

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAY FOSTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39455

FILED

DEC 13 2002

ORDER OF AFFIRMANCE

JANET M. ELLSON
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

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

On March 13, 2001, Foster was convicted, pursuant to a guilty plea, of one count of robbery with the use of a deadly weapon. The district court sentenced Foster to serve two consecutive prison terms of 24 to 60 months. Foster did not file a direct appeal.

On January 18, 2002, Foster 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 NRS 34.770, the district court declined to appoint counsel to represent Foster or to conduct an evidentiary hearing. On March 18, 2002, Foster filed a proper person motion for enlargement of time to respond to the State's opposition to his

petition.¹ On March 21, 2002, the district court denied Foster's motion for enlargement of time. On March 25, 2002, the district court denied Foster's petition. This appeal followed.

In his petition, Foster contended that his trial counsel Peter Christiansen was ineffective because he did not advise him or the district court that the deadly weapon enhancement could not legally be applied in Foster's case. In particular, Foster claimed he used a squirt gun and nail clippers in the course of the robbery, which were not deadly weapons as a matter of law. In support of his allegation that the deadly weapon enhancement was improper, Foster noted that his co-defendant only pleaded guilty to robbery without the deadly weapon enhancement. We conclude that the district court did not err in rejecting Foster's contention.

In order to state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness.² A petitioner must also demonstrate a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.³ A petitioner is

¹To the extent that Foster appeals from the denial of his motion for enlargement of time, we conclude the district court did not abuse its discretion in denying the motion.

²Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996); accord Hill v. Lockhart, 474 U.S. 52 (1985).

³Hill, 474 U.S. at 59.

not entitled to an evidentiary hearing on claims that are belied or repelled by the record.⁴

Foster's claim that his trial counsel was ineffective for failing to advise him or the court that there was insufficient evidence in support of the deadly weapon enhancement is belied by the record. Indeed, our review of the record indicates that there was substantial evidence in support of the deadly weapon enhancement.⁵ In particular, the criminal complaint, filed on November 30, 2000, charged Foster and his co-defendant Gregory Brown with conspiracy to commit robbery and robbery with use of a deadly weapon for holding a "knife type instrument to [the victim's neck]' and then "taking United States currency from the [victim's] pockets." Additionally, the victim, a taxicab driver, testified at Brown's preliminary hearing⁶ that an individual sitting in the backseat of his taxicab, later identified as Foster, put him in "some kind of a choke hold with his left hand and [had] a knife in the right hand." Although the victim testified he did not actually see the knife, he described the object held against his throat as "sharp metal." At the conclusion of Brown's preliminary hearing, Brown's counsel challenged the sufficiency of the

⁴Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

⁵See NRS 193.165(5) (defining a deadly weapon).

⁶We note that Foster waived his right to a preliminary hearing because he had negotiated a plea agreement resolving the charges pending against him.

evidence in support of the deadly weapon enhancement. The district court rejected that challenge, finding there was sufficient evidence that a deadly weapon had been used in the course of the robbery to present the issue to the trier of fact. Accordingly, Foster did not show that his trial counsel acted below an objective standard of reasonableness in not challenging the deadly weapon enhancement because that challenge would have been rejected.


Moreover, Foster has failed to show that, but for counsel's errors, he would not have pleaded guilty and would have insisted on a trial. In the petition, Foster did not seek a trial, but merely requested that the district court amend the judgment of conviction to strike the deadly weapon enhancement. Additionally, we note that Foster received a substantial benefit in exchange for his guilty plea; namely, the State agreed not to oppose concurrent time with Foster's parole revocation case and dropped the conspiracy count charged in the instant matter, as well as charges in another case pending against Foster. Moreover, our review of the plea canvass and the plea agreement indicates that Foster's guilty plea was knowing, voluntary, and intelligent; he was advised of the direct consequences of his criminal conviction and the constitutional rights he was waiving by pleading guilty. At the plea canvass, Foster indicated he understood the nature of the charge of robbery with a deadly weapon and admitted that he robbed the victim with a knife. Finally, we note that Foster is not entitled to the identical plea agreement or sentence as his

codefendant.⁷ Accordingly, the district court did not err in rejecting Foster's claim that his counsel was ineffective for failing to challenge the deadly weapon enhancement.

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.⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Shering

 J.
Leavitt

 J.
Becker

cc: Hon. Michael L. Douglas, District Judge
Attorney General/Carson City
Clark County District Attorney
Jay Foster
Clark County Clerk

⁷See Nobles v. Warden, 106 Nev. 67, 68, 787 P.2d 390, 391 (1990)

⁸See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).