

IN THE SUPREME COURT OF THE STATE OF NEVADA

GUY DOUGLAS DAILEY A/K/A BRET
LEROY WALKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41604

FILED

JAN 12 2004

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Guy Douglas Dailey's post-conviction petition for a writ of habeas corpus.

On April 12, 2001, Dailey was convicted, pursuant to a guilty plea, of one count of robbery with the use of a deadly weapon. The district court sentenced Dailey to serve two consecutive prison terms of 40 to 180 months. Dailey appealed, and this court affirmed the judgment of conviction.¹

On April 10, 2002, Dailey filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. The district court appointed counsel to represent Dailey, and counsel filed a supplement to the petition. Without conducting an evidentiary hearing, the district court denied the petition. Dailey filed the instant appeal.

In the petition, Dailey raised four allegations of ineffective assistance of trial counsel. In order to state a claim of ineffective

¹Dailey v. State, Docket No. 37888 (Order of Affirmance, July 30, 2001).

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

First, Dailey claims that his trial counsel was ineffective in failing to object to the sufficiency of the complaint filed in justice court. The district court found that Dailey was not prejudiced by counsel's failure to object to the allegedly insufficient complaint because the State charged Dailey by way of information. We agree.

This court has recognized that the filing of a defective complaint is not generally a bar to the filing of a new proceeding for the same offense.⁵ Therefore, even assuming the complaint was defective and trial counsel objected, that would not have changed the outcome of the

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.

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

⁵See Stockton v. Sheriff, 87 Nev. 94, 482 P.2d 285 (1971); but see Maes v. Sheriff, 86 Nev. 317, 319, 468 P. 2d 332, 333 (1970) (holding that a new proceeding for the same offense is not allowable when the complaint has been dismissed "due to the willful failure of the prosecutor to comply with important procedural rules").

proceedings because, under the facts of this case, the State could have merely filed a subsequent complaint or information alleging the same criminal offense. Accordingly, the district court did not err in rejecting Dailey's claim.

Second, Dailey claims that his trial counsel was ineffective in failing to thoroughly investigate the possession of a stolen motor vehicle count. In particular, Dailey claims that there was no basis for that charge, and that had trial counsel informed the district attorney of that fact, it could have resulted in a better plea bargain than Dailey received. We conclude that Dailey's contention lacks merit.

Dailey failed to show that he was prejudiced by trial counsel's failure to challenge the possession of a stolen motor vehicle count. Dailey did not plead guilty to the count of possession of a motor vehicle, and there is no indication that the district attorney would have offered Dailey a more favorable plea bargain had trial counsel moved to dismiss the stolen motor vehicle count prior to entering into plea negotiations.⁶ Moreover, Dailey's claim that he could have received a better plea bargain is insufficient to warrant relief because, to invalidate a judgment of conviction entered pursuant to a guilty plea, a petitioner must prove that he would have insisted on going to trial. Dailey makes no such allegation with regard to this claim. Accordingly, the district court did not err in rejecting it.

⁶See generally Larson v. State, 104 Nev. 691, 694, 766 P.2d 261, 263 (1988) (noting that an attorney's conduct with regard to plea negotiations, even when unwise when viewed in hindsight, seldom supports a finding of ineffective assistance of counsel).

Third, Dailey claims that his trial counsel was ineffective in failing to prevent Dailey's removal from the H.I.S.T.E.P program and transfer to the Nevada State Prison. Specifically, Dailey contends that the sentencing court may have given Dailey a lesser sentence had he been given the opportunity to complete the H.I.S.T.E.P program. The district court rejected Dailey's contention, ruling that he did not show that he was prejudiced by trial counsel's failure to object to Dailey's removal from the H.I.S.T.E.P program. We agree.

The record in this case reveals that, on November 16, 2000, trial counsel moved to continue the sentencing proceeding so that Dailey could complete the H.I.S.T.E.P program. The district court granted trial counsel's request. Thereafter, in January, Dailey's parole was revoked in another case and he was removed from the H.I.S.T.E.P program and sent to prison. Eventually, Dailey was sentenced in this case on April 12, 2001. First, we note that Dailey's claim regarding trial counsel's failure to object lacks adequate specificity because Dailey does not explain any conceivable basis for trial counsel's objection. Moreover, even assuming trial counsel should have objected to Dailey's removal from the H.I.S.T.E.P program, Dailey has not shown that the outcome of the proceedings would have been different. Had trial counsel objected, there is no indication that Dailey would have been allowed to remain in the H.I.S.T.E.P program. Likewise, even if Dailey had been allowed to complete the H.I.S.T.E.P program, he has not shown that the district court would have given him a

lesser sentence in this case.⁷ Accordingly, the district court did not err in rejecting Dailey's claim.

Finally, Dailey claims that his trial counsel was ineffective in failing to investigate to uncover exculpatory evidence. In particular, Dailey claims that trial counsel failed to view a videotape from the store that was robbed and failed to test a hat for DNA evidence; Dailey claims that both items of evidence "could" have been exculpatory. The district court found that Dailey's claim regarding the adequacy of his trial counsel's pretrial investigation was belied by the record. We agree.

As a preliminary matter, we note that Dailey's claim lacks adequate specificity to warrant an evidentiary hearing because Dailey did not allege that the videotape and hat evidence proved that he was actually innocent of the charged crime. Moreover, Dailey's claim that, but for counsel's failure to investigate, he would have insisted on going to trial is belied by the record. At the plea canvass and in the signed guilty plea agreement, Dailey acknowledged that he had considered and discussed all possible defenses and strategies with his attorney and that he was satisfied with his trial counsel's advice and representation. Moreover, at the plea canvass, Dailey admitted that he committed the charged offense, namely, that he robbed a convenience store by displaying a knife to the convenience store clerk. In exchange for his guilty plea, Dailey received a substantial benefit in that he avoided additional charges and the

⁷Prior to imposing sentence, the district court commented on Dailey's prior criminal history and the violent nature of the crime.

possibility of a longer prison term. Accordingly, the district court did not err in denying Dailey's claim.

Having considered Dailey's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.⁸

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. Jerome Polaha, District Judge
John J. Kadlic
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁸We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.