IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID B. THORSEN,
Appellant,
vs.
WARDEN, NORTHERN NEVADA CORRECTIONAL CENTER, DON HELLING,
Respondent.

No. 43215

FILED

AUG 27 2004

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant David B. Thorsen's post-conviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge.

Thorsen was originally convicted on October 22, 2002, pursuant to a guilty plea, of one count each of coercion and robbery. The district court sentenced Thorsen to serve two concurrent prison terms of 19-48 months and 48-120 months. Thorsen did not pursue a direct appeal from the judgment of conviction and sentence.

On October 20, 2003, Thorsen 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 Thorsen's petition. The district court appointed counsel to represent Thorsen and conducted an evidentiary hearing. On April 23, 2004, the district court entered an order denying Thorsen's petition. This timely appeal followed.

First, Thorsen contends that he received ineffective assistance of counsel. More specifically, Thorsen argues that counsel: (1) "convinced" him to plead guilty to crimes he did not commit; and (2) did little "more

than show up at arraignment and plead Thorsen guilty." We disagree with Thorsen's contention.

The right to the effective assistance of counsel applies "when deciding whether to accept or reject a plea bargain."[1] 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 counsel's performance fell below an objective standard of reasonableness,[2] and that, but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial.[3] The tactical decisions of defense counsel are "virtually unchallengeable absent extraordinary circumstances."[4] The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.[5] Finally, a district court's factual finding regarding a claim of ineffective assistance of counsel is entitled to deference so long as it is supported by substantial evidence and is not clearly wrong.[6]

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[1]See Larson v. State, 104 Nev. 691, 693 n.6, 766 P.2d 261, 262 n.6 (1988) (citing McMann v. Richardson, 397 U.S. 759 (1970)).

[2]See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[3]See Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

[4]Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691), modified on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

[5]Strickland, 466 U.S. at 697.

[6]Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Additionally, a guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.[7] In determining the validity of a plea, this court looks to the totality of the circumstances[8] and will not reverse a district court's determination absent a clear abuse of discretion.[9]

Initially, we note that in the instant appeal, Thorsen has failed to articulate any way in which the district court may have erred in fashioning a ruling on his habeas petition. Additionally, we conclude that the district court did not err in denying Thorsen's allegation of ineffective assistance of counsel. At his arraignment, Thorsen informed the district court that he spoke several times with counsel about his case and possible defenses if they were to proceed to trial, and that he agreed with counsel that the negotiated plea agreement was in his best interest. At no point has Thorsen challenged the sufficiency of the district court's plea canvass. Our review of the totality of the circumstances reveals that Thorsen's guilty plea was entered knowingly and intelligently.

Thorsen's trial counsel testified at the evidentiary hearing and stated that, in his opinion, the State's witnesses were more believable and credible than those he interviewed as potential defense witnesses. As a result, counsel testified that he advised Thorsen to plead guilty in order to limit his exposure; by pleading guilty, the State agreed to drop several

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

[8]State v. Freese, 116 Nev. 1097, 1106, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

[9]Hubbard, 110 Nev. at 675, 877 P.2d at 521.

charges against Thorsen, including burglary and additional counts of robbery or in the alternative multiple counts of attempted robbery and coercion. Based on all of the above, we conclude that substantial evidence supports the district court's finding that Thorsen did not receive ineffective assistance.

Second, Thorsen contends that the sentence imposed by the district court is "draconian, vindictive and mean spirited." Thorsen should have raised this issue in a direct appeal, and therefore, we will not address it. A court must dismiss a habeas petition if it presents claims that could have been presented in an earlier proceeding unless the court finds both good cause for failing to present the claims earlier and actual prejudice to the petitioner.[10] This court may excuse the failure to show cause where the prejudice from a failure to consider the claim amounts to a "fundamental miscarriage of justice."[11] Thorsen has failed to argue that any good cause exists for not raising this claim in a direct appeal, and he has failed to demonstrate that he is the victim of a fundamental miscarriage of justice.[12] We therefore conclude that Thorsen has waived this claim.

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[10]See NRS 34.810(1)(b)(2); NRS 34.810(3).

[11]Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

[12]Cf. Murray v. Carrier, 477 U.S. 478, 496 (1986) (holding that a federal habeas court may grant the writ in the absence of a showing of cause for the procedural default "where a constitutional violation has probably resulted in the conviction of one who is actually innocent").

Having considered Thorsen's contentions and concluded that they are either without merit or not properly raised in a post-conviction habeas petition, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Rose

_____, J.
Maupin

_____, J.
Douglas

cc: Hon. J. Michael Memeo, District Judge
Matthew J. Stermitz
Attorney General Brian Sandoval/Carson City
Elko County District Attorney
Elko County Clerk