

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT D. HAIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37786

FILED

APR 30 2002

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

ORDER OF AFFIRMANCE

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

On April 17, 2000, the district court convicted appellant, pursuant to a jury verdict, of failure to stop on signal of a peace officer.¹ The district court adjudicated appellant a habitual criminal and sentenced him to serve a term of five to twenty years in the Nevada State Prison, to run consecutively to a previous sentence. This court dismissed appellant's direct appeal.²

On December 11, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On May 14, 2000, and June 6, 2000, the district court entered written orders denying appellant's petition. This appeal followed.

¹See NRS 484.348(3)(b).

²Hain v. State, Docket No. 36027 (Order Dismissing Appeal, September 19, 2000).

In his petition, appellant initially claimed that his trial counsel was ineffective in failing to adequately challenge the prior convictions that led to appellant being sentenced as a habitual criminal, thus violating his constitutional rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. Specifically, appellant claimed his trial counsel failed to (1) file a petition to correct errors and review prior convictions, (2) raise other meritorious issues concerning appellant's prior convictions before and during the habitual criminal hearing, and (3) object and tell the court that it must make a determination on the validity of each conviction.³

To state a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense.⁴ "Deficient" performance of counsel is representation that falls below an objective standard of reasonableness.⁵ To establish prejudice based on deficient performance at sentencing, a defendant must show that but for counsel's mistakes, there is a reasonable probability that the sentence imposed would have been different.⁶ The court need not consider both prongs of

³To the extent that appellant also raises these issues as constitutional violations independent of his ineffective assistance of trial counsel claims, these issues could have been raised on direct appeal, and therefore, are waived. Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). We nevertheless address appellant's claims to the extent that they are framed as ineffective assistance of trial counsel.

⁴See Strickland v. Washington, 466 U.S. 668 (1984).

⁵See id. at 688.

⁶See id. at 694.

the Strickland test if the defendant makes an insufficient showing on either prong.⁷ Based upon our review of the record on appeal, we conclude that the district court did not err in determining that these claims of ineffective assistance of counsel lacked merit.

First, appellant did not demonstrate deficient performance or prejudice by his counsel's failure to file a petition to correct errors and review prior convictions. The record does not reveal that the district court made any errors with regard to appellant's prior felony convictions. During the habitual criminal adjudication proceeding, the State correctly informed the court that appellant had three prior felony convictions, and the court noted that one of appellant's prior felony convictions for unlawful taking of a vehicle occurred in California. The gravamen of appellant's argument appears to be that his counsel should have argued, either by written petition or objection, that unlawful taking of a vehicle is a gross misdemeanor in Nevada, and therefore, this conviction was erroneously considered a prior felony conviction for purposes of the habitual criminal adjudication. This contention lacks merit. NRS 207.010(1)(a) states that a person is a habitual criminal if the person "has previously been two times convicted, whether in this state or elsewhere. . . . of any crime which under the laws of the situs of the crime or of this state would amount to a felony." Appellant committed and was convicted of the crime of unlawful taking of a vehicle in California. Unlawful taking of a vehicle was a felony under California law and for purposes of NRS 207.010(1). We therefore conclude that the district court did not err in adjudicating him a habitual

⁷See id. at 697.

criminal under the statute.⁸ Therefore, appellant's counsel was not ineffective in this regard.

Second, appellant failed to demonstrate that his counsel rendered ineffective assistance by failing to raise other meritorious issues concerning appellant's prior convictions before and during the habitual criminal hearing. Appellant failed to provide sufficient facts that, if true, would entitle him to relief.⁹ Appellant did not specify what meritorious issues counsel failed to raise. Therefore, we are unable to conclude that appellant's counsel was ineffective in this regard.

Third, appellant failed to demonstrate that his counsel rendered ineffective assistance by failing to object and tell the court that it must make a determination on the validity of each prior conviction. The State provided the district court with certified copies of each of appellant's prior felony convictions which the district court properly relied on in determining their validity.¹⁰ Therefore, we are unable to conclude that appellant's counsel was ineffective in this regard.

Next, appellant claimed his appellate counsel was ineffective for failing to raise several claims on direct appeal, thus violating his

⁸See NRS 207.010.

⁹See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

¹⁰See McAnulty v. State, 108 Nev. 179, 181, 826 P.2d 567, 569 (1992):

“[O]nce the state produces certified copies of prior judgments of conviction which do not, on their face, raise a presumption of constitutional infirmity, the district court is entitled to rely on those prior convictions for enhancement purposes unless the defendant is able to prove by a preponderance of the evidence that the prior convictions are constitutionally infirm.”

constitutional rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. Specifically, appellant claimed that his appellate counsel was ineffective for failing to argue that the adjudication and sentencing of him as a habitual criminal was procedurally defective because (1) the State failed to advise the court and appellant before trial that habitual criminal charges would be filed, and improperly filed habitual criminal charges after he was convicted, (2) the State improperly referred to a prior California felony conviction, which caused the district court to adjudicate appellant a habitual criminal, (3) the State had not met its burden of proving the validity of appellant's prior convictions because it had not shown that appellant was represented by counsel in the prior criminal proceedings, and (4) the sentencing judge failed to weigh the appropriate factors or make an actual judgment on whether adjudicating appellant a habitual criminal was just and proper.¹¹

A claim of ineffective assistance of appellate counsel is reviewed under the "reasonably effective assistance" test set forth in Strickland.¹² Under this test, the petitioner must demonstrate (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's errors prejudiced the defense--i.e., that the omitted

¹¹To the extent that appellant also raises these issues as constitutional violations independent of his ineffective assistance of appellate counsel claims, these issues could have been raised on direct appeal, and therefore, are waived. Franklin, 110 Nev. 750, 877 P.2d 1058 overruled in part on other grounds by Thomas, 115 Nev. 148, 979 P.2d 222. We nevertheless address appellant's claims in connection with his contention that appellate counsel should have raised them on direct appeal.

¹²466 U.S. 668; see also Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

issue would have a reasonable probability of success on appeal.¹³ Based upon our review of the record on appeal, we conclude that the district court did not err in determining that these claims of ineffective assistance of counsel lacked merit.

First, appellant did not demonstrate that his appellate counsel rendered ineffective assistance by failing to argue that the State failed to advise the court and appellant before trial that habitual criminal charges would be filed, and improperly filed habitual criminal charges after he was convicted. NRS 207.016 allows a habitual criminal count filed pursuant to NRS 207.010 to be separately filed after conviction of the primary offense.¹⁴ On March 16, 2000, after the jury had returned a guilty verdict for the primary offense, the State properly filed a “notice of motion and motion to adjudicate defendant an [sic] habitual criminal.” Therefore, we conclude that appellant’s counsel was not ineffective in this regard.

Second, appellant did not demonstrate deficient performance or prejudice by his appellate counsel’s failure to argue that the State improperly referred to a prior California felony conviction, which caused the district court to adjudicate appellant a habitual criminal. As discussed above, the district court did not err in adjudicating him a habitual criminal under the statute.¹⁵ Therefore, we are unable to conclude that appellant’s counsel was ineffective in this regard.¹⁶

¹³Kirksey, 112 Nev. at 998, 923 P.2d at 1113-14.

¹⁴See NRS 207.016(2).

¹⁵See NRS 207.010.

¹⁶See Strickland, 466 U.S. 668.

Third, appellant failed to demonstrate deficient performance or prejudice by his appellate counsel's failure to argue that the State had not met its burden of proving the validity of appellant's prior convictions because the State had not shown that appellant was represented by counsel in the prior criminal proceedings. The record indicates that the State properly provided prima facie evidence of appellant's prior felony convictions by submitting certified copies of the convictions.¹⁷ Further, the certified copies of appellant's prior felony convictions indicate he was represented by counsel in the prior criminal proceedings. Thus, appellant's counsel was not ineffective in this regard.

Fourth, appellant did not demonstrate that his appellate counsel rendered ineffective assistance by failing to argue that the sentencing judge failed to weigh the appropriate factors or make an actual judgment on whether adjudicating appellant a habitual criminal was just and proper. This court has held that "[t]he decision to adjudicate a person as a habitual criminal is not an automatic one."¹⁸ Rather, the decision to adjudicate a criminal defendant as a habitual criminal is left to the "broadest kind of judicial discretion" in determining whether habitual criminal adjudication "would serve the purpose of discouraging this repeat offender."¹⁹ Further, this court has never required the articulation of talismanic phrases.²⁰ After listening to argument for and against habitual

¹⁷See NRS 207.016(5).

¹⁸Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993).

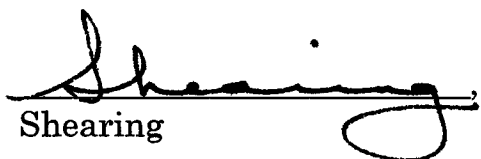
¹⁹See Tanksley v. State, 113 Nev. 997, 1004, 946 P.2d 148, 152 (1997) (quoting Clark, 109 Nev. at 428, 851 P.2d at 427).

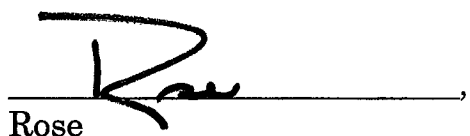
²⁰See generally Wynn v. State, 96 Nev. 673, 615 P.2d 946 (1980).

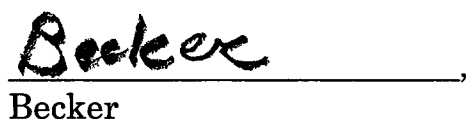
criminal adjudication, the district court determined that habitual criminal adjudication was appropriate because of appellant's increasing criminal activity and history, which included crimes of violence.²¹ It is clear from the record that the district court exercised its discretion in adjudicating appellant a habitual criminal and this court will not superimpose its view of the sentence on the district court.²² Thus, appellant's counsel was not ineffective in this regard.

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.²³ Accordingly, we

ORDER the judgment of the district court AFFIRMED.²⁴

 J.
Shearing

 J.
Rose

 J.
Becker

²¹See generally Odoms v. State, 102 Nev. 27, 32, 714 P.2d 568, 571 (1986) (“The purpose behind habitual criminal statutes is to increase sanctions for the recidivist.”); Howard v. State, 83 Nev. 53, 57, 422 P.2d 548, 550 (1967) (“Society has the right to remove from its ranks for a longer time those who refuse to conform to a lawful mode of living.”).

²²See Arajakis v. State, 108 Nev. 976, 984, 843 P.2d 800, 805 (1992).

²³See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²⁴We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

cc: Hon. Jack Lehman, District Judge
Attorney General/Carson City
Clark County District Attorney
Robert D. Hain
Clark County Clerk