

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDRES ACOSTA MARTINEZ,  
Appellant,  
vs.  
WARDEN, NEVADA STATE PRISON,  
MICHAEL BUDGE,  
Respondent.

No. 43139

FILED

OCT 07 2004

ORDER OF AFFIRMANCE

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

This is an appeal from an order of the district court dismissing appellant Andres Acosta Martinez' post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On April 3, 2003, Martinez was convicted, pursuant to a guilty plea, of one count of attempted robbery with the use of a firearm. The district court sentenced Martinez to serve two consecutive prison terms of 48-120 months, and ordered him to pay \$30,916.60 in restitution. Martinez did not pursue a direct appeal from the judgment of conviction and sentence.

On September 24, 2003, Martinez filed a proper person post-conviction petition for a writ of habeas corpus in the district court. In response, the State filed a motion to dismiss Martinez' petition. The district court appointed counsel to represent Martinez, and counsel filed an opposition to the State's motion to dismiss, to which the State replied. On March 19, 2004, and without conducting an evidentiary hearing, the district court entered an order granting the State's motion and dismissing Martinez' petition. This timely appeal followed.

Martinez contends that his guilty plea was invalid because he was not informed prior to sentencing that he may be ordered to pay

restitution. Martinez argues that the district court erred in concluding that his allegation was belied by the record, and by not conducting an evidentiary hearing on his petition where he would have presented evidence “outside of what could be examined in the record.” Notably, Martinez never claims that he did not read the plea agreement, but only that he had “little time” to review the document. We conclude that Martinez is not entitled to relief.

A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.<sup>1</sup> In determining the validity of a guilty plea, this court looks to the totality of the circumstances.<sup>2</sup> Additionally, this court has stated that “the 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.”<sup>3</sup> This court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.<sup>4</sup>

We conclude that the district court did not abuse its discretion in dismissing Martinez' habeas petition. Although the plea canvass did not include a discussion regarding restitution, the district court concluded that, pursuant to Lee v. State, Martinez was adequately advised and

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<sup>1</sup>Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

<sup>2</sup>State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.


<sup>3</sup>Freese, 116 Nev. at 1104, 13 P.3d at 447 (citing Bryant, 102 Nev. at 271, 721 P.2d at 367).


<sup>4</sup>Hubbard, 110 Nev. at 675, 877 P.2d at 521.

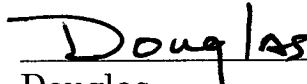
received sufficient notice of the restitution obligation by virtue of the fact that the written guilty plea agreement, signed by Martinez, explicitly informed him that, if appropriate, he would be ordered to pay restitution.<sup>5</sup> Additionally, Martinez did not object to the restitution amount during the sentencing hearing. Therefore, we conclude that Martinez failed to demonstrate that his plea was invalid in this regard, or that he was entitled to an evidentiary hearing.<sup>6</sup>

Accordingly, having considered Martinez' contention and concluded that it is without merit, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Rose

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

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

cc: Hon. Connie J. Steinheimer, District Judge  
Roger R. Harada  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

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<sup>5</sup>See Lee v. State, 115 Nev. 207, 985 P.2d 164 (1999). We also decline Martinez' invitation to overrule Lee.

<sup>6</sup>Pangallo v. State, 112 Nev. 1533, 1536, 930 P.2d 100, 102 (1996) (petitioner "not entitled to an evidentiary hearing if the factual allegations are belied or repelled by the record"), limited in part on other grounds by Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000).