IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD RAY LAWSON, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40934

FILED

SEP 0 4 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus. Appellant was originally convicted, pursuant to a guilty plea, of one count of attempted murder with the use of a firearm and one count of mayhem. Appellant filed a timely direct appeal, and this court affirmed the judgment of conviction.[1]

Appellant subsequently filed a proper person post-conviction petition, and the district court appointed counsel, who filed a supplement to the petition. Following an evidentiary hearing, the district court denied the petition. Appellant contends that the district court erred by denying the petition because appellant's counsel was ineffective at the time he entered his plea and at sentencing.

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. Further, a petitioner must demonstrate a

[1]Lawson v. State, Docket No. 38211 (Order of Affirmance, October 11, 2001).



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reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.[2]

Appellant first argues that counsel was ineffective because he failed to file a motion to suppress appellant's statements. Appellant argues that after he was informed of his Miranda[3] rights, he invoked his right to counsel and that his statements made thereafter should have been suppressed. We note that appellant's invocation was somewhat ambiguous, and it is not clear that a motion to suppress would have been granted, had it been filed. Even assuming, however, that statements made during the interrogation could have been suppressed, appellant has failed to demonstrate prejudice, in light of the fact that when appellant was first approached by police, he spontaneously blurted out, "OK, what do you want me to tell you. I shot the guy." Additionally, while appellant was in jail, he confessed to the crime to his mother in a phone conversation that was recorded. We therefore conclude that appellant has not shown that he would have insisted on going to trial had counsel filed a motion to suppress.

Appellant next argues that he would not have pleaded guilty had counsel informed him that he could not have been convicted of multiple counts of battery with a deadly weapon causing substantial bodily harm. Appellant's argument is based on his assertion that being charged with one count of battery for each time he shot the victim would have been multiplicitous. At the evidentiary hearing, counsel testified that he researched the issue and determined that the probable result

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

[3]Miranda v. Arizona, 384 U.S. 436 (1966).

would be that appellant could be convicted of all the counts of battery.[4] We conclude that counsel's performance was not deficient.

Finally, appellant argues that counsel was ineffective for failing to challenge the amount of restitution. The record reveals, however, that the amount of restitution set forth in the presentence investigation was adequately supported by documentation. The district court's award of restitution was not based on impalpable or suspect evidence.[5] Accordingly, appellant has not demonstrated that counsel's performance was deficient, nor can he demonstrate prejudice from counsel's failure to challenge the amount.

Having considered appellant's arguments and concluded that they are without merit. we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Shearing, J.
Shearing

Gibbons, J.
Gibbons

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[4]See, e.g., Powell v. State, 113 Nev. 258, 263-64, 934 P.2d 224, ___ (1997) (holding that an individual cannot be convicted of three counts of assault where only one shot was fired, but noting that where multiple shots are fired, multiple counts might be sustained).

[5]See Martinez v. State, 115 Nev. 9, 12-13, 974 P.2d 133, 135 (1999) (holding that the district court's determination of restitution will not be disturbed unless based on impalpable or suspect evidence).

cc: Hon. David R. Gamble, District Judge
Kay Ellen Armstrong
Attorney General Brian Sandoval/Carson City
Douglas County District Attorney/Minden
Douglas County Clerk