

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAY FOSTER A/K/A JAY MARLON
FOSTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39688

FILED

JAN 24 2003

ORDER OF AFFIRMANCE

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

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

On March 20, 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.¹ 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

¹On April 12, 2001, the district court amended the original judgment of conviction entered on March 20, 2001, to reflect the 24-60 month prison terms imposed by the district court at the sentencing hearing. The original judgment of conviction contained a clerical error; namely, it erroneously stated that prison terms of 16-24 months were imposed. Those prison terms were never imposed by the district court and were less than the statutory minimum for robbery. See NRS 200.380(2) (providing for a prison term of 2 to 15 years).

an evidentiary hearing. On March 29, 2002, Foster filed a proper person motion for enlargement of time to respond to the State's opposition to his petition.² On April 30, 2002, the district court denied Foster's motion for enlargement of time. On May 14, 2002, the district court denied Foster's petition. This appeal followed.

In his petition, Foster contended that his trial counsel were ineffective because they 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 codefendant 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.³ 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.⁴ A petitioner is

²To 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.

³Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996); accord Hill v. Lockhart, 474 U.S. 52 (1985).

⁴Hill, 474 U.S. at 59.

not entitled to an evidentiary hearing on claims that are belied or repelled by the record.⁵

Foster's claim that his trial counsel were ineffective for failing to argue 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.⁶ In particular, the information, filed on November 30, 2000, charged Foster with robbery with use of a deadly weapon for taking personal property from several victims using a firearm. 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 victims with a deadly weapon.

Moreover, Foster has failed to show that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to 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 prison time with two other pending cases and agreed to dismiss the charges filed in another case. Finally, we note that Foster is not entitled to the identical sentence as his codefendant.⁷ Accordingly, the district court did not err in rejecting Foster's claim that

⁵Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

⁶See NRS 193.165(5) (defining a deadly weapon).


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


his counsel were 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 Foster 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.
Rose


_____, J.
Maupin


_____, J.
Gibbons

cc: Hon. John S. McGroarty, District Judge
Jay Foster
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

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