

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH RIITANO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 38472

FILED

JUL 11 2002

MANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
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 June 19, 2000, the district court convicted appellant, pursuant to a guilty plea, of burglary. The district court adjudicated appellant a habitual criminal and sentenced him to serve a term of seventy-six to one hundred and ninety months in the Nevada State Prison, to run consecutively to two sentences imposed in other district court cases. On direct appeal this court affirmed the judgment of the district court.<sup>1</sup>

On April 20, 2001, 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 September 13, 2001, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that the district court abused its discretion in adjudicating him a habitual criminal and that he

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<sup>1</sup>Ritano v. State, Docket No. 36440 (Order of Affirmance, October 24, 2000).

received ineffective assistance of counsel. Our review of the record on appeal reveals that the district court did not err in denying appellant's petition.

Appellant claimed that the district court abused its discretion in adjudicating him a habitual criminal because it improperly relied on two alleged prior convictions. On direct appeal, in determining that appellant's sentence was not cruel and unusual, this court held that appellant did not demonstrate that the district court abused its discretion in adjudicating appellant a habitual criminal. Appellant appears to be attempting to subvert the doctrine of the law of the case by arguing that in adjudicating appellant a habitual criminal the district court relied on impalpable or highly suspect evidence.<sup>2</sup> Even assuming this claim is not barred by the doctrine of the law of the case,<sup>3</sup> it is without merit.

NRS 207.010(1) provides that a sentence may be enhanced if a defendant has been convicted of two or more felonies. The amended information listed ten prior convictions on which the State relied in recommending that appellant be adjudicated a habitual criminal. Appellant contends that he was never convicted for possession of a controlled substance in Virginia in 1991, or for escape in New York in

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<sup>2</sup>See Hall v. State, 91 Nev. 314, 315, 535 P.2d 797,798 (1975); Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976) ("So long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence, this court will refrain from interfering with the sentence imposed.").

<sup>3</sup>See Hall, 91 Nev. at 316, 535 P.2d at 799 ("The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceeding.").

1983 as stated in the amended information. At the sentencing hearing, the State filed certified copies of convictions in Nevada for a 1999 conviction for petty larceny, a 1993 conviction for grand larceny, a 1992 conviction for conspiracy to commit burglary and two certified copies of convictions in California for burglary and petty theft. Accordingly, even assuming that appellant is correct that two of the convictions listed in the amended information were not actually convictions, the district court did not rely on "impalpable or highly suspect evidence" in adjudicating appellant a habitual criminal.<sup>4</sup> Therefore, the district court did not abuse its discretion in adjudicating appellant a habitual criminal.

Next, appellant claimed that he did not commit burglary because "as a matter of law" four cartons of cigarettes do not contain a value exceeding two hundred and fifty dollars and he therefore committed a misdemeanor rather than a felony. Appellant waived this claim by pleading guilty.<sup>5</sup> Therefore, this claim is without merit.

Appellant also claimed that his trial counsel was ineffective for failing to "research the law" as to whether appellant had committed a felony or a gross misdemeanor. Specifically, appellant argued that he did not have the requisite intent to commit larceny when he entered the building, and therefore, could not have committed burglary. To invalidate a judgment of conviction based on a guilty plea, an appellant must demonstrate that counsel's performance fell below an objective standard of

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<sup>4</sup>See Silks, 92 Nev. at 94, 545 P.2d at 1161; see also NRS 207.016(5) ("For the purposes of NRS 207.010, . . . a certified copy of a felony conviction is prima facie evidence of conviction of a prior felony.").

<sup>5</sup>See Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975).

reasonableness.<sup>6</sup> Further, an appellant must demonstrate a reasonable probability that, but for counsel's errors, appellant would not have pleaded guilty and would have insisted on going to trial.<sup>7</sup> Appellant's claim that he lacked the requisite intent is belied by the record.<sup>8</sup> Officers observed appellant enter the store and walk directly to the cigarette case where he proceeded to remove cartons of cigarettes, conceal them on his person, and exit the store without paying.<sup>9</sup> Moreover, during the plea canvass appellant acknowledged that at the time he entered the store he had "the intent to commit a larceny therein."<sup>10</sup> Finally, in exchange for appellant's guilty plea, the State dropped a second burglary charge. Therefore, appellant has failed to establish that his counsel's performance fell below an objective standard of reasonableness, or that but for counsel's alleged

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<sup>6</sup>Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>7</sup>Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

<sup>8</sup>See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

<sup>9</sup>Appellant had also been charged with burglary in two previous cases which occurred under the same factual circumstances. One charge was eventually dismissed pursuant to a negotiated agreement which resulted in appellant being adjudicated guilty of grand larceny; the other was dropped in exchange for appellant pleading guilty to petty larceny.

<sup>10</sup>See generally Lundy v. Warden, 89 Nev. 419, 422, 514 P.2d 212, 213-14 (1973) (holding that district court did not err in denying appellant's motion to withdraw guilty plea when "nothing in the record impeaches [appellant's] plea or suggests that his admissions in open court were anything but the truth.") (quoting Brady v. United States, 397 U.S. 742, 758 (1970)); see also Hargrove, 100 Nev. at 503, 686 P.2d at 225 (stating that appellant's factual claims were belied by the record, "especially the transcript of the change of plea canvass.").

failure to "research the law" appellant would not have pleaded guilty and would have insisted on going to trial.

Appellant also raised two claims of ineffective assistance of appellate counsel. To prevail on a claim of ineffective assistance of appellate counsel, appellant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that appellant was prejudiced by the deficient performance.<sup>11</sup> To show prejudice, appellant must show that the omitted issue would have had a reasonable probability of success on appeal.<sup>12</sup>

First, appellant claimed that his appellate counsel was ineffective for failing to raise on direct appeal the issue that trial counsel was ineffective for failing to "research the law" as to whether appellant had committed a felony or a gross misdemeanor. Claims of ineffective assistance of counsel may not be raised on direct appeal, "unless there has already been an evidentiary hearing."<sup>13</sup> In this case, there was no evidentiary hearing. Moreover, as discussed, appellant failed to establish that trial counsel was ineffective in this regard. Therefore, appellant cannot show that this issue would have had a reasonable probability of success on appeal.

Second, appellant claimed that his appellate counsel was ineffective for failing to raise on direct appeal the issue that the district court abused its discretion in adjudicating him a habitual criminal. As discussed, the district court did not abuse its discretion in adjudicating

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<sup>11</sup>Strickland, 466 U.S. at 687.

<sup>12</sup>Id.; Kirksey, 112 Nev. at 998, 923 P.2d at 1113-14.

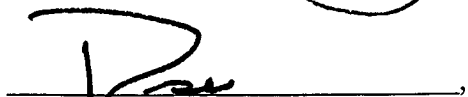
<sup>13</sup>Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).


appellant a habitual criminal. Therefore appellant cannot show that this issue would not have had a reasonable probability of success on appeal.

Having reviewed the record 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.<sup>14</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Becker

cc: Hon. Valorie Vega, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Joseph Riitano  
Clark County Clerk

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<sup>14</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).