

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL WAYNE KAPETAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36201

FILED

JUL 27 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Bloom*
CHIEF DEPUTY CLERK

DANIEL WAYNE KAPETAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36202

ORDER DISMISSING APPEALS

These are appeals from a district court order denying appellant's post-conviction petitions for writs of habeas corpus.¹

On November 14, 1997, the district court convicted appellant in district court case number CR97-2099, pursuant to a guilty plea, of driving while having 0.10 percent or more by weight of alcohol in the blood in violation of NRS 484.379 and

¹On June 29, 2000, appellant's counsel filed a motion to consolidate these appeals for disposition pursuant to NRAP 3(b). Cause appearing, the motion is granted and these appeals are consolidated.

NRS 484.3792(1)(c). The court sentenced appellant to serve 12 to 60 months in prison and ordered appellant to pay a \$2,000.00 fine. This court dismissed appellant's direct appeal. See Kapetan v. State, Docket Nos. 31568 and 31569 (Order Dismissing Appeals, June 3, 1998).

Also on November 14, 1997, the district court convicted appellant in district court case number CR97-2105, pursuant to a guilty plea, of driving while having 0.10 percent or more by weight of alcohol in the blood in violation of NRS 484.379 and NRS 484.3792(1)(c). The court sentenced appellant to serve 16 to 72 months in prison, to be served consecutively to the sentence in district court case number CR97-2099, and ordered appellant to pay a \$2,000.00 fine. This court dismissed appellant's direct appeal. See Kapetan v. State, Docket Nos. 31568 and 31569 (Order Dismissing Appeals, June 3, 1998).

On September 29, 1998, appellant filed a proper person post-conviction petition for a writ of habeas corpus in each district court case. The district court appointed counsel, who filed a supplemental petition. After conducting an evidentiary hearing, the district court denied the petitions. These timely appeals followed.

Appellant contends that the district court erred in denying his petitions. In particular, appellant contends that the district court erred in denying the following claims: (1)

that appellate counsel provided ineffective assistance on appeal from the judgments of conviction; (2) that the State breached the spirit of the plea bargains; (3) that the guilty pleas were not knowingly and voluntarily entered; and (4) that trial counsel provided ineffective assistance. Appellant argues that he is entitled to relief in the form of a new sentencing hearing. We conclude that appellant's contentions lack merit.

Appellant first argues that he received ineffective assistance of counsel on appeal because counsel filed a no-merit appeal and drafted an "inferior" fast track statement after moving to withdraw from representing appellant. Appellant argues that prejudice should be presumed under these circumstances. We disagree.

A claim of ineffective assistance of appellate counsel is reviewed under the "reasonably effective assistance" test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996). Under this test, the defendant must demonstrate (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's errors prejudiced the defense--i.e., that the omitted issue would have a reasonable probability of success on appeal. Id. at 998, 923 P.2d at 1113-14.

Appellant has failed to identify any issues that appellate counsel failed to raise on appeal. Although appellant makes much of the fact that appellate counsel originally filed a no-merit appeal, appellate counsel eventually filed a fast track statement arguing that the State breached the plea agreement. We decline to presume prejudice.

Moreover, to the extent that appellant contends that appellate counsel provided ineffective assistance by failing to argue the issue raised on appeal in a more persuasive fashion, we conclude that this contention lacks merit. The circumstances surrounding the alleged breach of the plea agreement were fully set forth in the fast track statement that this court considered on direct appeal from the judgments of conviction. We therefore conclude that appellant has failed to demonstrate that appellate counsel provided ineffective assistance in the way in which he pursued the issue raised on direct appeal.

Appellant next contends that the State breached the spirit of the plea bargains. However, as noted above, this issue was raised on direct appeal and rejected by this court. That decision constitutes the law of the case. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). Accordingly, we refuse to reconsider this issue.

Appellant also claims that the guilty pleas were not knowingly and voluntarily entered because he was misinformed

as to the sentence that the State had agreed to recommend. We disagree.

To determine if a plea is valid, this court considers the entire record and the totality of the facts and circumstances of a case. See Bryant v. State, 102 Nev. 268, 271, 721 P.2d 364, 367 (1986). A guilty plea is presumptively valid, and the defendant must establish that it was not. Id. at 272, 721 P.2d at 368. Absent an abuse of discretion, this court will not reverse a district court's decision on the validity of a plea. See Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994).

We conclude that appellant failed to demonstrate that the guilty pleas were invalid. The written plea agreements provided that the State was free to argue at sentencing, but would recommend no more than five years on each count. At the arraignment, the parties informed the court that there might be on-going negotiations to get a recommendation for concurrent sentences if appellant performed successfully in an in-patient treatment program, but that such an agreement had not yet been reached. Trial counsel testified at the evidentiary hearing that there was no guarantee that the prosecutor would agree to recommend concurrent sentences even if appellant performed well in an alcohol treatment program. The district court found that this testimony was credible and that appellant's contrary testimony

was not credible. Under these circumstances, we conclude that appellant failed to demonstrate that he was misled regarding the negotiations.

Appellant contends that trial counsel provided ineffective assistance by recommending guilty pleas upon "undetermined" plea bargains. However, appellant did not raise this issue below in either of his proper person petitions or the supplement filed by counsel. Accordingly, we decline to consider this ground for relief. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991).

Appellant next contends that trial counsel provided ineffective assistance by failing to present witnesses at sentencing to place appellant in the most favorable light possible. In particular, appellant complains that counsel failed to call appellant's alcohol counselor to testify as to appellant's progress in an in-patient treatment program. We conclude that this contention lacks merit.

To establish prejudice based on the deficient assistance of counsel at sentencing, a defendant must show that but for counsel's mistakes, there is a reasonable probability that the sentence imposed would have been different. See Strickland, 466 U.S. at 694. In this case, the district court found that while the testimony of appellant's alcohol counselor was credible and would have been relevant to sentencing, there was not a reasonable probability


that the sentence would have been different if counsel had presented the testimony at sentencing. This finding is entitled to deference. See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). Moreover, we note that the court was aware at the time of sentencing that appellant had entered a treatment program and wanted to turn his life around. Under the circumstances, we conclude that appellant failed to demonstrate prejudice and, as a result, the district court did not err in rejecting this claim of ineffective assistance.

Appellant finally contends that trial counsel provided ineffective assistance at sentencing by failing to correct errors in the presentence investigation report. We disagree. The district court found that appellant received a copy of the presentence report prior to sentencing and reviewed it with counsel. The court further found that counsel's testimony that appellant did not identify any errors in the report was credible. Appellant has not demonstrated that these factual findings are not supported by substantial evidence or that they are clearly wrong. See Riley, 110 Nev. at 647, 878 P.2d at 278. Based on the district court's findings of fact, we conclude that appellant failed to demonstrate that counsel's performance in this respect was deficient. Accordingly, we conclude that the district court

did not err in rejecting this claim of ineffective assistance.²

Having considered appellant's contentions and concluded that they lack merit, we

ORDER these appeals dismissed.


Maupin J.


Shearing J.


Becker J.

cc: Hon. Steven R. Kosach, District Judge
Attorney General
Washoe County District Attorney
Karla K. Butko
Washoe County Clerk

²To the extent that appellant argues that the district court abused its discretion at sentencing by relying on a presentence report that included erroneous information, we conclude that this claim cannot be raised in a post-conviction petition. See NRS 34.810(1)(a). However, we note that the substance of this claim is addressed in connection with appellant's contention that counsel provided ineffective assistance by failing to bring the alleged errors to the court's attention.