IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN E. BRINKLEY, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37683

FILED
FEB 14 2002
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On July 6, 1999, the district court convicted appellant, pursuant to a guilty plea, of two counts of driving under the influence with two or more prior convictions. The district court sentenced appellant to serve in the Nevada State Prison a term of twenty-four (24) to sixty (60) months for the first count, and a consecutive term of twenty-four (24) to seventy-two (72) months for the second count. These sentences were ordered to be served concurrently with a sentence imposed in another case. Appellant did not file a direct appeal.

On July 7, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On March 19, 2001, the district court denied appellant's petition. This appeal followed.

02-02960

In his petition, appellant first claimed that his counsel rendered ineffective assistance by failing to object at sentencing to the State's alleged breach of the plea agreement. Specifically, appellant argued that the State breached the plea agreement by not affirmatively recommending that the court sentence appellant to serve all his terms concurrently.

Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant failed to demonstrate his counsel was ineffective in this regard. Appellant entered a guilty plea at arraignment. Appellant's counsel informed the court that in exchange for appellant's guilty plea to both counts, the State had stipulated to a joint recommendation at sentencing that the sentences for both counts would be imposed to run concurrently. The State agreed that this was a correct statement of the negotiations, but also interjected that the State had reserved the right to be free to argue as to the length of the sentence. At sentencing, the State recommended that both terms run concurrently per the stated conditions of the negotiations as set forth in the plea canvass. Both the State and appellant's counsel also alternatively recommended that in the event that the court decided to run both counts consecutively, the court should run the terms concurrently with a sentence imposed in another case. The district court then sentenced appellant to serve consecutive terms on both counts and ran them concurrently with the sentence imposed in another case. We are therefore unable to conclude from the record that the State breached the

plea agreement. Thus, appellant has failed to demonstrate that his counsel was ineffective in this regard.

Next, appellant claimed that his counsel rendered ineffective assistance by failing to file an appeal raising the claim that the State breached the plea agreement. As discussed above, we are unable to conclude from the record that the State breached the plea agreement by not affirmatively recommending that the court sentence appellant to serve all his terms concurrently. Further, there is no indication that appellant ever expressed a desire to appeal to his counsel.[1] Therefore, appellant has failed to demonstrate his counsel was ineffective in this regard.[2]

Finally, appellant claimed that the State's alleged breach of the plea agreement denied him due process and equal protection of law. Based upon our review, we conclude that the district court did not err in denying this claim. This claim fell outside the narrow scope of claims allowed in a post-conviction petition for a writ of habeas corpus challenging a conviction based on a guilty plea.[3]

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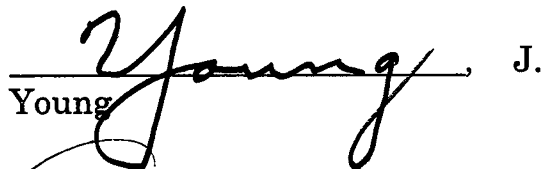
[1]Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).

[2]See Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996); see also Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

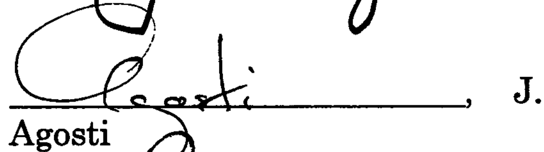
[3]See NRS 34.810(1)(a); see also Kirksey, 112 Nev. 980, 999, 923 P.2d 1102, 1114 ("Where the defendant has pleaded guilty, the only claims that may be raised thereafter are those involving the voluntariness of the plea itself and the effectiveness of counsel.").

Having reviewed the records on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.[4] Accordingly, we

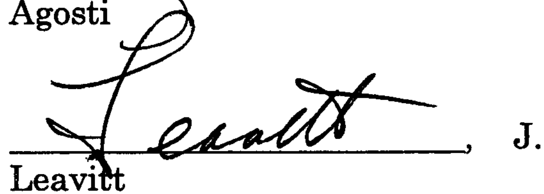
ORDER the judgment of the district court AFFIRMED.[5]



_______________, J.
Young



_______________, J.
Agosti



_______________, J.
Leavitt

cc: Hon. Richard Wagner, District Judge
Attorney General/Carson City
Lander County District Attorney
John E. Brinkley, Jr.
Lander County Clerk

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

[5]We have considered all proper person documents filed or received in these matters, and we conclude that the relief requested is not warranted.