

IN THE SUPREME COURT OF THE STATE OF NEVADA

DARRYL LEE SANDERS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 58642

**FILED**

JUN 13 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
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.<sup>1</sup> Eighth Judicial District Court, Clark County; David B. Barker, Judge.

In his petition filed on January 12, 2011, appellant claimed that his plea was invalid because it was involuntary or unknowing. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994). In determining the validity of a guilty plea, this court looks to the totality of the circumstances. State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. at 271, 721 P.2d at 367.

First, appellant claimed that his plea was invalid because he was not informed that he could receive more than five to twenty years in

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<sup>1</sup>This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

prison and appellant was sentenced to eight to twenty years in prison. Appellant was informed by the State at the change of plea hearing that he could receive as little as five-and-a-half years to twelve years or as much as eight to twenty years in prison. Further, at the evidentiary hearing, the district court determined that appellant's claim was not credible and substantial evidence supports the decision of the district court. See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his guilty plea was the product of a racist conspiracy. Appellant failed to support this claim with specific facts that, if true, would entitle him to relief. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his plea was invalid because he was not informed that a count of habitual criminal could be dismissed. This claim is belied by the record. Id. Appellant was informed in the guilty plea agreement and at the change of plea hearing that the parties could argue for or against adjudication as a habitual criminal and that the district court had discretion to sentence appellant under either the burglary statute or the habitual criminal statute. Therefore, the district court did not err in denying this claim.

Appellant also claimed that he received ineffective assistance of counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate that 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 that, but for counsel's errors, the outcome of the proceedings would have been different. Strickland v. Washington,

466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). To prove prejudice sufficient to invalidate 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). Both components of the inquiry must be shown, Strickland, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings regarding ineffective assistance of counsel but review the court's application of the law to those facts de novo. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, appellant claimed that counsel was ineffective for informing appellant that he would not receive a fair trial. Appellant failed to demonstrate that counsel was deficient. At the evidentiary hearing, counsel testified that she explained to appellant what the evidence was against him and that taking a plea bargain would be in his best interest. Appellant failed to demonstrate that she informed him that he would not receive a fair trial. Candid advice about the potential outcome at trial is not evidence of deficient performance. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that counsel was ineffective for failing to explain the consequences of the plea, exaggerating the evidence that would be used by the State at trial, giving petitioner erroneous information regarding the elements of the crime, and using scare tactics that frightened appellant from going to trial. Appellant failed to

demonstrate that counsel was deficient. At the evidentiary hearing, counsel testified that she explained the consequences of the plea and the elements of the crime. Further, appellant failed to demonstrate that she exaggerated the evidence or frightened him with scare tactics. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that counsel was ineffective for failing to inform appellant's new counsel at sentencing about her ideas for arguing against habitual criminal. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. At the evidentiary hearing, counsel testified that she discussed what arguments to make at sentencing with appellant's new counsel. Further, the arguments that appellant claims that counsel should have made were presented in the sentencing memorandum, argued at the sentencing hearing, or were arguments that would have been futile. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that counsel was ineffective for failing to seek a ruling on his sentencing memorandum. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. The sentencing memorandum was not a motion that counsel needed the district court to rule on. Further, appellant failed to demonstrate a reasonable probability of a different outcome at sentencing had counsel sought a ruling on the sentencing memorandum because the district court acknowledged reading it. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that counsel was ineffective for failing to request a sentence on the substantive crime before imposing the habitual criminal enhancement. Appellant failed to demonstrate that he

was prejudiced. Appellant failed to demonstrate a reasonable probability of a different outcome at sentencing had counsel made such a motion or objected. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that counsel was ineffective for failing to defend against the habitual criminal adjudication. This claim is belied by the record. Counsel provided the court with a sentencing memorandum that argued against habitual criminal adjudication. Further, counsel argued at the sentencing hearing that appellant should not be adjudicated a habitual criminal and should instead be placed on probation so that he could seek drug and alcohol treatment. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that counsel was ineffective for failing to object to the recommendation made in the PSI. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. While counsel did not specifically object to the recommendation, counsel did argue for a different sentence than what was recommended. Further, appellant failed to demonstrate a reasonable probability of a different outcome at sentencing had counsel specifically objected to the recommendation. Therefore, the district court did not err in denying this claim.

Eighth, appellant claimed that counsel was ineffective for failing to admonish the district court to follow the plea agreement. Appellant failed to demonstrate that counsel was deficient. The plea agreement allowed the parties to argue for or against small habitual criminal adjudication. Appellant was found to be a habitual criminal and was sentenced within the minimum and maximum terms of the small habitual criminal statute. NRS 207.010(1)(a). Counsel is not required to

make futile motions. Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Therefore, the district court did not err in denying this claim.


Ninth, appellant claimed that counsel was ineffective for failing to make strategic choices in the best interests of the petitioner. Appellant failed to support this claim with specific facts that, if true, would entitle him to relief. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. Therefore, the district court did not err in denying this claim.


Tenth, appellant claimed that counsel was ineffective for failing to argue that the district court first needed to determine that appellant was a repeat offender and that adjudicating him a habitual criminal was in the best interests of society before sentencing appellant. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. The district court found that this was appellant's ninth felony in the last 27 years and that he had failed previous terms of parole and probation by committing new crimes. Based on these findings, any motion or objection by counsel would have been futile. Donovan, 94 Nev. at 675, 584 P.2d at 711. Further, appellant failed to demonstrate that there was a reasonable probability of a different outcome at sentencing had counsel made a motion or objected. Therefore, the district court did not err in denying this claim.

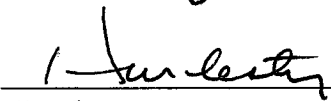
Next, appellant claimed that appellate counsel was ineffective for failing to communicate with appellant. Appellant failed to demonstrate that he was prejudiced because he failed to demonstrate that any of the claims he would have requested counsel present had a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Therefore, the district court did not err in denying this claim.

Finally, appellant raised several claims that were outside the scope of a post-conviction petition for a writ of habeas corpus challenging the validity of a judgment of conviction based upon a guilty plea: he did not stipulate to his prior convictions and the State failed to meet its burden with respect to his prior convictions, the habitual criminal statute is unconstitutional, and the district court abused its discretion by failing to grant appellant's motion to dismiss the habitual criminal count, failing to ask appellant, after assuring him that he was headed for prison, whether or not he still wanted to plead guilty, failing to impose a sentence on the substantive crime, failing to issue an order granting or denying the sentencing memorandum, and failing to state on the record why it was not dismissing the habitual criminal count. NRS 34.810(1)(a). The district court did not err in denying these claims. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

\_\_\_\_\_, J.  
Saitta

\_\_\_\_\_, J.  
Pickering

\_\_\_\_\_, J.  
Hardesty

cc: Hon. David B. Barker, District Judge  
Darryl Lee Sanders  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk