

IN THE SUPREME COURT OF THE STATE OF NEVADA

JIM EDWARD FOWLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52725

FILED

AUG 10 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Sixth Judicial District Court, Humboldt County; John M. Iroz, Judge.

On July 10, 2007, the district court convicted appellant, pursuant to a guilty plea, of one count of attempted murder. The district court sentenced appellant to serve a term of 43 to 192 months in the Nevada State Prison. The district court further ordered appellant to pay \$68,675.78 in restitution. This court affirmed the judgment of conviction on direct appeal. Fowler v. State, Docket No. 49845 (Order of Affirmance, October 22, 2007). The remittitur issued on November 16, 2007.

On March 21, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On October 10, 2008, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that he received ineffective assistance of trial counsel. 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 was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability of a different outcome in the proceedings. Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984). In order to demonstrate prejudice sufficient to invalidate the decision to enter a guilty plea, a petitioner must demonstrate that there is a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland v. Washington, 466 U.S. at 697.

First, appellant claimed that trial counsel was ineffective because he coerced appellant into entering a guilty plea. Appellant claimed that he felt coerced because trial counsel informed him he had no defense to the charge. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. In entering his guilty plea, appellant affirmatively acknowledged that his guilty plea was voluntarily entered and was not the product of any threats. During the plea canvass, appellant acknowledged that trial counsel had performed every request, and appellant further acknowledged that he was satisfied with trial counsel's performance. Appellant failed to demonstrate that there was a reasonable probability that he would not have pleaded guilty in the instant case. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to investigate and present witnesses at the

preliminary hearing to testify about the victim's behavior at the ranch. Appellant further claimed that there was no proof of the injuries suffered by the victim because medical records and x-rays were not presented. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Probable cause to support a criminal charge "may be based on slight, even 'marginal' evidence, because it does not involve a determination of the guilt or innocence of an accused." Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) (citations omitted). Appellant failed to demonstrate that further interviews or investigations regarding the victim's behavior would have revealed evidence that would have changed the outcome of the preliminary hearing. Testimony was presented at the preliminary hearing that appellant hit the victim in the head with a hatchet. The victim testified that he was told by medical personnel that he had "blood in his head" and had to be transferred to a hospital in Reno because he was in bad condition. The responding law enforcement officer testified about his observations of the victim after the attack. Photographs were admitted of the victim and the condition of the bunk house. The evidence presented at the preliminary hearing satisfied the probable cause requirement. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to obtain medical records of the victim to question the victim's ability to remember the incident. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to provide any specific facts supporting this claim. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Given the lack of factual support, appellant failed to demonstrate that there was a reasonable probability that he would not have entered a guilty plea and

would have insisted on going to trial. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to adequately present mitigating evidence at sentencing. Appellant claimed that trial counsel should have referred to the presentence investigation report for the purpose of highlighting his lack of significant criminal history and possible mental health issues. Appellant further claimed that trial counsel failed to adequately interview and investigate character witnesses to testify about the situation at the ranch. Appellant failed to demonstrate that trial counsel's performance was prejudiced. Appellant was convicted of attempted murder for hitting the victim over the head with a hatchet. Appellant and trial counsel argued at sentencing that the victim's slovenly ways, poor consideration for others, and stealing of appellant's meat led to appellant hitting the victim over the head with a hatchet. The district court rejected this reasoning as providing any justification or mitigation of the offense. Appellant failed to demonstrate that further actions regarding these matters would have had a reasonable probability of altering the outcome at sentencing. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for falsely stating that he had reviewed the presentence investigation report with appellant. Appellant claimed that trial counsel handed him the presentence investigation report five minutes before sentencing and because of the shackles he was unable to adequately review the report. Appellant claimed that some of the offenses listed in the report were not his. Appellant failed to demonstrate that he was prejudiced. Appellant failed to specifically identify the mistakes in the presentence investigation report. Hargrove, 100 Nev. 498, 686 P.2d 222. Appellant failed to

demonstrate that further review of the report with his trial counsel would have had a reasonable probability of altering the outcome at sentencing. Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel was ineffective in regards to restitution. Appellant claimed that the presentence investigation report did not contain documents or bills supporting the restitution amounts. Appellant claimed that the amount of restitution was not proven and trial counsel should have requested a separate restitution hearing and continuance. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. At the sentencing hearing, trial counsel suggested that the amount of restitution had not been proven. The district attorney presented appellant's trial counsel with a copy of the documents supporting the restitution amount. After an off-the-record discussion with appellant, trial counsel stated that he had no objection to the restitution amount. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel voiced further objection or requested a continuance. Therefore, we conclude that the district court did not err in denying this claim.

Seventh, appellant claimed that trial counsel was ineffective for failing to request a competency evaluation when the presentence investigation report referred to mental health issues. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. This court has held that the test for determining competency is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual

understanding of the proceedings against him.” Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)). Appellant failed to identify the mental health issues or demonstrate that they impaired his ability to consult with his lawyer or his understanding of the proceedings. The record on appeal indicates that appellant responded appropriately to all questions put to him during the plea canvass and during the sentencing hearing. Therefore, we conclude that the district court did not err in denying this claim.

Eighth, appellant claimed that trial counsel was ineffective for failing to ask the victim about his citizenship. Appellant failed to demonstrate that his trial counsel’s performance was deficient or that he was prejudiced. Such a question had no bearing on sentencing. Therefore, we conclude that the district court did not err in denying this claim.

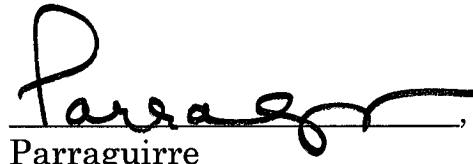
Ninth, appellant claimed that his trial counsel was ineffective for failing to object to the district attorney’s misrepresentation of facts at the preliminary hearing and during the sentencing hearing. Specifically, appellant claimed the State misrepresented facts regarding his employers and his alleged racial animosity. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that any objections would have had a reasonable probability of altering the outcome of the proceedings. Therefore, we conclude that the district court did not err in denying this claim.

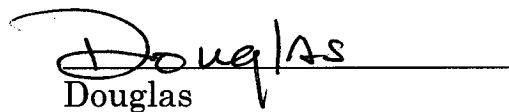
Finally, appellant claimed that a witness lied at the preliminary hearing. This claim fell outside the narrow scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea. NRS

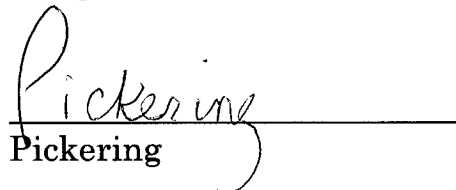
34.810(1)(a). Therefore, we conclude that the district court did not err in denying this claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Sixth Judicial District Court Dept. 2, District Judge
Jim Edward Fowler
Attorney General Catherine Cortez Masto/Carson City
Humboldt County District Attorney
Humboldt County Clerk

¹We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.