. See NRS 207.010; NRS 207.016(3)(a); see also Cohen v. State, 97 Nev. 166, 169, 625 P.2d 1170, 1172 (1981) (stating that only the sentence prescribed under the habitual criminal statute may be imposed where a defendant is charged with and adjudicated a habitual criminal). Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that counsel was ineffective for not obtaining a proper and fair sentence. Specifically, appellant claimed that his conviction for assault with a deadly weapon should have been a misdemeanor rather than a felony offense. Appellant failed to show that counsel's performance was deficient or that he was prejudiced. Appellant pleaded guilty to the felony offense of assault with a deadly weapon and stipulated to a small habitual criminal sentence. He failed to explain what actions counsel should have taken regarding his sentence, and how counsel's unspecified errors affected his decision to plead guilty. To the extent that he challenged the factual basis of his conviction, he waived any such challenge when he entered his guilty plea. See Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975) (stating that the entry of a guilty plea generally waives any right to appeal from events occurring prior to the entry of the plea). We therefore conclude that the district court did not err in denying this claim.

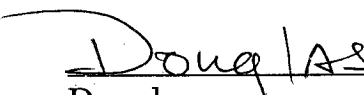
Next, appellant claimed that appellate counsel was ineffective for failing to raise all of the above-mentioned underlying claims on direct appeal. Because those underlying claims lacked merit, he could not demonstrate that appellate counsel's performance was deficient or that he was prejudiced. Therefore, we conclude that the district court did not err in denying these claims.

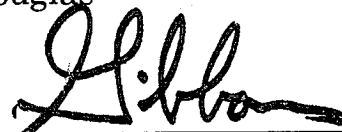
Finally, appellant claimed that the district court improperly adjudicated him a habitual criminal because he did not receive timely notice and the district court failed to hold a hearing regarding his prior convictions or sentence him first for his primary offense. These challenges

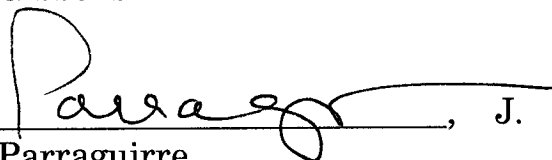
were outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based on a guilty plea. NRS 34.810(1)(a).

We therefore conclude that the district court did not err in denying the petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Hon. David B. Barker, District Judge
Gary Dee Proctor
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk