

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEVAN JAMES RIVERA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43094

FILED

SEP 07 2004

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying appellant Devan Rivera's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

On April 16, 1998, the district court convicted Rivera, pursuant to a guilty plea, of one count each of first-degree murder and first-degree kidnapping with substantial bodily harm. The district court sentenced Rivera to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole. This court dismissed Rivera's untimely appeal for lack of jurisdiction.¹

On March 7, 2002, Rivera filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On May 24, 2002, the district court determined that Rivera's petition was procedurally barred and denied Rivera relief. Rivera did not file an appeal.

¹Rivera v. State, Docket No. 34756 (Order Dismissing Appeal, October 21, 1999).

On September 18, 2003, Rivera filed a second 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 34.770, the district court declined to appoint counsel to represent Rivera or to conduct an evidentiary hearing. On March 4, 2004, the district court denied Rivera's petition. This appeal followed.

Rivera filed his petition more than five years after entry of his judgment of conviction. Thus, Rivera's petition was untimely filed.² Moreover, Rivera's petition was an abuse of the writ because he had previously filed a post-conviction petition for a writ of habeas corpus.³ Rivera's petition was procedurally barred absent a demonstration of good cause and prejudice.⁴

In an attempt to excuse his untimely petition, Rivera argued that he was unable to secure the necessary transcripts until after he filed his first post-conviction habeas petition. Further, Rivera argued that he should be excused because he is a layman in the law. We conclude that Rivera failed to adequately excuse the procedural defects in his petition.⁵

²See NRS 34.726(1). Because Rivera did not file a timely direct appeal, the statutory time period is measured from entry of the judgment of conviction. See Dickerson v. State, 114 Nev. 1084, 967 P.2d 1132 (1998).

³See NRS 34.810(2).

⁴See NRS 34.726(1); NRS 34.810(3).

⁵See Harris v. Warden, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998) (stating that "the good cause necessary to overcome a procedural bar must be some impediment external to the defense"); Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988).

Moreover, as an alternate and independent ground to deny relief, the claims Rivera raised in his petition are without merit. Rivera argued that his guilty plea was unknowingly and unintelligently entered because: the district court failed to inform him of the possible range of punishment; the district court failed to question him concerning promises of leniency; and the district court did not personally address him regarding his waiver of the right to a jury trial, the right to confront witnesses, and the privilege against self-incrimination.

A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that his plea was not entered knowingly and intelligently.⁶ "[T]he failure to utter talismanic phrases will not invalidate a plea where a totality of the circumstances demonstrates that the plea was freely, knowingly and voluntarily made."⁷ The record reveals that during the oral plea canvass, Rivera's trial counsel informed the court of the sentence that Rivera would face if he pleaded guilty pursuant to the guilty plea agreement. Further, Rivera acknowledged that he read, understood, and discussed the written guilty plea agreement with his attorney. Rivera's trial counsel specifically stated that he had gone over the plea agreement "line by line" with Rivera. The signed written guilty plea agreement contained a discussion concerning the waiver of Rivera's constitutional right to a trial by jury, right to confront his accusers, and his privilege against self-incrimination. Additionally, the guilty plea agreement provided that Rivera was not acting due to any promises of


⁶Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

⁷State v. Freese, 116 Nev. 1097, 1104, 13 P.3d 442, 447 (2000).

leniency. Therefore, Rivera failed to demonstrate that under the totality of the circumstances, his guilty plea was not entered knowingly or intelligently.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Rivera is not entitled to relief and that briefing and oral argument are unwarranted.⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. Valorie Vega, District Judge
Devan James Rivera
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁸See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).