

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARC A. EDEN,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36388

**FILED**

OCT 03 2000

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK


ORDER OF AFFIRMANCE

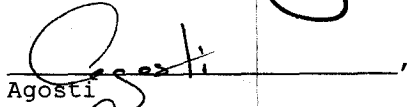
This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

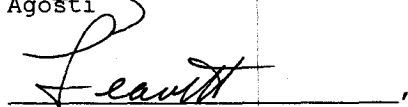
In the petition, appellant presented claims of ineffective assistance of counsel. The district court found that counsel was not ineffective. The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal. See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). Appellant has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, appellant has not demonstrated that the district court erred as a matter of law. Accordingly, for the reasons stated in the attached order of

the district court, the order of the district court is affirmed.

It is so ORDERED.<sup>1</sup>

  
\_\_\_\_\_  
Shearing J.

  
\_\_\_\_\_  
Agosti J.

  
\_\_\_\_\_  
Leavitt J.

cc: Hon. Connie J. Steinheimer, District Judge  
Attorney General  
Washoe County District Attorney  
Karla K. Butko  
Washoe County Clerk

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<sup>1</sup>On appeal, appellant contends that the district court abused its discretion at sentencing. This issue was not raised below. We therefore decline to consider it. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991). Moreover, this issue could have been raised on direct appeal, and has therefore been waived. Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

FILED

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AMY HARVEY, CLERK

BY [Signature]  
DEPUTY

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
7 IN AND FOR THE COUNTY OF WASHOE

8 \* \* \*

9 MARK A. EDEN,

10 Petitioner,

11 v.

Case No. CR98P0239

12 DAVID MILLIGAN, WARDEN,  
13 NORTHERN NEVADA CORRECTIONAL CENTER,

Dept. No. 4

14 Respondent.

15 FINDINGS OF FACT, CONCLUSIONS OF LAW  
16 AND JUDGMENT

17 On May 5, 2000, the parties, by and through their  
18 respective counsel, Joseph R. Plater, for the State of Nevada,  
19 and Karla Butko, for the petitioner, appeared before the court on  
20 Petitioner's Petition for Writ of Habeas Corpus (Post-  
21 Conviction). After having heard and considered the evidence, the  
22 court makes the following findings of fact and conclusions of  
23 law:

24 FINDINGS OF FACT

25 1. Petitioner was arrested on January 8, 1998, for  
26 grand larceny when he took a woman's purse in a local casino.

1           2. Mr. Richard Molezzo, Esq., of the Washoe County  
2 Public Defender's Office, represented petitioner. After a  
3 preliminary hearing, petitioner was bound over to the district  
4 court to face the original charge.

5           3. At the district court level, the State refused to  
6 negotiate the case; as a consequence, Mr. Molezzo wanted to try  
7 the case. Petitioner, however, did not want to go to trial  
8 because he thought that it would waste court time and the  
9 taxpayers' money. Accordingly, petitioner pled guilty to grand  
10 larceny.

11           4. Petitioner voluntarily, knowingly, and  
12 intelligently entered his guilty plea with a full and complete  
13 understanding of the consequences of his plea. Although this  
14 court misinformed petitioner when he pled guilty that he was  
15 facing a one to ten year prison sentence, petitioner's plea was  
16 nevertheless voluntary, knowing, and intelligent. The court  
17 finds that if petitioner was willing to plead guilty and expose  
18 himself to a possible ten year sentence, then he was a fortiori  
19 willing to plead to a sentence that exposed him to significantly  
20 less time. Further, petitioner did not testify at the  
21 evidentiary hearing that he wanted his guilty plea vacated so  
22 that he could proceed to trial, or that had he known the true  
23 sentencing range when he pled guilty he would have insisted on  
24 not pleading guilty and proceeding to trial. To the contrary,  
25 petitioner has always wanted to avoid trial and to plead guilty.

26           5. At sentencing, Mr. Molezzo did not present evidence

1 that petitioner was amenable to drug or alcohol rehabilitation.  
2 The court finds that this was a reasonable strategic decision.  
3 Given petitioner's prior criminal history (five felony  
4 convictions, three misdemeanor convictions, five prison  
5 sentences, and several failed probations), the court would not  
6 have issued a different sentence had petitioner presented expert  
7 testimony regarding his amenability to treatment. Petitioner has  
8 had numerous opportunities to receive treatment and to conform  
9 his behavior to the law. Despite this, he continues to break the  
10 law. The court is also not persuaded by the testimony that  
11 petitioner is amenable to treatment at this time or that he would  
12 not commit further offenses had he not been incarcerated.

13           6. The State properly pursued the habitual criminal  
14 charge against petitioner. Although the court at one point  
15 misinformed petitioner as to the potential sentence he might  
16 receive if he were declared to be a habitual criminal, the court  
17 also correctly told him that he was facing "a five to 20 category  
18 B" felony. Petitioner said that he understood. In addition,  
19 petitioner expressly told the court at sentencing that he knew he  
20 was facing five to twenty years in prison for being a habitual  
21 criminal. Finally, petitioner was not entitled to a formal  
22 canvass as to the habitual criminal charge, as is required in  
23 guilty pleas.

24           7. Petitioner entered his guilty plea without signing  
25 a guilty plea memorandum. This was not error. NRS 174.035(6).  
26 See also, State v. Alvaro-Ochoa-Lopez, 116 Nev. Adv. Op. No. 50

1 (2000) (holding that absence of required written plea memorandum  
2 not per se error if plea is otherwise voluntary, knowing and  
3 intelligent).

4 8. At the habitual criminal hearing, the court  
5 reviewed the prior convictions the State offered. At that time  
6 the court determined that the convictions were constitutional and  
7 valid. Petitioner's claim that the court did not review the  
8 convictions is not true. The court further determines that a  
9 guilty plea transcript or memorandum is not necessary to validate  
10 a felony judgment of conviction. See Dressler v. State, 819 P.2d  
11 1288, 1295-96, 107 Nev. 686, 697-98 (1991) ("in order to use a  
12 prior felony conviction for enhancement purposes, the state's  
13 initial burden of production shall be satisfied if the state  
14 presents prima facie evidence of the existence of the prior  
15 conviction . . . so long as the record of that conviction does  
16 not, on its face, raise a presumption of constitution  
17 infirmity[]"; misdemeanor convictions, on the other hand, must be  
18 accompanied with proof that counsel was present or that the  
19 defendant validly waived counsel). Nevertheless, the judgments  
20 of convictions in this case reveal that petitioner was  
21 represented by counsel.

22 9. Petitioner claims that his counsel should have gone  
23 to trial and argued that petitioner committed an attempted grand  
24 larceny at most. The court rejects this argument. First,  
25 against his counsel's advice, petitioner did not want to go to  
26 trial. It was petitioner's absolute right to determine whether

1 to plead or go to trial. Accordingly, when he pled guilty,  
2 petitioner waived his right to contest the merit of the charge  
3 against him. Second, given the evidence that was presented at  
4 the evidentiary hearing, the court finds that it is highly  
5 unlikely that petitioner would have been convicted of attempted  
6 grand larceny instead of grand larceny had he gone to trial.

7 10. Immediately after sentencing, Mr. Molezzo informed  
8 petitioner of his right to appeal his sentence within thirty days  
9 of the sentence. Petitioner never told Mr. Molezzo that he  
10 wanted to appeal. Petitioner's testimony to the contrary is  
11 expressly rejected. Thus, petitioner was not denied his right to  
12 direct appeal.

13 CONCLUSIONS OF LAW

14 1. Petitioner was afforded the effective assistance of  
15 counsel.

16 2. Petitioner knowingly, voluntarily, and  
17 intelligently pled guilty with a full and complete understanding  
18 of the possible penalties he faced.

19 3. The State properly charged and proved that  
20 petitioner is a habitual criminal. Petitioner's prior  
21 convictions are constitutionally valid.

22 4. Petitioner was not required to execute a written  
23 plea memorandum when he pled guilty.

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JUDGMENT

It is therefore the order and judgment of this court that Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction) is hereby denied.

DATED this 23 day of May, 2000.

Cornie J. Steinheimer  
DISTRICT JUDGE