

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANNY LEE WILLIAMS A/K/A DANNY  
HOYOPA TUBBI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

DANNY LEE WILLIAMS A/K/A DANNY  
HOYOPA TUBBI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

DANNY LEE WILLIAMS A/K/A DANNY  
HOYOPA TUBBI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 42668

**FILED**

MAY 18 2005

JANET J. BERRY  
CLERK OF SUPREME COURT  
DEPUTY CLERK

No. 42669

No. 42670

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

These are appeals from district court orders denying appellant's post-conviction petitions for writs of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge. We affirm in part, and reverse in part.

Appellant Danny Lee Williams pleaded guilty below to three separate felony charges: (1) using and/or being under the influence of a controlled substance;<sup>1</sup> (2) carrying a concealed weapon (CCW);<sup>2</sup> and (3)

<sup>1</sup>See NRS 453.411.

<sup>2</sup>See NRS 202.350(3); supra note 4.

being an ex-felon in possession of a firearm.<sup>3</sup> The district court sentenced Williams to the following prison terms: 12 to 48 months for being under the influence of a controlled substance; 19 to 48 months for carrying a concealed weapon, a firearm, enhanced to felony status based upon prior CCW convictions;<sup>4</sup> and, based upon a separate adjudication of Williams as a habitual criminal, life with the possibility of parole after 10 years for being an ex-felon in possession of a firearm.<sup>5</sup> The district court ordered concurrent service of the controlled substance and concealed weapons sentences. It ordered that both concurrent sentences be served consecutively to service of the life sentence.

Williams' direct appeals were either dismissed or affirmed by unpublished order.<sup>6</sup> Williams filed timely pro se petitions for post-conviction relief in the district court, claiming ineffective assistance of counsel at the trial level and on direct appeal. The district court appointed counsel, consolidated the petitions and conducted an evidentiary hearing. Counsel filed a single supplement related to all three matters. Finding that the performance of counsel was reasonable, the district court denied the petitions. Williams appeals.

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<sup>3</sup>See NRS 202.360.

<sup>4</sup>Under the 1999 version of NRS 202.350, which applied to the instant CCW charge, first time CCW offenses involving firearms were punishable as gross misdemeanors; any subsequent CCW offense involving a firearm was punishable as a felony. The 2003 Legislature amended NRS 202.350 to provide for mandatory felony status for first offense CCW involving a firearm. See 2003 Nev. Stat., ch. 256, § 6 at 1351.

<sup>5</sup>See NRS 207.010(1)(b)(2).

<sup>6</sup>Docket Nos. 34776, 34777 and 34778.

## DISCUSSION

Williams argues that the district court erred in its rejection of his allegations of ineffective assistance of counsel. First, he claims that his counsel was ineffective in failing to challenge, at the trial level and on direct appeal, the use of prior California misdemeanor convictions to sentence him on the CCW charge as a felon. Second, he claims that his counsel was otherwise ineffective at sentencing, resulting in his adjudication as a habitual criminal.

Claims of ineffective assistance of counsel present mixed questions of law and fact, which this court reviews de novo.<sup>7</sup> Under the test set forth in Strickland v. Washington, a defendant must show that the performance of counsel was both objectively unreasonable and prejudicial.<sup>8</sup> There is a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance,”<sup>9</sup> and “the claimant must overcome the presumption that a challenged action might be considered sound strategy.”<sup>10</sup> To establish prejudice, the claimant must establish that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.”<sup>11</sup> A reasonable probability is one “sufficient to undermine

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<sup>7</sup>Browning v. State, 120 Nev. 347, 354, 91 P.3d 39, 45 (2004).

<sup>8</sup>466 U.S. 668, 688 (1984).

<sup>9</sup>Id. at 689.

<sup>10</sup>Browning, 120 Nev. at 354, 91 P.3d at 45.

<sup>11</sup>Strickland, 466 U.S. at 694.

confidence in the outcome.”<sup>12</sup> If a defendant fails to show prejudice, an inquiry into whether counsel acted unreasonably is unnecessary.<sup>13</sup>

The use of Williams’ prior California convictions to enhance the CCW sentence

The 1999 version of NRS 202.350(3), which applies to this case, treated first time CCW offenses involving firearms as gross misdemeanors. Second offenses involving firearms required enhancement to felony status.<sup>14</sup> Here, the district court treated the CCW charge below as a felony based upon two prior California misdemeanor CCW convictions entered upon pleas of guilty or nolo contendere. Williams contends that his counsel at the trial and direct appeal levels failed to evaluate or litigate the constitutional validity of the prior convictions. In this, he argues that the California documents relied upon by the district court for felony treatment fail constitutional muster because they contain no indication that the pleas were obtained with the assistance of counsel or pursuant to valid waiver of counsel. He reasons that the district court should not have utilized the prior convictions in connection with the CCW sentencing and, but for the ineffective assistance of his counsel, he would now stand convicted of a gross misdemeanor rather than a felony on that charge.<sup>15</sup> He also points to the fact that, at the evidentiary hearing on his

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<sup>12</sup>Id.

<sup>13</sup>See Strickland, 466 U.S. at 697.

<sup>14</sup>See supra note 4.

<sup>15</sup>Williams maintains the documents that the State submitted only show one conviction for CCW. Our review of the record indicates a guilty plea in connection with a January 2, 1997, CCW arrest, and a nolo contendere plea in connection with an August 24, 1987, CCW arrest.

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petitions, his attorneys conceded complete failure to raise the issue at any level.

Validity of prior convictions for enhancement purposes

The State initially argues that trial and appellate counsel's performance resulted in no prejudice because the CCW sentence was imposed to run concurrently with one of the other two felony sentences. We disagree. While Williams may not gain his ultimate freedom on the habitual offender sentence by attacking his felony CCW conviction, the separate conviction stands alone and may have an affect on his ability to secure release on parole. We will therefore turn to the merits of his claim that the CCW enhancement was infirm and that the enhancement was caused by deficient representation.

The Sixth Amendment to the United States Constitution guarantees that a defendant has the right to counsel at all "critical stages" of the criminal process.<sup>16</sup> "A plea hearing qualifies as a 'critical stage.'"<sup>17</sup> "The right to counsel applies in any offense -- misdemeanor or felony -- for

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Accordingly, we will treat the California proceedings as having resulted in two separate convictions.

<sup>16</sup>See, e.g., Iowa v. Tovar, 541 U.S. 77 (2004); see also Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial").

<sup>17</sup>Tovar, 541 U.S. at 87 (citing White v. Maryland, 373 U.S. 59, 60 (1963)).

which a term of imprisonment is imposed.”<sup>18</sup> Thus, an uncounseled misdemeanor conviction is constitutional as long as the defendant is not actually sentenced to jail.<sup>19</sup> In accord with these principles, we have previously stated that “[i]n order to use a prior misdemeanor conviction for enhancement purposes, the State must affirmatively show ‘either that counsel was present or that the right to counsel was validly waived, and that the spirit of constitutional principles was respected in the prior misdemeanor proceedings.’”<sup>20</sup> Here, Williams served time in jail subsequent to a pair of arrests in connection with either one or two CCW convictions. Thus, subject to the discussion below, if the record of the prior convictions fails to demonstrate assistance or waiver of counsel, Williams’ counsel at the trial and appeal levels in this matter should have attacked the district court’s felony treatment of the CCW charge.

According to the appellate record in this case, the documents submitted by the State to enhance the CCW charge to felony status fail to indicate that Williams was represented by or waived counsel in the prior California misdemeanor proceedings. Assuming that the record is complete in this regard, the documentation is facially invalid for sentence enhancement purposes.<sup>21</sup> Going further, it is clear from the record that

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<sup>18</sup>United States v. Akins, 243 F.3d 1199, 1202 (9th Cir. 2001) (citing Argersinger, 407 U.S. at 37).

<sup>19</sup>See Scott v. Illinois, 440 U.S. 367, 372-73 (1979).

<sup>20</sup>Parsons v. State, 116 Nev. 928, 937 n.7, 10 P.3d 836, 841 n.7 (2000) (quoting Dressler v. State, 107 Nev. 686, 697, 819 P.2d 1288, 1295 (1991)).

<sup>21</sup>As noted above, Williams claims that the California documents only reveal a single conviction. Regardless of Williams’ contention on this  
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neither his counsel in justice court nor his counsel at sentencing attempted any attack on the use of the infirm convictions by the district court. Thus, in the absence of an indication that Williams knowingly agreed before pronouncement of sentence that the prior CCW convictions were valid, or that he knowingly agreed to waive proof of their validity, the district court should have granted Williams' post-conviction petition concerning CCW felony adjudication below.

Alleged waiver of the right to contest prior convictions

Williams argues that he did not waive or stipulate to the use of the prior convictions and that, to any extent that the record indicates such a waiver or stipulation, his counsel was ineffective for not advising him as to whether the State could prove the constitutional validity of the prior convictions.

It is clear that, under Krauss v. State, a defendant may stipulate to, or waive, proof of prior convictions at sentencing.<sup>22</sup> In the instant case, the district court relied on the fact that, when Williams pleaded guilty to the State's CCW charge, "he denied that he wished to litigate the question of whether he had been previously convicted of

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point, we conclude that it is insignificant to the ultimate issue on appeal. Neither document shows the presence or waiver of counsel on its face.

<sup>22</sup>116 Nev. 307, 311, 998 P.2d 163, 165 (2000) (decided while Williams' direct appeals were pending); see also Richmond v. State, 118 Nev. 924, 929, 59 P.3d 1249, 1252 (2002) (holding that new rules apply "to all cases on direct appeal regardless of whether the new rule is based on the [F]ederal [C]onstitution or state law").

Carrying a Concealed Weapon.”<sup>23</sup> Certainly, it is undisputed that Williams was convicted of the predicate California offense(s). We conclude, however, that Williams’ acknowledgement of the prior conviction was not a knowing waiver under Krauss.<sup>24</sup>

Several factors undermine the district court’s conclusion that Williams waived any argument as to the validity of the prior convictions by pleading guilty.<sup>25</sup> First, during the CCW sentencing, counsel did not stipulate to the validity of the prior convictions for enhancement purposes, rather he “submitted” the issue to the court, presumably relying on the fact that the State had the burden of proving the validity of the convictions. Second, counsel conceded during the post-conviction evidentiary hearing that he did not even look at the prior convictions. Third, justice court counsel testified at the hearing that the State never provided her with a copy of the prior misdemeanor convictions before she withdrew as Williams’ counsel, and that she believed the sentencing proceeding was the proper forum to litigate any issue of the validity of the

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<sup>23</sup>See Krauss, 116 Nev. at 311, 998 P.2d at 165 (stating that “a defendant should be able to stipulate to or waive proof of the prior convictions at sentencing”).

<sup>24</sup>It is notable that the defendant in Krauss admitted that he was represented by counsel in the predicate offenses. Id. at 309-10, 998 P.2d at 164-65.

<sup>25</sup>See Davies v. State, 95 Nev. 553, 559 n.4, 598 P.2d 636, 640 n.4 (1979) (noting that counsel’s failure to object to evidence, when not supported by any possible theory of trial strategy, may constitute a colorable claim of ineffective assistance despite a claim of waiver for failure to object).



prior convictions.<sup>26</sup> Fourth, while the guilty plea memorandum advised Williams that he was pleading guilty to a felony CCW count and confirmed that he was effectively admitting all elements of the offense, his attorneys never raised the enhancement issue or advised him relative to the variant implications of the plea to the CCW charge. Fifth, the plea agreement also expressly permitted the defense to “argue for an appropriate sentence.” In this, the State, in fact, presented the California CCW documentation during sentencing. Accordingly, we conclude that Williams did not effectively waive or stipulate to the validity of the prior convictions for enhancement purposes before, or during, sentencing.<sup>27</sup>

#### Summary of ruling on enhancement issue

In light of the above, we conclude that Williams received ineffective assistance of counsel in connection with his felony CCW conviction.<sup>28</sup> First, the record of the prior convictions used to enhance the

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<sup>26</sup>The plea arrangement was reached in justice court at the preliminary hearing stage of the proceedings.

<sup>27</sup>The State argues that a defendant collaterally attacking a prior conviction being used to enhance a current charge should bear the burden of proving that the prior conviction is somehow invalid. This court’s jurisprudence has consistently placed this burden of proof on the State and we decline to depart from this settled standard. We also reject the State’s proposal that we limit the allowable scope of collateral attacks on prior convictions that are subsequently used for enhancement purposes under the federal rule adopted in Custis v. United States, 511 U.S. 485 (1994) and its progeny. See State v. Boskind, 807 A.2d 358, 362 (Vt. 2002). We also reject the notion that Tovar, 541 U.S. 77, somehow validates the enhancement in this instance.

<sup>28</sup>See Harrison v. Jones, 880 F.2d 1279, 1282-84 (11th Cir. 1989) (holding that counsel was ineffective during sentencing when he failed to raise a meritorious objection to the use of a prior conviction to enhance a penalty).

CCW charge to felony status quite arguably failed to pass Sixth Amendment muster. Second, had counsel raised the issue at sentencing or on appeal, there is a reasonable probability that Williams would have been entitled to treatment of the CCW charges under the sentencing guidelines for gross misdemeanors. Third, Williams did not knowingly, with effective assistance, waive his right to seek treatment of the CCW charge as a gross misdemeanor. Accordingly, this matter is reversed in part and remanded for resentencing on the CCW charge. On remand, the district court is instructed to consider whether the prior record of the convictions pass constitutional muster and, if not, treat the charge as a gross misdemeanor.<sup>29</sup>

Ineffective assistance during sentencing

Williams next argues that trial counsel was ineffective at sentencing proceedings because he failed to correct inaccuracies in the presentence investigation (“PSI”) reports; failed to mitigate any prejudice the court might have felt towards Williams due to a prior bail hearing; and failed to present any mitigating evidence, besides the testimony of Williams. Williams alleges that, but for these alleged failures, a reasonable probability exists that the result of sentencing proceedings,

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<sup>29</sup>We are mindful of Williams’ agreement to plead to felony CCW, and that he has not claimed that he agreed to plead to felony CCW based upon ineffective assistance of counsel. Rather, he claims that his counsel failed to litigate the validity of the felony enhancement. Thus, his claim that his counsel failed to advise him concerning the implications of the invalid prior convictions does not warrant the option of plea withdrawal. He is simply entitled to proceed to sentencing on the CCW charge and argue for non-felony status.

including the habitual offender sentence in connection with the ex-felon in possession charge, would have been different. We disagree.

This court has underscored the importance of presenting omitted mitigating sentencing evidence during a post-conviction evidentiary hearing concerning the sentencing process.<sup>30</sup> Also, courts generally reject claims of ineffective assistance of counsel where additional proffered evidence is unlikely to change the outcome of the proceeding.<sup>31</sup> Applying these principles, we note that the district court at sentencing was fully aware of Williams' background and the history of the litigation before it. Additionally, aside from his own testimony, Williams presented no mitigating evidence at the evidentiary hearing beyond that presented during the original sentencing. Finally, it does not appear that the district court's erroneous felony adjudication on the CCW charge played a significant role in its ultimate decision to adjudicate Williams a habitual criminal.

We therefore conclude that Williams has failed to satisfy Strickland's prejudice prong with regard to his claim that trial counsel ineffectively represented him at sentencing.<sup>32</sup>

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<sup>30</sup>Wilson v. State, 105 Nev. 110, 112-18, 771 P.2d 583, 584-88 (1989).

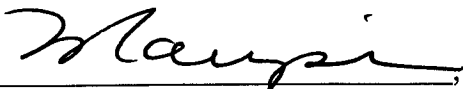
<sup>31</sup>See Strickland, 466 U.S. at 691.


<sup>32</sup>See Strickland, 466 U.S. at 697 (explaining that a court need not address both performance and prejudice prongs of the inquiry if defendant makes an insufficient showing on either prong).

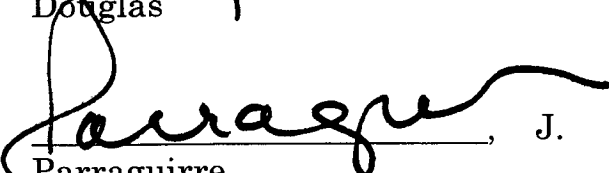
CONCLUSION

We conclude that Williams' trial counsel was ineffective for failing to litigate the validity of the prior California CCW convictions used to enhance his CCW conviction from a gross misdemeanor to a felony, and that appellate counsel was ineffective for failing to raise the issue on direct appeal. However, we conclude that the rest of Williams' post-conviction claims lack merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART, AND REMAND this matter to the district court for resentencing on Williams' CCW conviction.

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Parraguirre

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