IN THE SUPREME COURT OF THE STATE OF NEVADA

GEORGE WOODSIDE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41242

FILED

JAN 13 2004

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

ORDER OF AFFIRMANCE

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

Woodside was convicted, pursuant to a guilty plea, of one count of discharging a firearm out of a motor vehicle (count I), discharging a firearm at or into a residence (count II), and two counts of being an ex-felon in possession of a firearm (counts III-IV). In exchange for his guilty plea, the State agreed not to charge Woodside with attempted murder with the use of a deadly weapon, and not forward counts III-IV for federal prosecution. The district court sentenced Woodside to serve consecutive prison terms of 48-120 months, 12-48 months, and 12-48 months for counts I-III, and a concurrent prison term of 12-48 months for count IV. Woodside was ordered to pay a total of $1,643.02 in restitution to five different victims. On appeal, this court affirmed the judgment of conviction and sentence.[1]

[1]Woodside v. State, Docket No. 38241 (Order of Affirmance, November 30, 2001).

On March 29, 2002, Woodside filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Woodside, and counsel filed a supplemental petition. The State filed a motion to dismiss Woodside's petition in the district court, which Woodside opposed. On November 25, 2002, the district court heard arguments from counsel and granted the State's motion in part and denied the motion in part, thereby dismissing some of the claims in Woodside's petition. On January 23, 2003, the district court conducted an evidentiary hearing on the remaining claims, and on February 28, 2003, entered an order denying Woodside's petition. This timely appeal followed.

Woodside contends that he received ineffective assistance of counsel prior to the entry of his guilty plea, and again on direct appeal. We disagree. 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 counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial.[2] Appellate counsel is not required to raise every nonfrivolous issue; thus, to establish prejudice based on the deficient performance of counsel on appeal, a petitioner must show that any omitted appellate issues would have had a reasonable probability of success on appeal.[3]

First, Woodside contends that trial counsel was ineffective for

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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]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

failing to move to dismiss the two counts of being an ex-felon in possession of a firearm because: (1) at sentencing, the State did not produce a certified copy of the judgment of conviction; and (2) the charges were redundant. Woodside also contends that appellate counsel was ineffective for failing to raise these two issues in his direct appeal. We disagree with Woodside's contentions.

As part of the plea negotiations, the State was required to prove that Woodside was, in fact, an ex-felon. The State was unable to provide a certified copy of the judgment of conviction, however, the State of Idaho forwarded court records which the State presented to the district court at Woodside's sentencing. The documents indicated that Woodside was initially charged in 1984 with one count each of grand theft (embezzlement) and grand theft, both felonies. He was appointed counsel, pleaded guilty to both of the counts, and was sentenced to serve two concurrent prison terms of 10 years. In 1985, Woodside's sentence was altered to allow for a period of probation. Based on the evidence provided by the State, the district court concluded that Woodside was an ex-felon beyond a reasonable doubt.

We conclude that the district court did not err in determining that Woodside's counsel was not ineffective for failing to move to dismiss the two counts of being an ex-felon in possession of a firearm. In Brown v. State, this court concluded that the State, in proving a violation of NRS 202.360 (ex-felon in possession of a firearm), must introduce evidence of the defendant's prior felony convictions as an element of the crime.[4] Woodside has not provided this court with any authority for the

[4]114 Nev. 1118, 1126, 967 P.2d 1126, 1131 (1998).

proposition that the State was required to present a certified copy of his Idaho judgment of conviction in order to prove his status as an ex-felon.[5] At the sentencing hearing, the district court concluded that the State adduced sufficient evidence of Woodside's prior conviction. Based on the substantial benefit received by Woodside as a result of his guilty plea and the unlikely success of a motion to dismiss the charges, Woodside failed to demonstrate that trial counsel was unreasonable for failing to pursue the matter, or that he would have insisted on going to trial on the additional state and federal charges. Trial counsel credibly testified at the evidentiary hearing on the petition that Woodside told her that he had a felony conviction, and also that Woodside never expressed any interest in withdrawing his guilty plea. Finally, based on all of the above, we cannot conclude that appellate counsel was ineffective for failing to raise the issue in Woodside's direct appeal because his argument is without merit.

We also conclude that the district court did not err in determining that counsel were not ineffective for failing to raise the argument, either prior to the entry of his plea or on direct appeal, that the two counts of being an ex-felon in possession of a firearm were impermissibly redundant. Woodside has failed to provide any relevant authority or cogent argument for the proposition that the information was legally deficient. NRS 202.360(1) provides that an ex-felon "shall not own or have in his possession or under his custody or control any firearm." As

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[5]Cf. Hudson v. Warden, 117 Nev. 387, 394-95, 22 P.3d 1154, 1159 (2001) (holding that to prove prior conviction necessary for sentence enhancement, "the State is required to satisfy its burden of production by presenting a record of the existence of the prior conviction"); Pettipas v. State, 106 Nev. 377, 379, 794 P.2d 705, 706 (1990) ("formal, written judgment of conviction" not necessary to prove a prior conviction).

this court stated in Bedard v. State, "'[t]he general test for multiplicity is that offenses are separate if each requires proof of an additional fact that the other does not.'"[6] When Woodside was arrested, two guns were found in his possession. The criminal information listed two separate counts of being an ex-felon in possession of a firearm, with each count describing one of the guns. Moreover, this court has approved of multiple convictions in cases with similar facts.[7] Therefore, we conclude that Woodside's contention is without merit.

Second, Woodside contends that the district court erred in dismissing without an evidentiary hearing his claim that his guilty plea was not entered knowingly and voluntarily. Woodside argues that his plea was not valid because counsel rendered ineffective assistance by not properly advising him that the State could not prove the predicate felony "to justify the ex-felon in possession of a firearm charge." This claim is both belied by the record and without merit. The district court did, in fact, conduct an evidentiary hearing on Woodside's petition where the nature of his guilty plea was extensively addressed. Not only did Woodside testify about the circumstances surrounding his plea, but so did his trial and appellate counsel. Trial counsel testified that she did not object to the sufficiency of the evidence regarding the prior felony conviction because she believed the evidence was sufficient, and also that Woodside was receiving a significant benefit by pleading guilty. Appellate counsel

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[6]118 Nev. ___, ___, 48 P.3d 46, 48 (2002) (quoting Gordon v. District Court, 112 Nev. 216, 229, 913 P.2d 240, 249 (1996)).

[7]See generally Middleton v. State, 114 Nev. 1089, 1100, 968 P.2d 296, 305 (1998) and Sheriff v. Middleton, 112 Nev. 956, 958, 921 P.2d 282, 283 (1996).

testified that he did not pursue the matter in the direct appeal because of trial counsel's concession. We conclude that the district court did not err in determining that Woodside's trial and appellate counsel were not ineffective in this regard.

Finally, Woodside contends that appellate counsel was ineffective for failing to raise the issue that his convictions for discharge of a firearm out of a motor vehicle[8] and shooting into an occupied dwelling[9] were impermissibly redundant. Woodside argues: "This act occurred on one day. There was one discharge of the same weapon. The shot was fired out of the same gun from inside the car and toward the dwelling which was struck. This is the same offense." We disagree with Woodside's contention.

At the hearing on the State's motion, the district court heard the arguments of counsel and dismissed the claim. The district court determined that each count required proof of an element not required by the other, and therefore, concluded that appellate counsel was not ineffective for failing to raise a meritless argument. We agree and conclude that Woodside has failed to demonstrate that this omitted argument would have been successful on appeal, and therefore, the district court did not err in dismissing this claim.[10]

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[8]NRS 202.287(1)(b).

[9]NRS 202.285(1)(b).

[10]See Blockburger v. United States, 284 U.S. 299, 304 (1932) ("The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each

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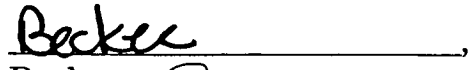
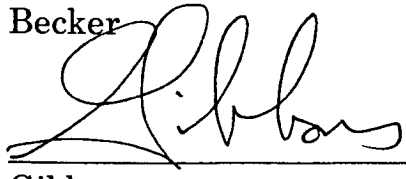
Accordingly, having considered Woodside's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

Shearing, C.J.



Becker, J.



Gibbons, J.

cc: Hon. Connie J. Steinheimer, District Judge
Karla K. Butko
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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provision requires proof of a fact which the other does not."); Bedard, 118 Nev. at ___, 48 P.3d at 48.