

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL SIMON,

No. 36504

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

DEC 17 2001

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

ORDER AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Appellant Michael Simon filed the petition to challenge his judgment of conviction, based on a guilty plea, of one count each of first-degree kidnapping with use of a deadly weapon and sexual assault. On the kidnapping count, Simon received two consecutive terms of life in prison with the possibility of parole, and for sexual assault, he received a concurrent term of life in prison with the possibility of parole. He was also ordered to pay \$1,000.00 in restitution.

Simon contends that the district court erred in denying him an evidentiary hearing on his claims. A petitioner for post-conviction relief must support any claims with specific factual allegations that if true would entitle him to relief.¹ The petitioner is not entitled to an evidentiary hearing if the factual allegations are belied or repelled by the record.²

Simon claims initially that during a hearing on his habeas petition the district court acknowledged that he had raised issues requiring an evidentiary hearing. The record does not support this claim. The court simply spoke of the possibility that an evidentiary hearing might be necessary on some of Simon's claims; it never ruled that such a hearing was in order.

¹Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

²Id. at 503, 686 P.2d at 225.

Simon next complains that he was not arraigned before a magistrate until eight days after his arrest. He argues that this violated his Fourth Amendment rights under County of Riverside v. McLaughlin.³ Simon asserts this as an independent claim; it therefore deserves no consideration.⁴ It also has no merit because

a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.⁵

In his petition to the district court, Simon argued that because of the delay in his appearance before a magistrate, the justice and district courts lacked jurisdiction in this matter. Since a court should consider lack of jurisdiction at any time,⁶ we address this issue but conclude that it too has no merit. This court has held that McLaughlin requires only that a suspect "receive a probable cause determination within forty-eight hours, either ex parte or before the magistrate."⁷ This requirement was met here. Simon does not dispute that the day after his arrest the justice court determined ex parte that there was probable cause for his arrest.

Simon also contends that the justice court did not have jurisdiction to conduct the preliminary examination in this case because the State did not properly file a criminal complaint against him until the day after the examination. It appears that the State filed a complaint before the examination, but it was not properly file-stamped. Even if this rendered the complaint defective, Simon's conviction in district court remains valid. If a defendant fails to attack the complaint prior to the

³500 U.S. 44 (1991).

⁴A court must dismiss a habeas petition if the petitioner's conviction was upon a plea of guilty and the petition is not based on an allegation that the plea was involuntary or unknowing or was entered without effective assistance of counsel. NRS 34.810(1)(a).

⁵Tollett v. Henderson, 411 U.S. 258, 267 (1973).

⁶Cf. Ex Parte Alexander, 80 Nev. 354, 358, 393 P.2d 615, 616-17 (1964); NRS 174.105(1) and (3).

⁷Powell v. State, 113 Nev. 41, 43 n.3, 930 P.2d 1123, 1124 n.3 (1997) (emphasis deleted).

preliminary examination, a deficiency in the complaint is immaterial.⁸ A defendant is "committed on the evidence adduced at the preliminary examination. The information in the district court is founded on the commitment and not in any way on the complaint."⁹ "[A] preliminary examination having been had in accordance with the terms of the statute, and the defendant held to answer for a public offense, to-wit, a felony, any infirmity in the complaint, if there be any, is of no consequence"¹⁰ Nor was Simon prejudiced by his counsel's failure to challenge the sufficiency of the complaint, even assuming such a challenge would have been successful. Dismissal of a complaint based on objection to its form or substance does not constitute an acquittal, and a second complaint concerning the same matter can be filed.¹¹

Simon asserts that his trial counsel provided ineffective assistance because he failed to do a number of things: interview witnesses, retain expert witnesses, meaningfully cross-examine the State's witnesses at the preliminary hearing, move to suppress evidence from a room rented by Simon and evidence taken from Simon's vehicle without a warrant, move to exclude the introduction of a witness's jacket based on lack of chain of custody, review the plea agreement with Simon, and object to inaccuracies in the presentence investigation report. Simon also asserts that his counsel was ineffective because he provided false information to Simon regarding the sentence and misrepresented to the district court that he reviewed the plea agreement with Simon.

Claims of ineffective assistance of counsel are properly presented in a timely, first post-conviction petition for a writ of habeas corpus.¹² To establish ineffective assistance of counsel, a claimant must show both that counsel's performance was deficient and that the deficient

⁸State v. Plunkett, 62 Nev. 258, 271, 149 P.2d 101, 104 (1944); cf. NRS 174.105(1)-(2).

⁹Plunkett, 62 Nev. at 271, 149 P.2d at 104.

¹⁰Id. at 274, 149 P.2d at 105.

¹¹See NRS 174.085(1), (5), and (6).

¹²See, e.g., Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

performance prejudiced the defense.¹³ To show prejudice, the claimant must show a reasonable probability that but for counsel's errors the result of the proceeding would have been different.¹⁴ Judicial review of a lawyer's representation is highly deferential, and a claimant must overcome the presumption that a challenged action might be considered sound strategy.¹⁵

Simon fails to demonstrate that his assertions of ineffective assistance of counsel have any merit. They remain unsupported by any specific factual allegations that if true would warrant relief.¹⁶ They also lack specific argument or authority to support them.¹⁷ Moreover, Simon fails to cite the record to support his claims.¹⁸

Simon also contends that his guilty plea was not knowing and voluntary. He notes that just two days before he executed the written plea agreement he complained to the district court about his trial counsel and said that he needed another lawyer. He complains that neither his counsel nor the district court informed him that his offenses were nonprobationable and subject to special parole terms or that he would have to pay restitution. He also claims that his counsel simply handed him the plea memorandum and told him to sign it. Again Simon largely fails to cite the record or legal authority to support his claims. Moreover, the record belies all these claims, except the one concerning restitution. In pleading guilty, Simon told the district court that before signing the plea memorandum he had read it, discussed it with counsel, and understood everything in it and that his plea was voluntary. The plea memorandum

¹³Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

¹⁴Id. at 988, 923 P.2d at 1107.

¹⁵Strickland, 466 U.S. at 689.

¹⁶See Hargrove, 100 Nev. at 502, 686 P.2d at 225.


¹⁷See Mazzan v. Warden, 116 Nev. 48, 75, 993 P.2d 25, 42 (2000) (stating that contentions unsupported by specific argument or authority should be summarily rejected on appeal).

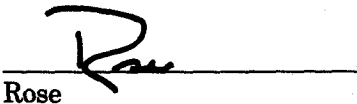
¹⁸See NRAP 28(e) ("Every assertion in briefs regarding matters in the record shall be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found."); see also NRAP 28(a)(4); NRAP 28A(a)(3).

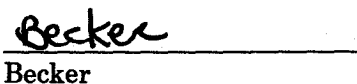
informed Simon that probation was not an option and that a conviction of sexual assault carried special parole requirements.¹⁹ In signing the memorandum, Simon also acknowledged that he had fully discussed the agreement with his counsel, that he was satisfied with his counsel's services, and that the plea was voluntary.

However, the record shows that neither the district court nor the plea memorandum informed Simon that he could be ordered to pay restitution as a consequence of his guilty plea. No other circumstance indicates that he was so informed before pleading guilty. Therefore, we remand this matter and direct the district court to correct Simon's judgment of conviction by vacating the requirement that he pay \$1,000.00 in restitution.²⁰ Aside from this modification, we affirm appellant's judgment of conviction. Accordingly, 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.

 J.
Shearing

 J.
Rose

 J.
Becker

¹⁹A defendant who pleads guilty is sufficiently advised that he is ineligible for probation if the plea memorandum so informs him. Little v. Warden, 117 Nev. ___, ___ P.3d ___ (Adv. Op. No. 69, at 6-8, November 15, 2001). Such a defendant need not be informed of parole ineligibility because it is not a direct consequence of a guilty plea. Id. at 4 n.9.

²⁰See Cruzado v. State, 110 Nev. 745, 747, 879 P.2d 1195, 1196 (1994) (stating that where defendant was not informed that restitution was possible consequence of guilty plea, restitution requirement must be vacated from judgment of conviction); Lee v. State, 115 Nev. 207, 209-10, 985 P.2d 164, 166 (1999) (concluding that written plea agreement fully informed defendant that restitution was possible consequence of his guilty plea; overruling Cruzado to the extent that it required district court to inform defendant of this consequence).

cc: Hon. John S. McGroarty, District Judge
Attorney General/Carson City
Clark County District Attorney
Christopher R. Oram
Clark County Clerk